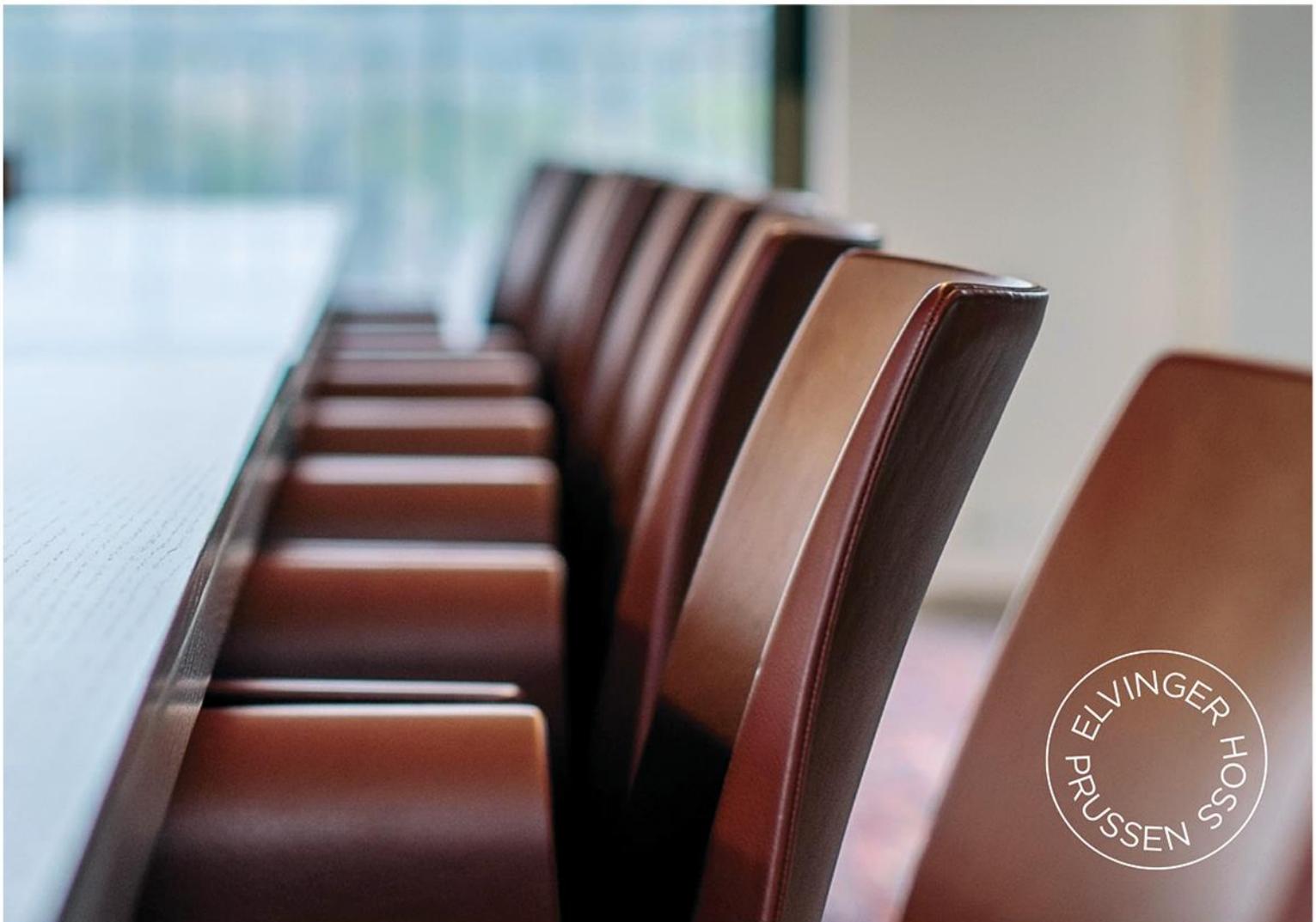


## The Alternative Investment Fund Managers Directive and its implementation in Luxembourg

References to additional AIFM Level 2 and Level 3 measures are also included

October 2024



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*This brochure contains the Luxembourg Law of 12 July 2013 on alternative investment fund managers (“AIFM Law”), the AIFMD and the Level 2 AIFM Regulation, as well as all the other relevant AIFM legislation and guidelines, in one single document.*

*The October 2024 edition reflects the latest updates to the ESMA Q&A on the AIFM Directive and the CSSF FAQ on the AIFM Law and the AIFM Directive<sup>1</sup>.*

*This brochure can be printed and/or used as an [electronic version](#).*

*By using the electronic version, you will have direct access to the corresponding article in the AIFM Law, the AIFMD (consolidated with the Level 2 AIFM Regulation), together with links to additional Level 2 AIFM measures, ESMA Guidelines and Q&As published by the EU Commission, ESMA and the CSSF:*

- 1. the Commission Implementing Regulation (EU) 447/2013 of 15 May 2013 establishing the procedure for AIFMs which choose to opt in under Directive 2011/61/EU (Appendix XI);*
- 2. the Commission Implementing Regulation (EU) 448/2013 of 15 May 2013 establishing a procedure for determining the Member State of reference of a non-EU AIFM (Appendix XII);*
- 3. the Commission Delegated Regulation (EU) 694/2014 of 17 December 2013 supplementing Directive 2011/61/EU with regard to regulatory technical standards determining types of alternative investment fund managers (Appendix VIII);*
- 4. the ESMA Guidelines on sound remuneration policies under the AIFMD dated 3 July 2013, as amended on 14 October 2016 (Appendix VII);*
- 5. the ESMA Guidelines on key concepts of the AIFMD dated 13 August 2013 (Appendix IX);*
- 6. the ESMA Guidelines on reporting obligations under Articles 3 and 24 of the AIFMD dated 8 August 2014 (Appendix XIII);*
- 7. CSSF Regulation N°15-03 on the marketing of foreign AIFs to retail investors in Luxembourg (Appendix XVI);*

*The following Q&A and FAQ are also included with links to the relevant article(s) of the AIFMD, the AIFM Law and/or the AIFM Level 2 measures:*

- 8. the Q&A on the AIFMD published by the EU Commission in March 2013 (Appendix X);*
- 9. the Q&A on the application of the AIFMD published by ESMA, version dated 14 June 2023 (including additional questions issued from 1 January 2024 in the ESMA Q&A IT-tool) (Appendix XIV);*
- 10. the FAQ on the AIFM Law and the Level 2 AIFM Regulation published by the CSSF, version 22, dated April 2024 (Appendix XV); and*
- 11. the FAQ on cross-border distribution of funds – Guidance on marketing communications published by the CSSF, version dated 12 October 2022 (Appendix XVII).*

*“Level 3 measures” include the documents referred to in points 4 to 11 above, except point 7.*

<sup>1</sup> The AIFMD II changes are not included in this brochure as AIFMD II is not yet applicable. For more visibility information on the AIFMD II changes to AIFMD, a dedicated AIFMD II brochure is available on our website.

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# Part I: Law of 12 July 2013 on Alternative Investment Fund Managers

## CHAPTER 1

### GENERAL PROVISIONS

#### Article 1 AIFM Law

##### Definitions

[Art. 4 AIFMD]

For the purpose of this Law, the following definitions shall apply:

- (1) "EBA": the European Banking Authority established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council;
- (2) "ESMA": the European Securities and Market Authority established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council;
- (3) "competent authorities": the national authorities of Member States which are empowered, by law or regulation, to supervise AIFMs. In Luxembourg, the CSSF is the competent authority for the supervision of AIFMs subject to this Law;
- (4) "supervisory authorities" in relation to non-EU AIFMs: the national authorities of a third country which are empowered by law or regulation to supervise AIFMs;
- (5) "competent authorities of an EU AIF": the national authorities of a Member State which are empowered, by law or regulation, to supervise the AIFs. The CSSF is the competent authority for the supervision of AIFs established in Luxembourg;
- (6) "supervisory authorities" in relation to non-EU AIFs: the national authorities of a third country which are empowered by law or regulation to supervise the AIFs;
- (7) "competent authorities" in relation to a depositary:
  - (a) if the depositary is a credit institution authorised under Directive 2006/48/EC, the competent authorities as defined in point (4) of Article 4 thereof;
  - (b) if the depositary is an investment firm authorised under Directive 2004/39/EC, the competent authorities as defined in point (22) of Article 4(1) thereof;
  - (c) if the depositary falls within a category of institution referred to in point (c) of the first subparagraph of Article 21(3) of Directive 2011/61/EU, the national authorities of its home Member State which are empowered, by law or regulation, to supervise such categories of institution;
  - (d) if the depositary is an entity referred to in the third subparagraph of Article 21(3) of Directive 2011/61/EU, the national authorities of the Member State in which that entity has its registered office and which are empowered by law or regulation to supervise such entity or the official body competent to register or supervise such entity pursuant to the rules of professional conduct applicable thereto;
  - (e) if the depositary is appointed as depositary for a non-EU AIF in accordance with point (b) of Article 21(5) of Directive 2011/61/EU and does not fall within the scope of points (a) to (d) of this point, the relevant national authorities of the third country where the depositary has its registered office;

- (8) "initial capital": the funds which are referred to in points (a) and (b) of Article 57(1) of Directive 2006/48/EC;
- (9) "marketing": a direct or indirect offering or placement, at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the European Union;

▪ **FAQ AIFM published by CSSF (Appendix XV) Section 21 Definition of marketing and reverse solicitation [Question 21.a\)](#)**

- (10) "control": control as defined in "Article 22(1) and (2) of Directive 2013/34/EU"<sup>2</sup>;
- (11) "prime broker": a credit institution, a regulated investment firm or another entity subject to prudential regulation and ongoing supervision, offering services to professional investors primarily to finance or execute transactions in financial instruments as counterparty and which may also provide other services such as clearing and settlement of trades, custodial services, securities lending, customised technology and operational support facilities;
- (12) "ESRB": the European Systemic Risk Board established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council;
- (13) "CSSF": the *Commission de Surveillance du Secteur Financier* (the Commission for the Supervision of the Financial Sector);
- (14) "Directive 77/91/EEC": Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of Article 58(2) of the Treaty, in respect of the formation of *sociétés anonymes* (public limited companies) and the maintenance and alteration of their capital, with a view to making such safeguards equivalent;
- (15) (...) <sup>3</sup>
- (16) "Directive 95/46/EC": Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;
- (17) "Directive 97/9/EC": Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes;
- (18) "Directive 98/26/EC": 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;
- (19) "Directive 2002/14/EC": Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community;
- (20) "Directive 2003/41/EC": 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;
- (21) "Directive 2003/71/EC": 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;
- (22) "Directive 2004/25/EC": Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids;
- (23) "Directive 2004/39/EC": Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments;
- (24) "Directive 2004/109/EC": 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

<sup>2</sup> Law of 21 July 2023.

<sup>3</sup> Law of 21 July 2023.

issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC;

- (25) "Directive 2006/48/EC": 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;
- (26) "Directive 2006/49/EC": 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;
- (27) "Directive 2006/73/EC": 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;
- (28) "Directive 2009/65/EC": 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);
- (29) "Directive 2011/61/EU": Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on alternative investment fund managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010;

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- "(29-1) "Directive 2013/34/EU": Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC;"
- (30) "leverage": any method by which the AIFM increases the exposure of an AIF it manages whether through borrowing of cash or transferable securities, or leverage embedded in derivative positions or by any other means;
- (31) "issuer": an issuer within the meaning of point (d) of Article 2(1) of Directive 2004/109/EC, where that issuer has its registered office in the European Union, and where its shares are admitted to trading on a regulated market within the meaning of point (14) of Article 4(1) of Directive 2004/39/EC;
- (32) "parent undertaking": a parent undertaking within the meaning of "Article 22(1) to (5) of Directive 2013/34/EU"<sup>4</sup>;
- (33) "established":
  - (a) for AIFMs, "having its registered office in";
  - (b) for AIFs, "being authorised or registered in" or, if the AIF is not authorised or registered, "having its registered office in";
  - (c) for depositaries, "having its registered office or branch in";
  - (d) for legal representatives that are legal persons, "having its registered office or branch in";
  - (e) for legal representatives that are natural persons, "domiciled in";
- (34) "Member State": a Member State of the European Union. The States that are contracting parties to the Agreement creating the European Economic Area other than the Member States of the European Union, within the limits set forth by this Agreement and related acts, are considered as equivalent to Member States of the European Union.
- (35) "home Member State of the AIF":
  - (a) 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
  - (b) if the AIF is neither authorised nor registered in a Member State, the Member State in which the AIF has its registered office and/or head office;

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<sup>4</sup> Law of 21 July 2023.

- (36) "home Member State of the AIFM": the Member State in which the AIFM has its registered office; for non-EU AIFMs, all references to "home Member State of the AIFM" in this Law shall be read as the "Member State of reference", as provided for in Chapter 7;
- (37) "host Member State of the AIFM": any of the following:
- (a) a Member State, other than the home Member State, in which an EU AIFM manages EU AIFs;
  - (b) a Member State, other than the home Member State, in which an EU AIFM markets units or shares of an EU AIF;
  - (c) a Member State, other than the home Member State, in which an EU AIFM markets units or shares of a non-EU AIF;
  - (d) a Member State, other than the Member State of reference, in which a non-EU AIFM manages EU AIFs;
  - (e) a Member State, other than the Member State of reference, in which a non-EU AIFM markets units or shares of an EU AIF;
  - (f) a Member State, other than the Member State of reference, in which a non-EU AIFM markets units or shares of a non-EU AIF;

(Law of 10 May 2016)

- (g) "the Member State, other than the home Member State, in which an AIFM established in the European Union provides the services referred to in Article 6(4) of Directive 2011/61/EU;"
- (38) "Member State of reference": the Member State determined in accordance with Article 37(4) of Directive 2011/61/EU;
- (39) "Alternative Investment Funds (AIFs)": collective investment undertakings, including investment compartments thereof, which:
- (a) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
  - (b) do not require authorisation pursuant to Article 5 of Directive 2009/65/EC;
- (40) "EU AIF":
- (a) an AIF which is authorised or registered in a Member State under the applicable national law; or
  - (b) an AIF which is not authorised or registered in a Member State, but has its registered office and/or head office in a Member State;
- (41) "non-EU AIF": an AIF which is not an EU AIF;
- (42) "feeder AIF": an AIF which:
- (a) invests at least 85% of its assets in units or shares of another AIF (the "master AIF");
  - (b) invests at least 85% of its assets in more than one master AIF where those master AIFs have identical investment strategies; or
  - (c) has otherwise an exposure of at least 85% of its assets to such a master AIF;
- (43) "master AIF": an AIF in which another AIF invests or has an exposure in accordance with point (42);
- (44) "subsidiary": a subsidiary undertaking as defined in "Article 22(1) to (5) of Directive 2013/34/EU"<sup>5</sup>;
- (45) "own funds": own funds as referred to in Articles 56 to 67 of Directive 2006/48/EC. For the purposes of applying this definition, Articles 13 to 16 of Directive 2006/49/EC are applied *mutatis mutandis*;
- (46) "Alternative Investment Fund Managers (AIFMs)": legal persons whose regular business is managing one or more AIFs;
- (47) "EU AIFM": an AIFM which has its registered office in a Member State;

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<sup>5</sup> Law of 21 July 2023.

- (48) "non-EU AIFM": an AIFM which is not an EU AIFM;
- (49) "external AIFM": an AIFM 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;
- (50) "managing AIFs": performing at least investment management functions referred to in point 1(a) or (b) of Annex I of Directive 2011/61/EU for one or more AIFs;
- (51) "financial instrument": an instrument as specified in Section C of Annex I to Directive 2004/39/EC;
- (52) "carried interest": 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;
- (53) "professional investor": an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to Directive 2004/39/EC;
- (54) "retail investor": an investor who is not a professional investor;
- (55) "close links": a situation in which two or more natural or legal persons are linked by:
- (a) participation, namely ownership, directly or by way of control, of 20% or more of the voting rights or capital of an undertaking;
  - (b) control, namely the relationship between a parent undertaking and a subsidiary, as referred to in "Article 22(1) and (2) of Directive 2013/34/EU"<sup>6</sup>, or a similar relationship between a natural or legal person and an undertaking; for the purposes of this point a subsidiary undertaking of a subsidiary undertaking shall also be considered to be a subsidiary of the parent undertaking of those subsidiaries.
- A situation in which two or more natural or legal persons are permanently linked to the same person by a control relationship shall also be regarded as constituting a "close link" between such persons;
- (56) "UCITS": an undertaking for collective investment in transferable securities authorised in accordance with Article 5 of Directive 2009/65/EC;
- (57) "qualifying holding": a direct or indirect holding in an AIFM which represents 10% or more of the capital or of the voting rights, in accordance with Articles 9 and 10 of Directive 2004/109/EC, taking into account the conditions regarding aggregation of the holding laid down in Article 12(4) and (5) thereof, or which makes it possible to exercise a significant influence over the management of the AIFM in which that holding subsists;
- (58) "third country": a State which is not a Member State;

(Law of 21 July 2021: A561)

- "(58-1) "pre-marketing": provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM or on its behalf, to potential professional investors domiciled or with a registered office in the European Union in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with Article 31 or 32 of Directive 2011/61/EU, in that Member State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment;"
- (59) "legal representative": a natural person domiciled in the European Union or a legal person with its registered office in the European Union, and which, expressly designated by a non-EU AIFM, acts on behalf of such non-EU AIFM *vis-à-vis* the authorities, clients, bodies and counterparties to the non-EU AIFM in the European Union with regard to the non-EU AIFM's obligations under Directive 2011/61/EU;
- (60) "employees' representatives": employees' representatives as defined in point (e) of Article 2 of Directive 2002/14/EC;
- (61) "UCITS management company": a management company authorised pursuant to Chapter 15 of the Law of 17 December 2010 relating to undertakings for collective investment, as amended;

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<sup>6</sup> Law of 21 July 2023.

- (62) "holding company": a company with shareholdings in one or more other companies, the commercial purpose of which is to carry out a business strategy or strategies through its subsidiaries, associated companies or participations in order to contribute to their long-term value, and which is either a company:
- (a) operating on its own account and whose shares are admitted to trading on a regulated market in the European Union; or
  - (b) not established for the main purpose of generating returns for its investors by means of divestment of its subsidiaries or associated companies, as evidenced in its annual report or other official documents;
- (63) "non-listed company": a company which has its registered office in the European Union and the shares of which are not admitted to trading on a regulated market within the meaning of point (14) of Article 4(1) of Directive 2004/39/EC;
- (64) "securitisation special purpose entities": entities whose sole purpose is to carry on a securitisation or securitisations within the meaning of point (2) of Article 1 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 and other activities which are appropriate to accomplish that purpose;
- (65) "branch": when relating to an AIFM, a place of business which is a part of an AIFM, which has no legal personality and which provides the services for which the AIFM has been authorised; all the places of business established in the same Member State by an AIFM with its registered office in another Member State or in a third country shall be regarded as a single branch.

## Article 2 AIFM Law

### Subject matter and scope

[Art. 1 and Art. 2 AIFMD]

- **FAQ AIFM published by CSSF (Appendix XV) Section 1 Scope Question 1, Question 1.a), Question 1.b), Section 6 Lux AIFs Question 6**

- (1) This Law lays down the rules for the authorisation, ongoing operation and the requirements of transparency of AIFMs established in Luxembourg which manage and/or market AIFs in the European Union.

Subject to paragraph 2 of this Article and to Article 3, this Law shall apply to every legal person governed by Luxembourg law, the regular business of which is to manage one or more AIFs irrespective of whether these AIFs are AIFs established in Luxembourg, AIFs established in another Member State of the European Union or AIFs established in third countries, the AIF belongs to the open-ended or closed-ended type and whatever the legal form of the AIF or the legal structure of the AIFM.

This Law shall also apply to non-EU AIFMs which manage and/or market one or more AIFs established in the European Union or in a third country, where Luxembourg is defined as the Member State of reference of the AIFM within the meaning of Article 38 of this Law.

The AIFMs referred to in this paragraph must comply at all times with the provisions of this Law.

*(Law of 15 March 2016)*

"Without prejudice to the supervisory provisions laid down in this Law, where they are part of a financial conglomerate within the meaning of Article 2(14) of [Directive 2002/87/EC](#) of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council, the AIFMs referred to in this paragraph shall also be subject to supplementary supervision carried out by the CSSF in accordance with Part III, Chapter 3b, of the Law of 5 April 1993 on the financial sector, as amended."

- (2) This Law shall not apply to:
- (a) holding companies;
  - (b) institutions for occupational retirement provision which are covered by Directive 2003/41/EC, including, where applicable, the authorised entities responsible for managing such institutions and acting on their behalf referred to in Article 2(1) of that Directive, or the investment managers appointed pursuant to Article 19(1) of that Directive, in so far as they do not manage AIFs;
  - (c) supranational institutions, such as the European Central Bank, the European Investment Bank, the European Investment Fund, the European Financial Stability Facility S.A., the European Stability Mechanism, the European Development Finance Institutions and bilateral development banks, the International Monetary Fund and other supranational institutions and other similar international organisations, in the event that such institutions or organisations manage AIFs and in so far as those AIFs act in the public interest;
  - (d) the Central Bank of Luxembourg and other national central banks;
  - (e) national, regional and local governments and bodies or other organisations or institutions which manage funds supporting social security and pension systems;
  - (f) employee participation schemes and employee savings schemes;
  - (g) securitisation special purpose entities.

## Article 3 AIFM Law

### Exemptions

[Art. 3 AIFMD]

- *Q&A published by ESMA (Appendix XIV) Section III Reporting Question 58, Question 59*
- *FAQ AIFM published by CSSF (Appendix XV) Section 1 Scope Question 1.f), Section 3 Registration Question 3.a), Question 3.b), Question 3.c), Section 5 Entities governed by the law of 1993 Question 5.b), Section 14 Reporting Question 14.c), Question 14.d), Question 14.i)*

- (1) This Law shall not apply to AIFMs established in Luxembourg in so far as they manage one or more AIFs whose only investors are the AIFM or the parent undertakings or the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, provided that none of those investors is itself an AIF.
- (2) Without prejudice to the application of Article 50, only paragraphs 3 and 4 of this Article shall apply to the following AIFMs:
  - (a) AIFMs established in Luxembourg which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management, including any assets acquired through use of leverage, in total do not exceed a total threshold of EUR 100,000,000; or
  - (b) AIFMs established in Luxembourg which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management in total do not exceed a threshold of EUR 500,000,000 when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of five years following the date of initial investment in each AIF.
- (3) The AIFMs referred to in paragraph 2 must:
  - (a) be registered with the CSSF;
  - (b) identify themselves and the AIFs that they manage to the CSSF at the time of registration;
  - (c) provide information on the investment strategies of the AIFs that they manage to the CSSF at the time of registration;
  - (d) regularly provide the CSSF with information on the main instruments in which they are trading and on the principal exposures and most important concentrations of the AIFs that they manage in order to enable the CSSF to monitor systemic risk effectively; and
  - (e) inform the CSSF in the event that they no longer meet the conditions referred to in paragraph 2.

Where the conditions set out in paragraph 2 are no longer met, the AIFM concerned must apply for authorisation within 30 calendar days in accordance with the procedures laid down in this Law.
- (4) AIFMs referred to in paragraph 2 shall not benefit from any of the rights granted under this Law unless they choose to opt in under this Law. Where AIFMs opt in, this Law shall become applicable in its entirety.
- (5) In the event of failure to comply with the provisions of paragraph 3 of this Article, the CSSF may impose the fines provided for in Article 51(2) of this Law.

## Article 4 AIFM Law

### Determination of the AIFM

[Art. 5 AIFMD]

- **FAQ AIFM published by CSSF (Appendix XV) Section 1 Scope Question 1.a), Question 1.e), Section 4 Steps for Lux entities Question 4.a), Question 4.b), Question 4.c), Question 4.d), Question 4.e), Question 4.f), Question 6**

- (1) Each AIF established in Luxembourg managed within the scope of this Law must have a single AIFM, which shall be responsible for ensuring compliance with the provisions of this Law. The AIFM shall be:
  - (a) either an external AIFM; the external AIFM may be an AIFM established in Luxembourg, in another Member State or in a third country which is duly authorised pursuant to Directive 2011/61/EU;
  - (b) or, 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 authorised AIFM established in Luxembourg has been designated as the external AIFM of an AIF, whether the AIF is an AIF established in Luxembourg, an AIF established in another Member State or an AIF established in a third country, and this AIFM is unable to ensure compliance with requirements of this Law for which this AIF or another entity on its behalf is responsible, it shall immediately inform the CSSF and, if applicable, the competent authorities of the home Member State of the AIF concerned. The CSSF shall require the AIFM to take the necessary steps to remedy the situation.
- (3) If, despite the steps referred to in paragraph 2, the non-compliance with the requirements of this Law persists, the CSSF shall require that the AIFM resign as external AIFM of the AIF concerned. In that case, the AIF shall no longer be marketed in the European Union. If it concerns a non-EU AIFM managing a non-EU AIF, the AIF shall no longer be marketed in the European Union. The CSSF, when it is the competent authority of the home Member State of the AIFM shall immediately inform the competent authorities of the host Member States of the AIFM thereof.

## CHAPTER 2

### AUTHORISATION OF AIFMS

#### Article 5 AIFM Law

#### Conditions for taking up activities as AIFMs

[Art. 6 AIFMD]

- *FAQ AIFM published by CSSF (Appendix XV) Section 2 Authorisation [Question 2.a\)](#), Section 5 Entities governed by the Law of 1993 [Question 5.a\)](#), Section 9 AIFM functions/services [Question 9.a\)](#), [Question 9.b\)](#), [Question 9.c\)](#)*
- *CSSF Regulation N°15-03 (Appendix XVI) [Article 3](#), [Article 6](#)*

- (1) No person referred to in Article 2(1) may exercise in Luxembourg the activity of AIFM responsible for the management of AIF unless it is authorised in accordance with this Chapter.  
The persons referred to in this paragraph shall meet the conditions for authorisation set for in this Law at all times.
- (2) An external AIFM shall not engage in activities other than those referred to in Annex I to this Law and the additional management of UCITS subject to authorisation under Directive 2009/65/EC.  
[↪ Annex I AIFM Law](#)
- (3) An internally managed AIF shall not engage in any activities other than the activities of internal management of that AIF as referred to in Annex I of this Law. [↪ Annex I AIFM Law](#)
- (4) By way of derogation from paragraph 2, external AIFMs may, in addition, provide the following services:
  - (a) management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement provision in accordance with Article 19(1) of Directive 2003/41/EC, in accordance with mandates given by investors on a discretionary, client-by-client basis;
  - (b) non-core services comprising:
    - (i) investment advice;
    - (ii) safekeeping and administration in relation to shares or units of collective investment undertakings;
    - (iii) reception and transmission of orders in relation to financial instruments.
- (5) AIFMs shall not be authorised under this Chapter to provide:
  - a) only the services referred to in paragraph 4;
  - b) non-core services referred to in point (b) of paragraph 4 without also being authorised for the services referred to in point (a) of paragraph 4;
  - c) only the activities referred to in point 2 of Annex I; or [↪ Annex I AIFM Law](#)
  - d) the services referred to in point 1(a) of Annex I of this Law without also providing the services referred to in point 1(b) of Annex I of this Law or *vice versa*. [↪ Annex I AIFM Law](#)
- (6) Articles 1-1, 37-1 and 37-3 of the Law of 5 April 1993 on the financial sector, as amended, shall also apply to the provision of the services referred to in paragraph 4 of this Article by AIFMs.

*(Law of 23 July 2015)*

"Moreover, the second subparagraph of Article 101(4) of the Law of 17 December 2010 relating to undertakings for collective investment, as amended, shall apply to the managers that provide the service referred to in point (a) of paragraph 4 of this Article."

- (7) AIFMs must provide the CSSF, on request, with all the information necessary to allow the CSSF to monitor compliance with the conditions referred to in this Law at all times.
- (8) Credit institutions and investment firms authorised under the Law of 5 April 1993 on the financial sector, as amended, shall not be required to obtain an authorisation under this Law in order to provide investment services such as individual portfolio management in respect of AIFs. However, investment firms shall, directly or indirectly, offer units or shares of AIFs to investors in the European Union, or place such units or shares with investors in the European Union, only to the extent that the units or shares can be marketed in accordance with Directive 2011/61/EU.

## Article 6 AIFM Law

### Application for authorisation

[Art. 7 AIFMD]

- **FAQ AIFM published by CSSF (Appendix XV) Section 1 Question 1.f), Section 2 Authorisation Question 2.b), Question 2.c), Section 14 Reporting Question 14.c), Question 14.d), Question 14.j)**

- (1) The taking up of the activity of AIFMs established in Luxembourg is subject to an authorisation by the CSSF.
- (2) The application for authorisation shall include the following information:
  - (a) information on the persons effectively conducting the business of the AIFM;
  - (b) information on the identities of the AIFM's shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and on the amounts of those holdings;
  - (c) a programme of activity setting out the organisational structure of the AIFM, including information on how the AIFM intends to comply with its obligations under Chapters 2, 3 and 4 and, where applicable, Chapters 5, 6, 7 and 8 of this Law;
  - (d) information on the remuneration policies and practices pursuant to Article 12;
  - (e) information on arrangements made for the delegation and sub-delegation to third parties of functions as referred to in Article 18.
- (3) In addition, the application for authorisation shall include the following information on the AIFs that the AIFM intends to manage:
  - (a) information about the investment strategies including the types of underlying funds if the AIF is a fund of funds, and the AIFM's policy as regards the use of leverage, and the risk profiles and other characteristics of the AIFs it manages or intends to manage, including information about the Member States or third countries in which such AIFs are established or are expected to be established;
  - (b) information on where the master AIF is established if the AIF is a feeder AIF;
  - (c) the management regulations 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 19 for each AIF the AIFM intends to manage;
  - (e) any additional information referred to in Article 21(1) for each AIF the AIFM manages or intends to manage.
- (4) Where a UCITS management company, authorised pursuant to Chapter 15 of the Law of 17 December 2010 relating to undertakings for collective investment, as amended, or a management company authorised pursuant to Article 125-1 of that Law, applies for authorisation as an AIFM under this Law, the management company concerned shall not be required to provide information or documents which it has already provided to the CSSF when applying for authorisation under the Law of 17 December 2010, as amended, provided that such information or documents remain up-to-date.

## Article 7 AIFM Law

### Conditions for granting authorisation

[Art. 8 AIFMD]

- (1) The CSSF shall not grant authorisation to the AIFM established in Luxembourg unless the following conditions are met:
- (a) the CSSF is satisfied that the AIFM will be able to meet the conditions of this Law;
  - (b) the AIFM has sufficient initial capital and own funds in accordance with Article 8;
  - (c) the persons who effectively conduct the business of the AIFM are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the AIFs managed by the AIFM, the names of those persons and of every person succeeding them in office being communicated forthwith to the CSSF; the conduct of the business of the AIFM must be decided by at least two persons meeting such conditions;
  - (d) the shareholders or partners 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) for each AIFM established in Luxembourg, the head office and the registered office of each AIFM are located in Luxembourg.

Authorisation granted to an AIFM by the CSSF pursuant to this Chapter shall be valid for all Member States.

Authorised AIFMs shall be entered by the CSSF on a list. That entry shall be tantamount to authorisation and shall be notified by the CSSF to the AIFM concerned. This list and any amendments made thereto will be published by the CSSF in the Mémorial.

- (2) The relevant competent authorities of the other Member States involved shall be consulted by the CSSF before authorisation is granted to the following AIFMs:
- (a) a subsidiary of another AIFM, of a UCITS management company, of an investment firm, of a credit institution or of an insurance undertaking authorised in another Member State;
  - (b) a subsidiary of the parent undertaking of another AIFM, of a UCITS management company, of an investment firm, of a credit institution or of an insurance undertaking authorised in another Member State; and
  - (c) a company controlled by the same natural or legal persons as those that control another AIFM, a UCITS management company, an investment firm, a credit institution or an insurance undertaking authorised in another Member State.

- (3) Where close links exist between the AIFM and other natural or legal persons, the CSSF shall only grant authorisation if those links do not prevent the effective exercise of its supervisory functions.

The CSSF shall also refuse authorisation if 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, or difficulties involved in their enforcement, prevent the effective exercise of its supervisory functions.

- (4) The CSSF may restrict the scope of the authorisation, in particular as regards the investment strategies of AIFs the AIFM is allowed to manage.

- (5) The AIFM shall be informed in writing, within three months of the submission of a complete application, whether or not authorisation has been granted. The CSSF may prolong this period for up to three additional months, where it considers it necessary due to the specific circumstances of the case and after having notified the AIFM accordingly.

For the purpose of this paragraph an application is deemed complete if the AIFM has at least submitted the information referred to in points (a) to (d) of Article 6(2) and points (a) and (b) of Article 6(3).

The AIFM may start managing AIFs in Luxembourg with investment strategies described in the application for authorisation in accordance with point (a) of Article 6(3) as soon as the authorisation is

granted, but not earlier than one month after having submitted any missing information referred to in point (e) of Article 6(2) and points (c), (d) and (e) of Article 6(3).

- (6) No person shall make use of designations or of a description giving the impression that its activities are subject to this Law if it has not obtained the authorisation provided for in this Article.

(Law of 10 May 2016)

## Article 7a AIFM Law

[Art. 8 AIFMD]

- (1) "Without prejudice to the provisions set out in Article 7, the authorisation of an AIFM is subject to the condition that the latter entrusts the audit of its annual accounting documents to one or more *réviseurs d'entreprises agréés* (approved statutory auditors) who can prove that they possess adequate professional experience.
- (2) Any change regarding *réviseurs d'entreprises agréés* (approved statutory auditors) shall be previously approved by the CSSF.
- (3) The institution of *commissaires aux comptes* (supervisory auditors) provided for by the Law of 10 August 1915 on commercial companies, as amended, as well as "Article 900-3"<sup>7</sup> of that Law shall not apply to AIFMs referred to in this Chapter.

(Law of 21 July 2023)

"The institution of *commissaires* provided for by Article 1100-15 of the Law of 10 August 1915 concerning commercial companies, as amended, shall not apply to AIFMs subject to this Chapter. Upon completion of the liquidation, a report on the liquidation shall be drawn up by a *réviseur d'entreprises agréé* (approved statutory auditor). This report shall be tabled at the general meeting at which the liquidators report on the application of the corporate assets and submit the accounts and supporting documents. The same meeting shall resolve on the approval of the accounts of the liquidation, the discharge and the closure of the liquidation.

Where the AIFM contemplates appointing a *réviseur d'entreprises agréé* (approved statutory auditor) who is not the *réviseur d'entreprises agréé* (approved statutory auditor) of the AIFM mandated pursuant to paragraph 1, this appointment shall be previously approved by the CSSF."

- (4) Every AIFM subject to the supervision of the CSSF, whose accounts are audited by a *réviseur d'entreprises agréé* (approved statutory auditor), shall spontaneously communicate to the CSSF the reports and written comments issued by the *réviseur d'entreprises agréé* (approved statutory auditor) in the framework of his or her audit of the annual accounting documents.

The CSSF may set rules on the scope of the mandate for the audit of the annual accounting documents and on the content of the reports and written comments issued by the *réviseur d'entreprises agréé* (approved statutory auditor), as provided for in the preceding subparagraph, without prejudice to the legal provisions governing the content of the statutory auditor's report.

- (5) The *réviseur d'entreprises agréé* (approved statutory auditor) shall report promptly to the CSSF any fact or decision which s/he has become aware of while carrying out the audit of the accounting information contained in the annual report of an AIFM or any other legal task concerning an AIFM or an AIF, where any such fact or decision is likely to:
  - constitute a material breach of the provisions of this Law or of its implementing regulatory provisions; or
  - impair the continuous functioning of the AIFM or of an undertaking contributing towards its business activity; or
  - lead to a refusal to certify the accounts or to the expression of reservations thereon.

The *réviseur d'entreprises agréé* (approved statutory auditor) has also a duty to promptly report to the CSSF, in the accomplishment of his or her tasks referred to in the preceding subparagraph in respect of an AIFM, any fact or decision concerning the AIFM and meeting the criteria listed in the preceding subparagraph, of which s/he has become aware while carrying out the audit of the accounting information contained in its annual report or while carrying out any other legal task related to another undertaking having close links resulting from a control relationship with this AIFM or an undertaking contributing towards its business activity.

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<sup>7</sup> Law of 21 July 2023.

If, in the discharge of his or her duties, the *réviseur d'entreprises agréé* (approved statutory auditor) becomes aware that the information provided to investors or to the CSSF in the reports or other documents of the AIFM does not truly describe the financial situation and the assets and liabilities of the AIFM, s/he is obliged to inform the CSSF forthwith.

The *réviseur d'entreprises agréé* (approved statutory auditor) is also obliged to provide the CSSF with all information or certificates which it may require on any matters of which the *réviseur d'entreprises agréé* (approved statutory auditor) has or ought to have knowledge in connection with the discharge of his or her duties.

The disclosure in good faith to the CSSF by a *réviseur d'entreprises agréé* (approved statutory auditor) of any fact or decision referred to in this paragraph shall not constitute a breach of professional secrecy nor of any restriction on disclosure of information imposed by contract and shall not subject the *réviseur d'entreprises agréé* (approved statutory auditor) to liability of any kind.

The CSSF may request a *réviseur d'entreprises agréé* (approved statutory auditor) to perform a control of one or several particular aspects of the activities and operations of an AIFM. This control shall be carried out at the expense of the AIFM concerned.

- (6) Where a UCITS management company authorised pursuant to Chapter 15 of the Law of 17 December 2010 relating to undertakings for collective investment, as amended, or a management company authorised pursuant to Article 125-2 of that Law applies for authorisation as an AIFM under Chapter 2, the *réviseur d'entreprises agréé* (approved statutory auditor) of the management company concerned may also be appointed to carry out the tasks referred to in this Article."

## Article 8 AIFM Law

### Initial capital and own funds

[Art. 9 AIFMD]

- **FAQ AIFM published by CSSF (Appendix XV) Section 17 initial capital and own funds Question 17.a), Question 17.b), Question 17.c), Question 17.d)**

- (1) An AIFM which is an internally managed AIF, within the meaning of point (b) of Article 4(1), must have an initial capital of at least EUR 300,000.
- (2) An AIFM which is appointed as external manager of one or more AIFs, within the meaning of point (a) of Article 4(1), must have an initial capital of at least EUR 125,000 in accordance with the following provisions.
- (3) Where the value of the portfolios of AIFs managed by the AIFM exceeds EUR 250,000,000, the AIFM must 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 250,000,000. The required total of the initial capital and the additional amount shall not, however, exceed EUR 10,000,000.
- (4) For the purpose of applying paragraph 3, AIFs managed by the AIFM, including AIFs for which the AIFM has delegated functions in accordance with Article 18 but excluding AIF portfolios that the AIFM is managing under delegation, shall be deemed to be the portfolios of the AIFM.
- (5) Irrespective of paragraph 3, the own funds of the AIFM shall never be less than the amount required under "Article 13 of Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014"<sup>8</sup>.
- (6) AIFMs may not 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 CSSF as equivalent to those provided by Union law.
- (7) To cover potential professional liability risks resulting from activities AIFMs may carry out pursuant to this Law, both internally managed AIFs and external AIFMs shall either:
  - (a) have additional own funds which are appropriate to cover potential liability risks arising from professional negligence; or
  - (b) hold a professional indemnity insurance against liability arising from professional negligence which is appropriate to the risks covered.
- (8) Own funds, including any additional own funds as referred to in point (a) of paragraph 7, shall be invested in liquid assets or assets readily convertible to cash in the short term and must not include speculative positions.
- (9) With the exception of paragraphs 7 and 8, this Article shall not apply to AIFMs which are also UCITS management companies authorised in accordance with Chapter 15 of the Law of 17 December 2010 relating to undertakings for collective investment, as amended.

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<sup>8</sup> Law of 21 July 2021: A566.

## Article 9 AIFM Law

### Changes in the scope of the authorisation

[Art. 10 AIFMD]

- (1) The granting of authorisation implies an obligation for the AIFMs, before implementation, to notify the CSSF of any material changes, in particular to the information provided in accordance with Article 6 upon which the CSSF based itself to grant the authorisation.
- (2) If the CSSF decides to impose restrictions or reject the changes to the conditions for initial authorisation, the AIFM shall be informed thereof within one month of receipt of the notification referred to in paragraph 1. The CSSF may prolong that period for up to one month where it considers this to be necessary because of the specific circumstances of the case and after having notified the AIFM accordingly. The changes shall be implemented if the CSSF does not oppose the changes within the relevant assessment period.

## Article 10 AIFM Law

### Withdrawal of the authorisation and liquidation

[Art. 11 AIFMD]

- (1) The CSSF may withdraw the authorisation issued to an AIFM, on the basis of this Chapter, where that AIFM:
- (a) does not make use of the authorisation within twelve months, expressly renounces the authorisation or has ceased the activity covered by this Law for the preceding six months;
  - (b) obtained the authorisation by making false statements or by any other irregular means;
  - (c) no longer meets the conditions under which authorisation was granted;
  - (d) no longer complies with the provisions of the Law of 5 April 1993 on the financial sector, as amended, resulting from the transposition of Directive 2006/49/EC, if its authorisation also covers the discretionary portfolio management service referred to in point (a) of Article 5(4) of this Law;
  - (e) has seriously or systematically infringed the provisions of this Law or of its implementing regulations; or
  - (f) falls within any of the cases where Luxembourg law, in respect of matters outside the scope of this Law, provides for withdrawal.

(Law of 21 July 2023)

- (2) "The decision of the CSSF regarding the withdrawal from the list referred to in Article 7(1), shall, as from the notification thereof to the AIFM concerned and to be borne by the latter, until the judgement ordering the liquidation referred to in paragraph 3, entail *ipso jure* entail the suspension of any payment by this AIFM and a prohibition, on penalty of nullity, of taking any measures other than protective measures, except with the authorisation of the supervisory commissioner<sup>9</sup>. The office of supervisory commissioner shall be held by one or several supervisory commissioners appointed by the judge presiding over the *Tribunal d'arrondissement* (District Court) dealing with commercial matters acting on the CSSF's request. The request shall be introduced according to the procedure applicable to summary proceedings with the Court in the district in which the AIFM has its registered office. The supervisory commissioners shall have the appropriate knowledge and professional experience for the performance of their duties. The CSSF shall hold, *ipso jure*, the office of supervisory commissioner pending the appointment of the supervisory commissioner(s) by the Court.

The written authorisation by the supervisory commissioners shall be required for all actions and decisions of the AIFM, failing such authorisation, they shall be void.

The Court may, however, limit the scope of operations which are subject to authorisation.

The supervisory commissioners may submit for consideration to the relevant bodies of the AIFM any proposals which they consider appropriate. They may attend proceedings of the administrative, executive, management or supervisory bodies of the AIFM.

The Court shall decide as to the expenses and fees of the supervisory commissioners. It may grant advances to them.

The judgement pronouncing the dissolution and ordering the liquidation provided for in paragraph 3 shall terminate the duties of the supervisory commissioner. Before deciding the appointment of one or several liquidators, the Court shall receive from the supervisory commissioners a report on the use of the AIFM's assets. In the absence of a judgement pronouncing the dissolution and ordering the liquidation within the year following the notification to the AIFM concerned of the decision withdrawing the undertaking from the list, the supervisory commissioners shall report to the Court on an annual basis. Within one month after their replacement, the supervisory commissioners shall report to the liquidators appointed by judgement on the use of the AIFM's assets together with the accounts and supporting documents.

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<sup>9</sup> *Commissaire de surveillance*

If the Court reverses the withdrawal decision in accordance with Article 52(2), the supervisory commissioner shall be deemed to have resigned.

- (3) The *Tribunal d'arrondissement* (District Court) dealing with commercial matters shall, at the request of the State Prosecutor, acting on its own initiative or at the request of the CSSF, pronounce the dissolution and order the liquidation of the AIFMs whose entry on the list provided for in Article 7(1) will have been definitively refused or withdrawn.

When ordering the liquidation, the Court shall appoint a *juge-commissaire* (bankruptcy judge) and one or more liquidators. It shall determine the method of liquidation. It may render applicable, as far as it may determine, the rules governing bankruptcy. The method of liquidation may be changed by subsequent decision, either at the Court's own motion or at the request of the liquidator(s).

The Court shall decide as to the expenses and fees of the liquidators. It may grant them advances. The judgement pronouncing dissolution and ordering liquidation shall be provisionally enforceable.

- (4) The liquidator(s) may bring and defend all actions on behalf of the AIFM, receive all payments, grant releases with or without discharge, realise all the assets of the AIFM and reuse the proceeds therefrom, issue or endorse any negotiable instruments, compound or compromise all claims. They may alienate immovable property of the AIFM by public auction.

They may also, but only with the authorisation of the Court, mortgage and pledge its assets and alienate its immovable property by private treaty.

- (5) As from the day of the judgement, no actions relating to movable or immovable property or any enforcement procedures relating to movable or immovable property may be pursued, commenced or exercised otherwise than against the liquidators.

The judgement ordering liquidation shall terminate all seizures effected at the request of unsecured creditors not benefiting from preferential rights over movable and immovable property.

- (6) After payment or consignment of the sums necessary for the discharge of the debts, the liquidators shall distribute to the creditors the sums or amounts due to them.

- (7) The Court's decisions pronouncing the dissolution and ordering the liquidation of an AIFM shall be published in the *Recueil électronique des sociétés et associations* (electronic compendium of companies and associations) and in two newspapers with adequate circulation specified by the Court, at least one of which must be a Luxembourg newspaper.

The liquidator(s) shall arrange for such publications.

- (8) If there are no or insufficient assets, as ascertained by the *juge-commissaire* (bankruptcy judge), the documents relating to the proceedings shall be exempt from any registry and registration duties and the expenses and fees of the liquidators shall be borne by the Treasury and paid as judicial costs.

- (9) The liquidators shall be responsible both towards third parties and towards the AIFM for the discharge of their duties and for any faults committed in the conduct of their activities.

- (10) Where the liquidation has ended, the liquidators shall report to the Court the use of the assets of the AIFM and submit the accounts and supporting documents. The Court shall appoint *commissaires* to examine the documents.

After receipt of the *commissaires'* report, a ruling shall be given on the management of the liquidators and the closure of the liquidation.

The closure of the liquidation shall be published in accordance with paragraph 7.

This publication shall also indicate:

- (a) the place designated by the Court where the books and records must be kept for at least five years;
  - (b) the measures taken in order to consign the sums and assets due to creditors and shareholders to whom it has not been possible to deliver the same.
- (11) Any action against the liquidators of AIFMs, in their capacity as such, shall be prescribed five years after publication of the closure of the liquidation provided for in paragraph 10.

Actions against the liquidators in connection with the performance of their duties shall be prescribed five years after the date of the facts or, in the event of intentional concealment, five years after the discovery thereof."

(Law of 21 July 2023)

## Article 10-1 AIFM Law

### Non-judicial liquidation

- (1) "AIFMs shall, after dissolution, be deemed to exist for the purpose of their liquidation. In the case of a non-judicial liquidation, they shall remain subject to supervision by the CSSF.
- (2) All documents issued by an AIFM in liquidation shall indicate that it is in liquidation.
- (3) In the event of a non-judicial liquidation of an AIFM, the liquidator(s) shall be approved by the CSSF. The liquidator(s) shall provide all guarantees of good repute and professional skill.
- (4) Where a liquidator does not accept its appointment or is not approved, the *Tribunal d'arrondissement* (District Court) dealing with commercial matters shall, at the request of any interested party or of the CSSF, appoint the liquidator(s). The judgement appointing the liquidator(s) shall be provisionally enforceable, on the production of the original thereof and before registration, notwithstanding any appeal or objection.
- (5) No decision to carry out the non-judicial liquidation of an AIFM may be taken before the AIFM ceased all AIF management activity. This implies that the AIFM must have ended any contractual relationship with AIFs, and that it no longer acts, where applicable, as the manager or general partner of AIFs.

An AIFM which is also authorised to carry out the activity of discretionary management and non-core services referred to in Article 5(4), shall cease these activities and services before any decision concerning a non-judicial liquidation of that AIFM has been taken."

## CHAPTER 3

### OPERATING CONDITIONS FOR AIFMS

#### Section 1

#### General requirements

#### Article 11 AIFM Law

#### General principles

[Art. 12 AIFMD]

- (1) In the context of their activities, AIFMs must at all times:
- (a) act honestly, with due skill, care and diligence and fairly in conducting their activities;
  - (b) act in the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;
  - (c) have and employ effectively the resources and procedures that are necessary for the proper performance of their business activities;
  - (d) take all reasonable steps to avoid conflicts of interest and, when they cannot be avoided, to identify, manage and monitor and, where applicable, disclose those conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors and to ensure that the AIFs they manage are fairly treated;
  - (e) comply with all regulatory requirements applicable to the conduct of their business activities so as to promote the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;
  - (f) treat all AIF investors fairly.
- No investor in an AIF shall obtain preferential treatment, unless such preferential treatment is disclosed in the relevant AIF's management regulations or instruments of incorporation.
- (2) Each AIFM the authorisation of which also covers the discretionary portfolio management service referred to in point (a) of Article 5(4) of this Law shall:
- (a) not be permitted to invest all or part of the client's portfolio in units or shares of the AIFs it manages, unless it receives prior general approval from the client;
  - (b) with regard to the services referred to in Article 5(4), be subject to "Part III, Title III of the Law of 18 December 2015 on the failure of credit institutions and certain investment firms, as amended, and Article 22-1 of the Law of 5 April 1993 on the financial sector, as amended"<sup>10</sup>.

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<sup>10</sup> Law of 27 February 2018.

## Article 12 AIFM Law

### Remuneration

[Art. 13 AIFMD]

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

They must determine the remuneration policies and practices in accordance with Annex II of this Law.

[↪ Annex II AIFM Law](#)

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\* In the French version "règlement".

## Article 13 AIFM Law

### Conflicts of interest

[Art. 14 AIFMD]

- (1) AIFMs must take all reasonable steps to identify conflicts of interest that arise in the course of managing AIFs between:
- (a) the AIFM, including its managers, employees or any person directly or indirectly linked to the AIFM by control, and the AIF managed by the AIFM or the investors in that AIF;
  - (b) the AIF or the investors in that AIF and another AIF or the investors in that AIF;
  - (c) the AIF or the investors in that AIF and another client of the AIFM;
  - (d) the AIF or the investors in that AIF and a UCITS managed by the AIFM or the investors in that UCITS; or
  - (e) two clients of the AIFM.

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

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

- (2) Where organisational arrangements made by the AIFM to identify, prevent, manage and monitor conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to investors' interests will be prevented, the AIFM must 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 on behalf of an AIF uses the services of a prime broker, the terms must be set out in a written contract. In particular, any possibility of transfer and reuse of AIF assets must be provided for in that contract and must comply with the AIF management regulations or instruments of incorporation. The contract must provide that the depositary be informed of the contract.

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

## Article 14 AIFM Law

### Risk management

#### [Art. 15 AIFMD]

- (1) AIFMs must functionally and hierarchically separate the functions of risk management from the operating units, including from the functions of portfolio management.

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

- (2) "AIFMs shall implement adequate risk management systems in order to identify, measure, manage and monitor appropriately all risks relevant to each AIF investment strategy and to which each AIF is or may be exposed. In particular, AIFMs shall not solely or mechanically rely on credit ratings issued by credit rating agencies as defined in Article 3(1)(b) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, for assessing the creditworthiness of the AIFs' assets."<sup>11</sup>

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

- (3) AIFMs are required at least to:
- (a) implement an appropriate, documented and regularly updated due diligence process when investing on behalf of the AIF, according to the investment strategy, the objectives and risk profile of the AIF;
  - (b) ensure that the risks associated with each investment position of the AIF and their overall effect on the AIF's portfolio can be properly identified, measured, managed and monitored on an ongoing basis, including through the use of appropriate stress testing procedures;
  - (c) ensure that the risk profile of the AIF shall correspond to the size, portfolio structure and investment strategies and objectives of the AIF as laid down in the AIF management regulations\* or instruments of incorporation, prospectuses and offering documents.

(Law of 15 March 2016)

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

- (4) AIFMs must set a maximum level of leverage which they may employ on behalf of each AIF they manage as well as the extent of the right to reuse collateral or guarantee that could be granted under the leveraging arrangement, taking into account, *inter alia*:
- (a) the type of AIF;
  - (b) the investment strategy of the AIF;
  - (c) the sources of leverage of the AIF;
  - (d) any other interlinkage or relevant relationships with other financial services institutions which could pose systemic risk;
  - (e) the need to limit the exposure to any single counterparty;
  - (f) the extent to which the leverage is collateralised;
  - (g) the asset-liability ratio;

<sup>11</sup> Law of 15 March 2016.

\* In the French version "règlement".

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

## Article 15 AIFM Law

### Liquidity management

[Art. 16 AIFMD]

- (1) AIFMs are required, for each AIF that they manage other than for an unleveraged closed-ended AIF, to employ an appropriate liquidity management system and adopt procedures which enable them to monitor the liquidity risk of the AIF and to ensure that the liquidity profile of the investments of the AIF complies with its underlying obligations.  
  
They must regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable them to assess the liquidity risk of the AIFs and monitor the liquidity risk of the AIFs accordingly.
- (2) AIFMs must ensure that, for each AIF that they manage, the investment strategy, the liquidity profile and the redemption policy are consistent.

## **Section 2**

### **Organisational requirements**

#### **Article 16 AIFM Law**

##### **General principles**

[Art. 18 AIFMD]

AIFMs must use, at all times, adequate and appropriate human and technical resources that are necessary for the proper management of AIFs.

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

## Article 17 AIFM Law

### Valuation

[Art. 19 AIFMD]

- **FAQ AIFM published by CSSF (Appendix XV) Section 15 Valuation Question 15.a), Question 15.b), Question 15.c), Question 15.d)**

- (1) AIFMs must ensure that, for each AIF that they manage, appropriate and consistent procedures are established so that a proper and independent valuation of the assets of the AIF can be performed in accordance with this Article, the applicable national law and the AIF management regulations or instruments of incorporation.
- (2) The rules applicable to the valuation of assets and the calculation of the net asset value per unit or share of AIFs shall be laid down in the law of the country where the AIF is established and/or in the AIF management regulations or instruments of incorporation.
- (3) AIFMs are also required to ensure that the net asset value per unit or share of AIFs is calculated and disclosed to the investors in accordance with this Article, the applicable national law and the AIF management regulations\* or instruments of incorporation.

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

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

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

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

- (4) AIFMs must ensure that the valuation function is either performed by:
  - (a) an external valuer, which must be a legal or natural person independent from the AIF, the AIFM and any other persons with close links to the AIF or the AIFM; or
  - (b) the AIFM itself, provided that the valuation task is functionally independent from the portfolio management and the remuneration policy and other measures ensure that conflicts of interest are mitigated and that undue influence upon the employees is prevented.

The appointment of the depositary appointed for an AIF as external valuer of that AIF, is subject to the condition that it has functionally and hierarchically separated the performance of its depositary functions from its tasks as external valuer and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

- (5) Where an external valuer performs the valuation function, the AIFM must be able to demonstrate that:
  - (a) the external valuer is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct;
  - (b) the external valuer can provide sufficient professional guarantees to be able to perform effectively the relevant valuation function in accordance with paragraphs 1, 2 and 3; and
  - (c) the appointment of the external valuer complies with the requirements of Article 18(1) and (2) of this Law and the delegated acts adopted pursuant to Article 20(7) of Directive 2011/61/EU.
- (6) The appointed external valuer shall not be allowed to delegate the valuation function to a third party.

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\* In the French version "règlement".

- (7) AIFMs are required to notify the appointment of the external valuer to the CSSF. The CSSF shall require that another external valuer be appointed, where the conditions laid down in paragraph 5 are not met.
- (8) The valuation must be performed impartially and with all due skill, care and diligence.
- (9) Where the valuation function is not performed by an independent external valuer, the CSSF may require the AIFM to have its valuation procedures and/or valuations verified by an external valuer or, where appropriate, by a *réviseur d'entreprises agréé* (approved statutory auditor).
- (10) AIFMs are responsible for the proper valuation of AIF assets, the calculation of the net asset value and the publication of that net asset value. The AIFM's liability towards the AIF and its investors shall, therefore, not be affected by the fact that the AIFM has appointed an external valuer.

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

## Section 3

### Delegation of AIFM functions

#### Article 18 AIFM Law

##### Delegation

[Art. 20 AIFMD]

- **FAQ AIFM published by CSSF (Appendix XV) Section 7 Delegation Question 7.a), Question 7.b), Question 9.a)**

- (1) Where AIFMs intend to delegate to third parties the task of carrying out functions on their behalf, they shall notify the CSSF thereof before the delegation arrangements become effective. The following conditions must be met:
- (a) the AIFM must be able to justify its entire delegation structure on objective reasons;
  - (b) the delegate must dispose of sufficient resources to perform the respective tasks and the persons who effectively conduct the business of the delegate must be of sufficiently good repute and sufficiently experienced;
  - (c) where the delegation concerns portfolio management or risk management, it must be conferred only on undertakings which are authorised or registered for the purpose of asset management and subject to supervision or, where that condition cannot be met, only subject to prior approval by the CSSF;
  - (d) where the delegation concerns portfolio management or risk management and is conferred on a third-country undertaking, in addition to the requirements in point (c), cooperation between the CSSF and the supervisory authority of this undertaking must be ensured;
  - (e) the delegation must not prevent the effectiveness of supervision of the AIFM, and, in particular, must not prevent the AIFM from acting, or the AIF from being managed, in the best interests of its investors;
  - (f) the AIFM must be able to demonstrate that the delegate is qualified and capable of undertaking the functions in question, that it was selected with all due care and that the AIFM is in a position to monitor effectively at any time the delegated activity, to give at any time further instructions to the delegate and to withdraw the delegation with immediate effect when this is in the interest of investors.

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

- (2) No delegation of portfolio management or risk management shall be conferred on:
- (a) the depositary or a delegate of the depositary; or
  - (b) any other entity whose interests may conflict with those of the AIFM or the investors of the AIF, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.
- (3) The AIFM's liability towards the AIF and its investors shall not be affected by the fact that the AIFM has delegated functions to a third party, or by any further sub-delegation. In addition, the AIFM shall not 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 would become a letter-box entity.
- (4) The third party may sub-delegate any of the functions delegated to it provided that the following conditions are met:
- (a) the AIFM consented prior to the sub-delegation;

- (b) the AIFM notified the CSSF of the terms of the sub-delegation arrangements before they become effective;
  - (c) the conditions set out in paragraph 1 must be fulfilled, on the understanding that all references to the 'delegate' are read as references to the 'sub-delegate'.
- (5) No sub-delegation of portfolio management or risk management shall be conferred on:
- (a) the depositary or a delegate of the depositary; or
  - (b) any other entity whose interests may conflict with those of the AIFM or the investors of the AIF, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.
- The relevant delegate must control the services provided by each sub-delegate on an ongoing basis.
- (6) Where the sub-delegate further delegates any of the functions delegated to it, the conditions set out in paragraph 4 shall apply *mutatis mutandis*.

*(Law of 21 July 2023)*

## **Article 18a AIFM Law**

### **Tied agent**

- (1) "AIFMs established in Luxembourg shall be allowed to appoint tied agents within the meaning of point (1) of Article 1 of the Law of 5 April 1993 on the financial sector, as amended.
- (2) Where an AIFM decides to appoint tied agents, this AIFM shall comply, within the limits of the activities allowed pursuant to this Law, with the same rules as those applicable to investment firms pursuant to Article 37-8 of the Law of 5 April 1993 on the financial sector, as amended."

**Section 4**  
**Depositary**  
**Article 19 AIFM Law**

**Depositary**

[Art. 21 AIFMD]

- (1) For each AIF it manages, the AIFM must ensure that a single depositary is appointed in accordance with the provisions of this Article.

▪ **FAQ AIFM published by CSSF (Appendix XV) Section 10 Depositary Question 10.a)**

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

- (3) (i) For AIFs established in Luxembourg, the depositary must be a credit institution or an investment firm within the meaning of the Law of 5 April 1993 on the financial sector, as amended. An investment firm shall only be eligible as depositary of an AIF if all the following conditions have been fulfilled:

- the authorisation of the investment firm covers the ancillary service of safekeeping and administration of financial instruments for the account of clients referred to in point 1 of Section C of Annex II of the Law of 5 April 1993 on the financial sector, as amended;
- the investment firm is a legal person;
- it must have a fully paid-up minimum capital of EUR 730,000;
- it must have internal governance procedures, including an organisational and administrative structure and internal control procedures which are appropriate for the depositary's activity;
- it fulfils the requirements for own funds provided for in point (b) of Article 21(3) of Directive 2011/61/EU. These requirements for own funds are clarified by the CSSF.

Any investment firm which intends to exercise the functions of depositary for one or more AIFs established in Luxembourg must first notify the CSSF thereof. The CSSF has a maximum period of two months from the date of notification to object if the conditions mentioned in this paragraph are not fulfilled. If the CSSF decides to object, the CSSF informs without delay the investment firm thereof in writing indicating the reasons for its decision. In the absence of a decision by the CSSF, the investment firm may start the activity of depositary after expiry of the two-month period from the date of the notification. The decision of the CSSF may be referred to the *Tribunal administratif (Administrative Tribunal)*, which deals with the substance of the case. The action shall be filed within one month, or else shall be time-barred.

The depositary must either have its registered office in Luxembourg or have a branch there if its registered office is in another Member State.

In relation to AIFs established in Luxembourg, which have no redemption rights exercisable during a period of five years from the date of the initial investments and which, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with point (a) of Article 19(8) of this Law or generally invest in issuers or non-listed companies in order to potentially acquire control over such companies in accordance with Article 24 of this Law, the depositary may also be an entity which has the status of a professional depositary of assets other than financial instruments within the meaning of Article 26-1 of the Law of 5 April 1993 on the financial sector, as amended.

The provisions referred to under point (i) apply, unless otherwise provided by a specific law or a provision of EU law.

- (ii) For AIFs established in another Member State, the depositary must belong to one of the following categories of institutions mentioned in Article 21(3) of Directive 2011/61/EU, unless otherwise provided by the national law applicable to the AIF concerned or by a provision of EU law:
  - (a) a credit institution having its registered office in the European Union and authorised in accordance with Directive 2006/48/EC;
  - (b) an investment firm having its registered office in the European Union, subject to capital adequacy requirements in accordance with Article 20(1) of Directive 2006/49/EC including capital requirements for operational risks and authorised in accordance with Directive 2004/39/EC and which also provides the ancillary service of safekeeping and administration of financial instruments for the account of clients in accordance with point (1) of Section B of Annex I to Directive 2004/39/EC; such investment firms shall in any case have own funds not less than the amount of initial capital referred to in Article 9 of Directive 2006/49/EC; or
  - (c) another category of institution that is subject to prudential regulation and ongoing supervision and which, on 21 July 2011, falls within the categories of institution determined by Member States to be eligible to be a depositary under paragraph 3 of Article 23 of Directive 2009/65/EC.

For AIFs established in another Member State which have no redemption rights exercisable during the period of five years from the date of the initial investments and which, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with point (a) of Article 21(8) of Directive 2011/61/EU or generally invest in issuers or non-listed companies in order to potentially acquire control over such companies in accordance with Article 26 of the aforementioned Directive, the depositary may be an entity which carries out depositary functions as part of its professional or business activities in respect of which such entity is subject to mandatory professional registration recognised by the national law applicable to the AIF established in another Member State.

- (iii) For non-EU AIFs only, and without prejudice to point (b) of paragraph 5 of this Article, the depositary may also be a credit institution or any other entity of the same nature as the entities referred to in points (a) and (b) of the first subparagraph of Article 21(3) of Directive 2011/61/EU provided that the conditions of point (b) of Article 21(6) of that Directive are met.

▪ **FAQ AIFM published by CSSF (Appendix XV) Section 10 Depositary Question 10.i), Question 10.j)**

- (4) In order to avoid conflicts of interest 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 that AIF, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as prime broker and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF. Delegation by the depositary to such prime broker of its custody tasks in accordance with paragraph 11 is allowed if the relevant conditions are met.
- (5) The depositary must be established:
  - (a) for EU AIFs, in the home Member State of the AIF;
  - (b) for non-EU AIFs, in the third country where the AIF is established or in the home Member State of the AIFM managing the AIF or in the Member State of reference of the AIFM managing the AIF.
- (6) Without prejudice to the requirements set out in paragraph 3, the appointment of a depositary established in a third country shall, at all times, be subject to the following conditions:

- (a) the competent authorities of the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and the CSSF, as competent authority of the home Member State of the AIFM, have signed cooperation and exchange of information arrangements with the competent authorities of the depositary;
  - (b) the depositary is subject to effective prudential regulation, including minimum capital requirements, and supervision which have the same effect as European Union law and are effectively enforced;
  - (c) the third country where the depositary is established is not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force (FATF);
  - (d) the Member States in which the units or shares of the non-EU AIF are intended to be marketed and Luxembourg, as the home Member State of the AIFM, have signed an agreement with the third country where the depositary is established which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements;
  - (e) the depositary shall by contract be liable to the AIF or to the investors of the AIF, consistently with paragraphs 12 and 13, and shall expressly agree to comply with the provisions of paragraph 11.
- (7) The depositary must in general ensure that the AIF's cash flows are properly monitored, and shall in particular ensure that all payments made by or on behalf of investors upon the subscription of units or shares of an AIF have been received and that all cash of the AIF has been booked in cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the depositary acting on behalf of the AIF at an entity referred to in points (a), (b) and (c) of Article 18(1) of Directive 2006/73/EC, or another entity of the same nature, in the relevant market where cash accounts are required provided that such entity is subject to effective prudential regulation and supervision which have the same effect as European Union law and are effectively enforced and in accordance with the principles set out in Article 16 of Directive 2006/73/EC.

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

▪ **FAQ AIFM published by CSSF (Appendix XV) Section 10 Depositary Question 10.c), Question 10.d)**

- (8) The assets of the AIF or the AIFM acting on behalf of the AIF must be entrusted to the depositary for safe-keeping, taking into account the following elements:
- (a) for financial instruments that can be held in custody:
    - (i) the depositary must hold in custody all financial instruments that can be registered in a financial instruments account opened in the depositary's books and all financial instruments that can be physically delivered to the depositary;
    - (ii) for that purpose, the depositary must ensure that all those financial instruments that can be registered in a financial instruments account opened in the depositary's books are registered in the depositary's books within segregated accounts, in accordance with the principles set out in Article 16 of Directive 2006/73/EC, opened in the name of the AIF or the AIFM acting on behalf of the AIF, so that they can be clearly identified as belonging to the AIF in accordance with the applicable law at all times;
  - (b) for other assets:
    - (i) the depositary must verify the ownership of the AIF or the AIFM acting on behalf of the AIF of such assets and shall maintain a record of those assets for which it is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership of such assets;
    - (ii) the assessment whether the AIF or the AIFM acting on behalf of the AIF, holds the ownership shall be based on information or documents provided by the AIF or the AIFM and, where available, on external evidence;

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

- **FAQ AIFM published by CSSF (Appendix XV) Section 10 Depositary Question 10.d), Question 10.e), Question 10.f), Question 10.g), Question 10.h), Question 10.j), Question 11.e)**

- (9) In addition to the tasks referred to in paragraphs 7 and 8, the depositary must:
- (a) ensure that the sale, issue, re-purchase, redemption and cancellation of units or shares of the AIF are carried out in accordance with the applicable national law and the AIF management regulations\* or instruments of incorporation;
  - (b) ensure that the value of the units or shares of the AIF is calculated in accordance with the applicable national law, the AIF management regulations\* or instruments of incorporation and the procedures laid down in Article 19 of Directive 2011/61/EU;
  - (c) carry out the instructions of the AIFM, unless they conflict with the applicable national law or the AIF management regulations\* or instruments of incorporation;
  - (d) ensure that in transactions involving the AIF's assets any consideration is remitted to the AIF within the usual time limits;
  - (e) ensure that an AIF's income is applied in accordance with the applicable national law and the AIF management regulations\* or instruments of incorporation.

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

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

The depositary is not allowed to reuse assets referred to in paragraph 8 without the prior consent of the AIF or the AIFM acting on behalf of the AIF.

- (11) The depositary is not allowed to delegate to third parties the functions as described in this Article, save for those referred to in paragraph 8.

The depositary may delegate to third parties the functions referred to in paragraph 8 provided that the following conditions are fulfilled:

- (a) the tasks are not delegated with the intention of avoiding the requirements of Directive 2011/61/EU;
- (b) the depositary can demonstrate that there is an objective reason for the delegation;
- (c) the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it wants to delegate parts of its tasks, and keeps 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 ensures that the third party meets the following conditions at all times during the performance of the tasks delegated to it:
  - (i) the third party has the structures and the expertise that are adequate and proportionate to the nature and complexity of the assets of the AIF or the AIFM acting on behalf of the AIF which have been entrusted to it;
  - (ii) for custody tasks referred to in point (a) of paragraph 8, the third party is subject to effective prudential regulation, including minimum capital requirements, and supervision in the

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\* In the French version "règlement".

jurisdiction concerned and the third party is subject to an external periodic audit to ensure that the financial instruments are in its possession;

- (iii) the third party segregates the assets of the depositary's clients from its own assets and from the assets of the depositary in such a way that they can at any time be clearly identified as belonging to clients of a particular depositary;
- (iv) the third party does not make use of the assets without the prior consent of the AIF or the AIFM acting on behalf of the AIF and without first informing the depositary; and
- (v) the third party complies with the general obligations and prohibitions set out in paragraphs 8 and 10.

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

- (a) the investors of the relevant AIF must be duly informed that such delegation is required due to legal constraints in the law of the third country and of the circumstances justifying the delegation, prior to their investment; and
- (b) the AIF, or the AIFM on behalf of the AIF, must instruct the depositary to delegate the custody of such financial instruments to such local entity.

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

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

▪ **FAQ AIFM published by CSSF (Appendix XV) Section 10 Depositary Question 10.d)**

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

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

The depositary shall also be liable to the AIF, or to the investors of the AIF, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations pursuant to Directive 2011/61/EU.

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

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

- (a) all requirements for the delegation of its custody tasks set out in the second subparagraph of paragraph 11 are met;
- (b) a written contract between the depositary and the third party expressly transfers the liability of the depositary to that third party and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against the third party in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf; and

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

▪ **FAQ AIFM published by CSSF (Appendix XV) Section 10 Depositary Question 10.b)**

- (14) Further, where the law of a third country requires that certain financial instruments are held in custody by a local entity and there are no local entities that satisfy the delegation requirements laid down in point (d) (ii) of paragraph 11, the depositary can discharge itself of liability provided that the following conditions are met:
  - (a) the management regulations or instruments of incorporation of the AIF concerned expressly allow for such a discharge under the conditions set out in this paragraph;
  - (b) the investors of the relevant AIF have been duly informed of that discharge and of the circumstances justifying the discharge prior to their investment;
  - (c) the AIF or the AIFM on behalf of the AIF instructed the depositary to delegate the custody of such financial instruments to a local entity;
  - (d) there is a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, which expressly allows such a discharge; and
  - (e) there is a written contract between the depositary and the third party that expressly transfers the liability of the depositary to that local entity and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against that local entity in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf.
- (15) Liability to the investors of an AIF which has no legal personality may be invoked through the AIFM. Should the AIFM fail to act despite a request from an investor, within a period of three months following such a request, that investor may directly invoke the liability of the depositary.
- (16) Where the depositary is established in Luxembourg, it shall make available to the CSSF, on request, all information which it has obtained while performing its tasks and that may be necessary for the supervision of the AIF or the AIFM. If the CSSF is not the competent authority for the supervision of the AIF or the AIFM concerned, it shall communicate the information received to the competent authorities.

## CHAPTER 4

### TRANSPARENCY REQUIREMENTS

#### Article 20 AIFM Law

##### Annual report

[Art. 22 AIFMD]

- **FAQ AIFM published by CSSF (Appendix XV) Section 14 Reporting Question 14.i), Question 14.j), Question 14.k), Question 14.l1), Question 14.l2)**

- (1) An AIFM established in Luxembourg must, for each of the EU AIFs it manages and for each of the AIFs 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 to which the report refers. The annual report must be provided to investors on request. The annual report must be made available to the CSSF, and, where applicable, the home Member State of the AIF.

Where the AIF is required to make public an annual financial report in accordance with Directive 2004/109/EC only such additional information referred to in paragraph 2 hereafter 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 must be made public no later than four months following the end of the financial year to which it refers.

- (2) The annual report must at least contain the following:
- (a) a balance-sheet or a statement of assets and liabilities;
  - (b) an income and expenditure account for the financial year;
  - (c) a report on the activities of the financial year;
  - (d) any material changes in the information listed in Article 21 during the financial year to which the report refers;
  - (e) the total amount of remuneration for the financial year, split into fixed and variable remuneration, paid by the AIFM to its staff, and number of beneficiaries, and, where relevant, carried interest paid by the AIF;
  - (f) the aggregate amount of remuneration broken down by senior management and members of staff of the AIFM whose actions have a material impact on the risk profile of the AIF.
- (3) The accounting information given in the annual report must be prepared in accordance with the accounting standards of the home Member State of the AIF or in accordance with the accounting standards of the third country where the AIF is established and with the accounting rules laid down in the AIF management regulations or instruments of incorporation. "For the purposes of this paragraph, the accounting standards applicable to a Luxembourg AIF which has adopted the form of a special limited partnership are the accounting standards provided for by the Law of 19 December 2002 concerning the trade and companies register as well as the accounting and annual accounts of companies, as amended, as well as the accounting standards considered as equivalent by the amended Commission Decision of 12 December 2008 on the use by third countries' issuers of securities of certain third country's national accounting standards and International Financial Reporting Standards to prepare their consolidated financial statements."<sup>12</sup>

The accounting information given in the annual report must be audited by one or more persons empowered by law to audit accounts in accordance with Directive 2006/43/EC of the European Parliament

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<sup>12</sup> Law of 21 July 2021: A561.

and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts. The auditor's report, including any qualifications, shall be reproduced in full in the annual report.

By way of derogation from the second subparagraph, AIFMs marketing non-EU AIFs "may"<sup>13</sup> subject the annual reports of those AIFs to an audit meeting international auditing standards in force in the country where the AIF has its registered office.

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<sup>13</sup> Law of 21 July 2023.

## Article 21 AIFM Law

### Disclosure to investors

[Art. 23 AIFMD]

- (1) AIFMs must for each of the EU AIFs that they manage and for each of the AIFs that they market in the European Union make available to AIF investors, before they invest in the AIF, in accordance with the AIF management regulations or instruments of incorporation, the following information, as well as any material changes thereof:
- (a) a description of the investment strategy and objectives of the AIF, information on where any master AIF is established and where the underlying funds are established if the AIF is a fund of funds, a description of the types of assets in which the AIF may invest, the techniques it may employ and all associated risks, any applicable investment restrictions, the circumstances in which the AIF may use leverage, the types and sources of leverage permitted and the associated risks, any restrictions on the use of leverage and any collateral and asset reuse arrangements, and the maximum level of leverage which the AIFM is entitled to employ on behalf of the AIF;
  - (b) a description of the procedures by which the AIF may change its investment strategy or investment policy, or both;
  - (c) a description of the main legal implications of the contractual relationship entered into for the purpose of investment, including information on jurisdiction, on the applicable law and on the existence or not of any legal instruments providing for the recognition and enforcement of judgements in the territory where the AIF is established;
  - (d) the identity of the AIFM, the AIF's depository, 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 8(7);
  - (f) a description of any delegated management function as referred to in Annex I by the AIFM and of any safekeeping function delegated by the depository, the identification of the delegate and any conflicts of interest that may arise from such delegations; [↪ Annex I AIFM Law](#)
  - (g) a description of the AIF's valuation procedure and of the pricing methodology for valuing assets, including the methods used in valuing hard-to-value assets in accordance with Article 17;
  - (h) a description of the AIF's liquidity risk management, including the redemption rights both in normal and in exceptional circumstances, and the 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) a description of how the AIFM ensures a fair treatment of investors and, whenever an investor obtains preferential treatment or the right to obtain preferential treatment, a description of that preferential treatment, the type of investors who obtain such preferential treatment and, where relevant, their legal or economic links with the AIF or AIFM;
  - (k) the latest annual report referred to in Article 20;
  - (l) the procedure and conditions for the issue and sale of units or shares;
  - (m) the latest net asset value of the AIF or the latest market price of the unit or share of the AIF, established in accordance with Article 17;
  - (n) where available, the historical performance of the AIF;
  - (o) the identity of the prime broker and a description of any material arrangements of the AIF with its prime brokers and the way the conflicts of interest in relation thereto are managed and the provision in the contract with the depository on the possibility of transfer and reuse of AIF assets, and information about any transfer of liability to the prime broker that may exist;
  - (p) a description of how and when the information required under paragraphs 4 and 5 will be disclosed.

- (2) The AIFM shall inform the investors before they invest in the AIF of any arrangement made by the depositary to contractually discharge itself of liability in accordance with Article 19(13). The AIFM shall also inform investors of any changes with respect to depositary liability without delay.
- (3) Where the AIF is required to publish a prospectus in accordance with Directive 2003/71/EC or in accordance with national law, only such information referred to in paragraphs 1 and 2 which is in addition to that contained in the prospectus needs to be disclosed separately or as additional information in the prospectus.
- (4) AIFMs must, for each of the EU AIFs that they manage and for each of the AIFs that they market in the European Union, periodically disclose to investors:
  - (a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
  - (b) any new arrangements for managing the liquidity of the AIF;
  - (c) the current risk profile of the AIF and the risk management systems employed by the AIFM to manage those risks.
- (5) AIFMs managing EU AIFs employing leverage or marketing in the European Union AIFs employing leverage must, for each such AIF disclose, on a regular basis:
  - (a) any changes to the maximum level of leverage which the AIFM may employ on behalf of the AIF as well as any right of the reuse of collateral or any guarantee granted under the leveraging arrangement;
  - (b) the total amount of leverage employed by that AIF.

## Article 22 AIFM Law

### Reporting obligations to the CSSF

[Art. 24 AIFMD]

- **FAQ AIFM published by CSSF (Appendix XV) Section 14 Reporting Question 14.a), Question 14.b), Question 14.d), Question 14.e), Question 14.f), Question 14.g), Question 14.h), Question 14.m)**

- (1) AIFMs must regularly report to the CSSF on the principal instruments in which they trade on behalf of the AIFs they manage, as well as on the principal markets in which they trade.  
  
They must provide information on the main instruments in which they are trading, on markets of which they are a member or where they actively trade, and on the principal exposures and most important concentrations of each of the AIFs they manage.
- (2) An AIFM must, for each of the EU AIFs it manages and for each of the AIFs it markets in the European Union, provide the following information to the CSSF:
  - (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 the market risk, liquidity risk, counterparty risk and other risks including operational risk;
  - (d) information on the main categories of assets in which the AIF invested; and
  - (e) the results of the stress tests performed in accordance with point (b) of Article 14(3) and the second subparagraph of Article 15(1).
- (3) The AIFM must, on request, provide the following documents to the CSSF:
  - (a) an annual report of each EU AIF managed by the AIFM and of each AIF marketed by it in the European Union, for each financial year, in accordance with Article 20(1);
  - (b) for the end of each quarter a detailed list of all AIFs which the AIFM manages.
- (4) An AIFM managing AIFs employing leverage on a substantial basis shall make available to the CSSF information about the overall level of leverage employed by each AIF it manages, a break-down between leverage arising from borrowing of cash or securities and leverage embedded in financial derivatives and the extent to which the AIF's assets have been reused under leveraging arrangements.  
  
That information shall include the identity of the five largest sources of borrowed cash or securities for each of the AIFs managed by the AIFM, and the amounts of leverage received from each of those sources for each of those AIFs.
- (5) If the CSSF considers that such communication is necessary for the effective monitoring of systemic risk, it may require the AIFM to communicate information in addition to that described in this Article, on a periodic as well as on an *ad-hoc* basis.

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## CHAPTER 5

### AIFMS MANAGING SPECIFIC TYPES OF AIFS

#### Section 1

#### AIFMs managing leveraged AIFs

#### Article 23 AIFM Law

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

[Art. 25 AIFMD]

- (1) The CSSF shall use the information to be gathered under Article 22 of this Law for the purposes of identifying the extent to which the use of leverage contributes to the build-up of systemic risk in the financial system, risks of disorderly markets or risks to the long-term growth of the economy.
- (2) The CSSF shall ensure that all information gathered under Article 22 of this Law in respect of all AIFMs that it supervises and the information gathered under Article 6 of this Law is made available to competent authorities of other relevant Member States, ESMA and the ESRB by means of the procedures set out in Article 50 of Directive 2011/61/EU on supervisory cooperation. It shall, without delay, also provide information by means of those procedures, and bilaterally to the competent authorities of other Member States directly concerned, if an AIFM under its responsibility, or AIF managed by that AIFM could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions in other Member States.
- (3) The AIFM must provide proof that the leverage limits set by it for each AIF it manages are reasonable and that it complies with those limits at all times. The CSSF shall assess the risks that the use of leverage by an AIFM with respect to the AIFs it manages could entail. If the CSSF deems such action necessary in order to ensure the stability and integrity of the financial system, it shall, after having notified ESMA, the ESRB and, if applicable, the competent authorities of the relevant AIF, impose limits to the level of leverage that an AIFM is entitled to employ or other restrictions on the management of the AIF with respect to the AIFs under its management to limit the extent to which the use of leverage contributes to the build up of systemic risk in the financial system or risks of disorderly markets. The CSSF shall duly inform ESMA, the ESRB and, if applicable, the competent authorities of the AIF, of actions taken in this respect, through the procedures set out in Article 50 of Directive 2011/61/EU.
- (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 CSSF may decide that the proposed measure takes effect within the period referred to in the first sentence.

## Section 2

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

#### Article 24 AIFM Law

##### Scope

[Art. 26 AIFMD]

- **FAQ AIFM published by CSSF (Appendix XV) Section 10 Depository Question 10.i)**

- (1) This Section shall apply to the following:
  - (a) AIFMs managing one or more AIFs, which either individually or jointly, on the basis of an agreement aimed at acquiring control, acquire control of a non-listed company in accordance with paragraph 5;
  - (b) AIFMs cooperating with one or more other AIFMs on the basis of an agreement pursuant to which the AIFs managed by those AIFMs jointly, acquire control of a non-listed company in accordance with paragraph 5.
- (2) This Section shall not apply where the non-listed companies concerned are:
  - (a) small and medium-sized enterprises within the meaning of Article 2(1) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises; or
  - (b) special purpose vehicles with the purpose of purchasing, holding or managing real estate.
- (3) Without prejudice to paragraphs 1 and 2 of this Article, Article 25(1) shall also apply to AIFMs managing AIFs that acquire a non-controlling participation in a non-listed company.
- (4) Article 26(1), (2) and (3) and Article 28 shall apply also to AIFMs managing AIFs that acquire control over issuers. For the purposes of those Articles, paragraphs 1 and 2 of this Article shall apply *mutatis mutandis*.
- (5) For the purpose of this Section, for non-listed companies, control shall mean more than 50% of the voting rights of the company.

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

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

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

Notwithstanding point (10) of Article 1, for the purpose of Article 26(1), (2) and (3) and Article 28 in regard to issuers, control shall be determined in accordance with Article 5(3) of Directive 2004/25/EC.

- (6) This Section shall apply subject to the conditions and restrictions set out in Article 6 of Directive 2002/14/EC.
- (7) This Section shall apply without prejudice to stricter Luxembourg law provisions applying to the acquisition of participations in issuers and in non-listed companies on its territory.

## Article 25 AIFM Law

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

[Art. 27 AIFMD]

- **FAQ AIFM published by CSSF (Appendix XV) Section 19 Marketing (non-EU AIF) Question 20.a), Question 20.b), Question 20.d), Question 20.e), Question 20.f), Question 20.g)**

- (1) When an AIF acquires, disposes of or holds shares of a non-listed company, the AIFM managing such an AIF is required to notify the CSSF 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) When an AIF acquires, individually or jointly, control over a non-listed company pursuant to Article 24(1), in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF is required to notify the acquisition of control by the AIF:
  - (a) to the non-listed company;
  - (b) to the shareholders of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access; and
  - (c) to the CSSF.
- (3) The notification required under paragraph 2 must contain the following additional information:
  - (a) the resulting situation in terms of voting rights;
  - (b) the conditions subject to which control was acquired, including information about the identity of the different shareholders involved, any natural person or legal entity entitled to exercise voting rights on their behalf and, if applicable, the chain of undertakings through which voting rights are effectively held;
  - (c) the date on which control was acquired.
- (4) In its notification to the non-listed company, the AIFM must request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the acquisition of control by the AIF managed by the AIFM and of the information referred to in paragraph 3. The AIFM is required to use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this Article.
- (5) The notifications referred to in paragraphs 1, 2 and 3 shall be made as soon as possible, but no later than ten working days after the date on which the AIF has reached, exceeded or fallen below the relevant threshold or has acquired control over the non-listed company.

## Article 26 AIFM Law

### Disclosure in case of acquisition of control

[Art. 28 AIFMD]

▪ **FAQ AIFM published by CSSF (Appendix XV) Section 19 Marketing (non-EU AIF) Question 20.e)**

- (1) When an AIF acquires, individually or jointly, control of a non-listed company or an issuer pursuant to Article 24(1), in conjunction with paragraph 5 of that Article, the AIFM managing such AIF is required to make the information referred to in paragraph 2 below available to:
  - (a) the company concerned;
  - (b) the shareholders of the company of which the identities and addresses are available to the AIFM or can be made available by the company or through a register to which the AIFM has or can obtain access; and
  - (c) the CSSF.
- (2) The AIFM must make available in accordance with paragraph 1:
  - (a) the identity of the AIFMs which either individually or in agreement with other AIFMs manage the AIFs that have acquired control;
  - (b) the policy for preventing and managing conflicts of interest, in particular between the AIFM, the AIF and the company, including information about the specific safeguards established to ensure that any agreement between the AIFM and/or the AIF and the company is concluded at arm's length; and
  - (c) the policy for external and internal communication relating to the company in particular as regards employees.
- (3) In its notification to the company pursuant to point (a) of paragraph 1, the AIFM is required to request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the information referred to in paragraph 1. The AIFM is required to use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this Article.
- (4) When an AIF acquires, individually or jointly, control of a non-listed company pursuant to Article 24(1), in conjunction with paragraph 5 of that Article, the AIFM managing such AIF must ensure that the AIF, or the AIFM acting on behalf of the AIF, discloses its intentions with regard to the future business of the non-listed company and the likely repercussions on employment, including any material change in the conditions of employment, to:
  - (a) the non-listed company; and
  - (b) the shareholders of the non-listed company of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access.

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

- (5) When an AIF acquires control of a non-listed company pursuant to Article 24(1), in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF must provide the CSSF and the AIF's investors with information on the financing of the acquisition.

## Article 27 AIFM Law

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

[Art. 29 AIFMD]

- (1) When an AIF acquires, individually or jointly, control of a non-listed company pursuant to Article 24(1), in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF must either:
  - (a) request and use its best efforts to ensure that the annual report of the non-listed company drawn up in accordance with paragraph 2 is made available by the board of directors of the company to the employees' representatives or, where there are none, to the employees themselves within the period such annual report has to be drawn up in accordance with the national applicable law; or
  - (b) for each such AIF include in the annual report provided for in Article 20 the information referred to in paragraph 2 relating to the relevant non-listed company.
- (2) The additional information to be included in the annual report of the company or the AIF, in accordance with paragraph 1, 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 must also give an indication of:
  - (a) any important events that have occurred since the end of the financial year;
  - (b) the company's likely future development; and
  - (c) the information concerning acquisitions of own shares prescribed by Article 22(2) of Council Directive 77/91/EEC.
- (3) The AIFM managing the relevant AIF must either:
  - (a) request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information referred to in point (b) of paragraph 1 relating to the company concerned to the employees' representatives of the company concerned or, where there are none, to the employees themselves within the period referred to in Article 20(1); or
  - (b) make available the information referred to in point (a) of paragraph 1 to the investors of the AIF, in so far as already available, within the period referred to in Article 20(1) and, in any event, no later than the date on which the annual report of the non-listed company is drawn up in accordance with the national applicable law.

## Article 28 AIFM Law

### Asset stripping

[Art. 30 AIFMD]

- (1) When an AIF, individually or jointly, acquires control of a non-listed company or an issuer pursuant to paragraph 1 of Article 24, in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF shall for a period of twenty-four months following the acquisition of control of the company by the AIF:
  - (a) not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in paragraph 2;
  - (b) in so far as the AIFM is authorised to vote on behalf of the AIF at the meetings of the governing bodies of the company, not be allowed to vote in favour of a distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in paragraph 2; and
  - (c) in any event use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares by the company as described in paragraph 2.
- (2) The obligations imposed on AIFMs pursuant to paragraph 1 shall relate to the following:
  - (a) any distribution to shareholders made when on the closing date of the last financial year the net asset value 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 articles of incorporation, on the understanding that where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital;
  - (b) any distribution to shareholders the amount of which would exceed the amount of the profits at the end of the last financial year, plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the articles of incorporation;
  - (c) to the extent that acquisitions of own shares are permitted, any acquisition by the company, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, that would have the effect of reducing the net assets below the amount mentioned in point (a).
- (3) For the purposes of paragraph 2:
  - (a) the term "distribution" referred to in points (a) and (b) of paragraph 2 shall include, in particular, the payment of dividends and of interest relating to shares;
  - (b) the provisions on capital reductions shall not apply on a reduction in the subscribed capital, the purpose of which is to offset losses incurred or to include sums of money in a non-distributable reserve provided that, following that operation, the amount of such reserve is not more than 10% of the reduced subscribed capital; and
  - (c) the restriction set out in point (c) of paragraph 2 shall be subject to points (b) to (h) of Article 20(1) of Directive 77/91/EEC.

(Law of 21 July 2021: A561)

## "CHAPTER 5a

### CONDITIONS FOR PRE-MARKETING IN THE EUROPEAN UNION BY AN EU AIFM

#### Article 28-1 AIFM Law

#### AIFMS established in Luxembourg pre-marketing in Luxembourg or in another Member State

[Art. 30a AIFMD]

▪ **FAQ CBDF – marketing communications published by CSSF (Appendix XVII)**

- (1) An AIFM established in Luxembourg authorised under this Law may engage in pre-marketing in Luxembourg or in another Member State, except where the information presented to potential professional investors:
- (a) is sufficient to allow investors to commit to acquiring units or shares of a particular AIF;
  - (b) amounts to subscription forms or similar documents whether in a draft or a final form; or
  - (c) amounts to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.

Where a draft prospectus or offering documents are provided, they shall not contain information sufficient to allow professional investors to take an investment decision and shall clearly state that:

- (a) they do not constitute an offer or an invitation to subscribe to units or shares of an AIF; and
- (b) the information presented therein should not be relied upon because it is incomplete and may be subject to change.

The AIFM is not required to notify the CSSF or the competent authorities of the Member States in which the AIFM is or was engaged in pre-marketing of the content or of the addressees of pre-marketing, or to fulfil any conditions or requirements other than those set out in this Article, before it engages in pre-marketing.

- (2) The AIFM referred to in paragraph 1 shall ensure that professional investors do not acquire units or shares in an AIF through pre-marketing and that investors contacted as part of pre-marketing may only acquire units or shares in that AIF through marketing permitted under Article 29 or Article 30.

Any subscription by professional investors, within 18 months of the AIFM having begun premarketing, to units or shares of an AIF referred to in the information provided in the context of pre-marketing, or of an AIF established as a result of the pre-marketing, shall be considered to be the result of marketing and shall be subject to the applicable notification procedures referred to in Article 29 or Article 30.

- (3) Within two weeks of it having begun pre-marketing, the AIFM shall send an informal letter, in paper form or by electronic means, to the CSSF. That letter shall specify the Member States in which and the periods during which the pre-marketing is taking or has taken place, a brief description of the pre-marketing including the information on the investment strategies presented and, where relevant, a list of the AIFs and compartments of AIFs which are or were the subject of pre-marketing.

The AIFM shall ensure that pre-marketing is adequately documented.

- (4) Following reception of the letter referred to in paragraph 3, the CSSF shall promptly inform the competent authorities of the other Member States in which the AIFM is or was engaged in premarketing.

The CSSF may, upon request of the competent authorities of the Member States in which the AIFM is or has engaged in pre-marketing, provide further information on the pre-marketing that is taking or has taken place on its territory.

- (5) A third party shall only engage in pre-marketing on behalf of an AIFM established in Luxembourg authorised under this Law, where it is authorised as an investment firm in accordance with Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU ("Directive 2014/65/EU"), as a credit institution in accordance with Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC ("Directive 2013/36/EU"), as a UCITS management company in accordance with Directive 2009/65/EC, as an AIFM in accordance with Directive 2011/61/EU, or acts as a tied agent in accordance with Directive 2014/65/EU. Such a third party shall be subject to the conditions set out in this Article.

## Article 28-2 AIFM Law

### AIFMs established in another Member State pre-marketing in Luxembourg

[Art. 30a AIFMD]

▪ **FAQ CBDF – marketing communications published by CSSF (*Appendix XVII*)**

- (1) After receipt of the information referred to in the third subparagraph of Article 30a(2) of Directive 2011/61/EU by the competent authorities of the home Member State of an authorised AIFM established in another Member State which is or was engaged in pre-marketing in Luxembourg, the CSSF may request these competent authorities to provide further information on the pre-marketing that is taking or has taken place in Luxembourg.
- (2) The AIFM shall not be required to notify the CSSF of the content or of the addressees of premarketing, or to fulfil any conditions or requirements other than those set out in Article 30a of Directive 2011/61/EU, before it engages in pre-marketing."

## CHAPTER 6

### RIGHTS OF EU AIFMS TO MARKET AND MANAGE EU AIFS IN THE EUROPEAN UNION

#### Section 1

Conditions applicable to the marketing of units or shares in the European Union of EU AIFs managed by EU AIFMs

#### Article 29 AIFM Law

AIFMs established in Luxembourg marketing in Luxembourg units or shares of EU AIFs they manage

[Art. 30a AIFMD] [Art. 31 AIFMD]

- *FAQ AIFM published by CSSF (Appendix XV) Section 11 Marketing (Lux AIFM) Question 11.a), Question 11.d), Question 11.e), Section 12 Marketing (EU AIFM) Question 12.d), Section 13 Marketing process (Lux AIFM) Question 13.b), Question 13.c), Question 13.d), Question 13.e), Question 13.f), Question 13.g), Section 21 Definition of marketing and reverse solicitation Question 21.c)*
- *FAQ CBDF – marketing communications published by CSSF (Appendix XVII)*

- (1) An AIFM established in Luxembourg authorised under this Law which intends to market units or shares of any EU AIF that it manages to professional investors in Luxembourg is required to comply with the provisions laid down in this Article.

Where the EU AIF is a feeder AIF the marketing referred to in the first subparagraph is in addition subject to the condition that the master AIF is also an EU AIF which is managed by an authorised EU AIFM.

Where an AIFM established in Luxembourg intends to market AIFs that it manages to professional investors in Luxembourg and which are subject to authorisation and prudential supervision by an official Luxembourg supervisory authority, the provisions of this Article regarding the obligation of notification do not apply.

- (2) The AIFM referred to in this Article which intends to market units or shares of EU AIFs that it manages in Luxembourg shall first submit a notification to the CSSF in respect of each AIF that it intends to market. [↪ Annex III AIFM Law](#)

That notification must comprise the documentation and information set out in Annex III of this Law.

- (3) Within twenty working days at the latest following receipt of a complete notification file pursuant to paragraph 2, the CSSF shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 2. The CSSF shall prevent the marketing of the AIF only when the AIFM's management of the AIF does not or will not comply with the provisions of this Law or the AIFM otherwise does not or will not comply with the provisions of this Law. Should the CSSF agree, the AIFM may start marketing the AIF in Luxembourg from the date of the notification of the decision of the CSSF. Where the AIF concerned is established in a Member State other than Luxembourg, the CSSF shall also inform the competent authorities of the AIF that the AIFM may start marketing units or shares of the AIF in Luxembourg.

- (4) In the event of a material change to any of the particulars communicated in accordance with paragraph 2, the AIFM must give written notice of that change to the CSSF at least one month before implementing

the change as regards any changes planned by the AIFM, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with the provisions of this Law or the AIFM would otherwise no longer comply with the provisions of this Law, the CSSF shall inform the AIFM without undue delay that it is not allowed to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with the provisions of this Law or the AIFM otherwise no longer complies with the provisions of this Law, the CSSF shall take all due measures in accordance with Article 50, including, if necessary, the express prohibition of marketing of the AIF.

- (5) Without prejudice to the provisions of Article 46 of this Law, AIFs managed and marketed by AIFMs referred to in this Article may only be marketed to professional investors.

## Article 29-1 AIFM Law

"AIFMs established in Luxembourg de-notifying arrangements made for marketing in Luxembourg of units or shares of EU AIFs they manage

[Art. 32a AIFMD]

▪ **FAQ CBDF – marketing communications published by CSSF (Appendix XVII)**

- (1) An AIFM established in Luxembourg authorised under this Law which has made a notification in accordance with Article 29, may de-notify arrangements made for marketing as regards units or shares of some or all of its EU AIFs in Luxembourg, where all the following conditions are fulfilled:
  - (a) except in the case of closed-ended AIFs and funds regulated by Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds ("Regulation (EU) 2015/760"), a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such AIF units or shares held by investors in Luxembourg, is publicly available for at least 30 working days and is addressed, directly or through financial intermediaries, individually to all investors in Luxembourg, provided that their identity is known;
  - (b) the intention to terminate arrangements made for marketing units or shares of some or all of its AIFs in Luxembourg is made public by means of a publicly available medium, including by electronic means, which is customary for marketing AIFs and suitable for a typical AIF investor;
  - (c) any contractual provisions with financial intermediaries or delegates are modified or removed with effect from the date of de-notification in order to prevent any new or further, direct or indirect, offering or placement of the units or shares identified in the notification referred to in paragraph 2.

As of the date referred to in point (c) of the first subparagraph, the AIFM shall cease any new or further, direct or indirect, offering or placement of units or shares of the AIF it manages in Luxembourg.
- (2) Where the AIFM wishes to de-notify the arrangements made for marketing units or shares of some or all of its AIFs in Luxembourg in accordance with paragraph 1, it shall submit a notification to the CSSF containing the information pertaining to compliance with the conditions referred to in points (a), (b) and (c) of the first subparagraph of paragraph 1. The CSSF shall verify that this notification is complete.
- (3) The AIFM shall provide investors in Luxembourg who remain invested in the EU FIA as well as the CSSF with the information required under Articles 20 and 21. To this end, the use of any electronic or other distance communication means shall be allowed.
- (4) For a period of 36 months from the date referred to in point (c) of the first subparagraph of paragraph 1, the AIFM shall not engage in pre-marketing of units or shares of the EU AIFs referred to in the notification, or in respect of similar investment strategies or investment ideas, in Luxembourg."

## Article 30 AIFM Law

### AIFMs established in Luxembourg marketing in another Member State units or shares of EU AIFs they manage

[Art.32 AIFMD]

- *FAQ AIFM published by CSSF (Appendix XV) Section 11 Marketing (Lux AIFM) Question 11.a), Question 11.b), Question 11.c), Question 11.e), Section 13 Marketing process (Lux AIFM) Question 13.a), Question 13.c), Question 13.d), Question 13.e), Question 13.f), Question 13.g)*
- *FAQ CBDF – marketing communications published by CSSF (Appendix XVII)*

- (1) An AIFM established in Luxembourg authorised under this Law which intends to market units or shares of an EU AIF that it manages to professional investors in another Member State is required to comply with the provisions laid down in this Article.

Where the EU AIF is a feeder AIF, the marketing referred to in the first subparagraph is in addition subject to the condition that the master AIF is also an EU AIF and is managed by an authorised EU AIFM.

- (2) The AIFM which intends to market in another Member State units or shares of an EU AIF that it manages shall first submit a notification to the CSSF in respect of each AIF that it intends to market.

#### [↻ Annex IV AIFM Law](#)

That notification must comprise the documentation and information set out in Annex IV.

- (3) If it considers that the management of the AIF by the AIFM complies with and will continue to comply with the provisions of this Law and if the AIFM otherwise complies with the provisions of this Law, the CSSF shall, no later than twenty working days after the date of receipt of the complete notification file referred to in paragraph 2, transmit the notification file to the competent authorities of the Member States where it is intended that the AIF be marketed.

The CSSF shall enclose in the notification file a statement confirming that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

- (4) Upon transmission of the notification file, the CSSF shall, without delay, notify the AIFM about the transmission. The AIFM may market the AIF in the host Member State of the AIFM as of the date of that notification.

Where the AIF concerned is an AIF established in a Member State other than Luxembourg, the CSSF shall also inform the competent authorities of the AIF that the AIFM may start marketing the units or shares of the AIF in the host Member State of the AIFM.

- (5) Arrangements referred to in point (h) of Annex IV are subject to the laws of the host Member State of the AIFM and shall be subject to the supervision of the competent authorities of that Member State.

#### [↻ Annex IV AIFM Law](#)

- (6) The notification letter referred to in paragraph 2 and the statement referred to in paragraph 3 are provided in a language customary in the sphere of international finance.

- (7) In the event of a material change to any of the particulars communicated in accordance with paragraph 2, the AIFM must give written notice of that change to the CSSF at least one month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with the provisions of this Law or the AIFM would otherwise no longer comply with the provisions of this Law, the CSSF shall inform "the AIFM within a period of 15 working days of receipt of all the information

referred to in the first subparagraph<sup>14</sup>, that it is not allowed to implement the change. "The CSSF shall inform the competent authorities of the host Member State of the AIFM thereof."<sup>15</sup>

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with the provisions of this Law or the AIFM otherwise would no longer comply with the provisions of this Law, the CSSF shall take all due measures in accordance with Article 50, including, if necessary, the express prohibition of marketing of the AIF, and shall notify the competent authorities of the host Member State of the AIFM accordingly without unjustified delay.

If the changes "(...)"<sup>16</sup> do not affect the compliance of the AIFM's management of the AIF with the provisions of this Law, or the compliance by the AIFM with the provisions of this Law otherwise, the CSSF shall, "within one month"<sup>17</sup>, inform the competent authorities of the host Member State of the AIFM of those changes.

- (8) Without prejudice to the provisions of Article 43(1) of Directive 2011/61/EU, the AIFs managed and marketed by the AIFM referred to in this Article may only be marketed to professional investors.

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<sup>14</sup> Law of 21 July 2021: A561.

<sup>15</sup> Law of 21 July 2021: A561.

<sup>16</sup> Law of 21 July 2021: A561.

<sup>17</sup> Law of 21 July 2021: A561.

(Law of 21 July 2021: A561)

## Article 30-1 AIFM Law

"AIFMs established in Luxembourg de-notifying arrangements made for marketing in another Member State of units or shares of EU AIFs they manage

[Art. 32a AIFMD]

▪ **FAQ CBDF – marketing communications published by CSSF (Appendix XVII)**

- (1) An AIFM established in Luxembourg authorised under this Law may de-notify arrangements made for marketing as regards units or shares of some or all of its AIFs in a Member State in respect of which it has made a notification in accordance with Article 30, where all the following conditions are fulfilled:
  - (a) except in the case of closed-ended AIFs and funds regulated by Regulation (EU) 2015/760, a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such AIF units or shares held by investors in that Member State, is publicly available for at least 30 working days, and is addressed, directly or through financial intermediaries, individually to all investors in that Member State, provided that their identity is known;
  - (b) the intention to terminate arrangements made for marketing units or shares of some or all of its AIFs in that Member State is made public by means of a publicly available medium, including by electronic means, which is customary for marketing AIFs and suitable for a typical AIF investor;
  - (c) any contractual provisions with financial intermediaries or delegates are modified or removed with effect from the date of de-notification in order to prevent any new or further, direct or indirect, offering or placement of the units or shares identified in the notification referred to in paragraph 2.

As of the date referred to in point (c) of the first subparagraph, the AIFM shall cease any new or further, direct or indirect, offering or placement of units or shares of the AIF it manages in the Member State in respect of which it has submitted a notification in accordance with paragraph 2.
- (2) Where the AIFM wishes to de-notify the arrangements made for marketing units or shares of some or all of its AIFs in a Member State in accordance with paragraph 1, it shall submit a notification to the CSSF containing the information pertaining to compliance with the conditions referred to in points (a) to (c) of the first subparagraph of paragraph 1.
- (3) The CSSF shall verify that the notification submitted by the AIFM in accordance with paragraph 2 is complete. The CSSF shall, no later than 15 working days from the receipt of a complete notification, transmit that notification to the competent authorities of the Member State identified in the notification referred to in paragraph 2, and to ESMA. The CSSF shall promptly notify the AIFM of that transmission.
- (4) The AIFM shall provide investors who remain invested in the EU FIA as well as the CSSF with the information required under Articles 20 and 21. To this end, the use of any electronic or other distance communication means shall be allowed.
- (5) The CSSF shall transmit to the competent authorities of the Member State identified in the notification referred to in paragraph 2, information on any changes to the documentation and information referred to in points (b) to (f) of Annex IV.
- (6) For a period of 36 months from the date referred to in point (c) of the first subparagraph of paragraph 1, the AIFM shall not engage in pre-marketing of units or shares of the EU AIFs referred to in the notification referred to in paragraph 2, or in respect of similar investment strategies or investment ideas, in the Member State identified in that notification."

## Article 31 AIFM Law

AIFMs established in another Member State marketing in Luxembourg units or shares of EU AIFs they manage

[Art. 32 AIFMD]

- *FAQ AIFM published by CSSF (Appendix XV) Section 12 Marketing (EU AIFM) Question 12.a), Question 12.b), Question 12.c), Question 12.d), Section 21 Definition of marketing and reverse solicitation Question 21.c)*
- *FAQ CBDF – marketing communications published by CSSF (Appendix XVII)*

- (1) If an AIFM established in another Member State intends to market units or shares of an EU AIF that it manages to professional investors in Luxembourg, the competent authorities of the home Member State of the AIFM shall transmit the notification file as well as the statement referred to in Article 32(3) of Directive 2011/61/EU to the CSSF.  
  
Upon notification to the AIFM of the transmission referred to in this paragraph by the competent authorities of the home Member State of the AIFM to the CSSF, the AIFM may as of the date of that notification market the AIF concerned in Luxembourg.
- (2) Without prejudice to the provisions of Article 46 of this Law, the AIFs managed and marketed by the AIFMs referred to in this Article may only be marketed to professional investors.

(Law of 21 July 2021: A561)

## Article 31-1 AIFM Law

"AIFMs established in another Member State de-notifying arrangements made for marketing in Luxembourg of units or shares of EU AIFs they manage

[Art. 32a AIFMD]

▪ **FAQ CBDF – marketing communications published by CSSF (Appendix XVII)**

- (1) An AIFM established in another Member State which has made a notification in accordance with Article 32 of Directive 2011/61/EU, may de-notify arrangements made for marketing as regards units or shares of some or all of its AIFs in Luxembourg, where all the following conditions are fulfilled:
  - (a) except in the case of closed-ended AIFs and funds regulated by Regulation (EU) 2015/760, a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such AIF units or shares held by investors in Luxembourg, is publicly available for at least 30 working days, and is addressed, directly or through financial intermediaries, individually to all investors in that Member State, provided that their identity is known;
  - (b) the intention to terminate arrangements made for marketing units or shares of some or all of its AIFs in Luxembourg is made public by means of a publicly available medium, including by electronic means, which is customary for marketing AIFs and suitable for a typical AIF investor;
  - (c) any contractual provisions with financial intermediaries or delegates are modified or removed with effect from the date of de-notification in order to prevent any new or further, direct or indirect, offering or placement of the units or shares identified in the notification referred to in paragraph 2.

As of the date referred to in point (c) of the first subparagraph, the AIFM shall cease any new or further, direct or indirect, offering or placement of units or shares of the AIF it manages in Luxembourg.
- (2) The AIFM shall provide investors in Luxembourg who remain invested in the EU AIF with the information required under Articles 22 and 23 of Directive 2011/61/EU. To this end, the use of any electronic or other distance communication means shall be allowed.
- (3) The CSSF, in its capacity as competent authority of the Member State identified in the notification referred to in Article 32a(2) of Directive 2011/61/EU, shall have the same rights and obligations as the competent authorities of the host Member State of the AIFM, as referred to in Article 45 of Directive 2011/61/EU.

As from the date of transmission provided for in Article 32a(5) of Directive 2011/61/EU, the CSSF, acting as competent authority of the Member State identified in the notification referred to Article 32a(2) of Directive 2011/61/EU, shall not require the AIFM concerned to demonstrate compliance with the marketing requirements referred to in Article 5 of Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014.
- (4) For a period of 36 months from the date referred to in point (c) of the first subparagraph of paragraph 1, the AIFM shall not engage in pre-marketing of units or shares of the EU AIFs referred to in the notification, or in respect of similar investment strategies or investment ideas, in Luxembourg."

## Section 2

### Conditions applicable to the management of EU AIFs

#### Article 32 AIFM Law

"AIFMs established in Luxembourg managing EU AIFs established in another Member State and/or providing services in another Member State"<sup>18</sup>

[Art. 33 AIFMD]

- (1) "An AIFM established in Luxembourg authorised under this Law which intends to manage EU AIFs established in another Member State, either directly or by establishing a branch, must be authorised to manage that type of AIF.

An AIFM established in Luxembourg authorised under this Law may, in addition, provide in another Member State, either directly or by establishing a branch, the services referred to in Article 5(4) for which it has been authorised.

- (2) The AIFM intending to provide the activities and services referred to in paragraph 1 for the first time shall communicate the following information to the CSSF:
- (a) the Member State in which the AIFM intends to manage AIFs directly or to establish a branch, and/or to provide the services referred to in Article 5(4);
  - (b) a programme of operations stating in particular the services which the AIFM intends to perform and/or identifying the AIFs it intends to manage."<sup>19</sup>

- (3) If the AIFM intends to establish a branch, it must provide the following information in addition to that referred to in paragraph 2:

- (a) the organisational structure of the branch;
- (b) the address in the home Member State of the AIF from which documents may be obtained;
- (c) the names and contact details of the persons responsible for the management of the branch.

- (4) The CSSF, if it considers that the AIFM's management of the AIF complies and will continue to comply with the provisions of this Law and the AIFM otherwise complies with the provisions of this Law, shall, within one month of receiving the complete documentation in accordance with paragraph 2, or within two months of receiving the complete documentation in accordance with paragraph 3, transmit the complete documentation to the competent authorities of the host Member State of the AIFM.

The CSSF shall enclose a statement confirming that the AIFM is authorised in accordance with the provisions of this Law.

After transmission of the file to the competent authorities of the host Member State of the AIFM, the CSSF shall notify the AIFM about this transmission without delay.

Upon receipt of the transmission notification the AIFM may start to provide its services in its host Member State.

- (5) In the event of a change to any of the information communicated in accordance with paragraph 2, and, where relevant, paragraph 3, an AIFM must give written notice of that change to the CSSF at least one month before implementing planned changes, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with the provisions of this Law or the AIFM would otherwise no longer comply with the provisions of this Law, the CSSF shall inform "the AIFM within a period of 15 working days of receipt of all the information referred to in the first subparagraph"<sup>20</sup>, that it is not authorised to implement the change.

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<sup>18</sup> Law of 10 May 2016.

<sup>19</sup> Law of 10 May 2016.

<sup>20</sup> Law of 21 July 2021: A561.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with the provisions of this Law or the AIFM otherwise would no longer comply with the provisions of this Law, the CSSF shall take all due measures in accordance with Article 50 "and shall notify the competent authorities of the AIFM's host Member State without undue delay thereof."<sup>21</sup>

If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with the provisions of this Law, or the compliance by the AIFM with the provisions of this Law, the CSSF shall, without undue delay, inform the competent authorities of the host Member States of the AIFM of those changes.

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<sup>21</sup> Law of 21 July 2021: A561.

## Article 33 AIFM Law

"AIFMs established in another Member State managing AIFs established in Luxembourg and/or providing services in Luxembourg"<sup>22</sup>

[Art. 33 AIFMD]

"If an authorised AIFM established in another Member State intends to manage AIFs established in Luxembourg or to provide In Luxembourg the services referred to in Article 6(4) of Directive 2011/61/EU, either directly or by establishing a branch, the CSSF shall receive from the competent authorities of the home Member State of the AIFM, in accordance with Article 33 of Directive 2011/61/EU, the information referred to in paragraphs 2 and 3 respectively of Article 33 as well as the statement referred to in Article 33(4) of that Directive.

Upon notification to the AIFM of the transmission referred to in this Article by the competent authorities of the home Member State of the AIFM to the CSSF, the AIFM may start providing the activities and services in Luxembourg as of the date of that notification."<sup>23</sup>

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<sup>22</sup> Law of 10 May 2016.

<sup>23</sup> Law of 10 May 2016.

## CHAPTER 7

### SPECIFIC RULES IN RELATION TO THIRD COUNTRIES

#### Article 34 AIFM Law

#### Conditions for AIFMs established in Luxembourg which manage non-EU AIFs which are not marketed in Member States

[Art. 34 AIFMD]

- **FAQ CBDF – marketing communications published by CSSF (Appendix XVII)**

An AIFM established in Luxembourg authorised under this Law is authorised to manage non-EU AIFs which are not marketed in the European Union provided that:

- (a) the AIFM complies with all the requirements established in this Law except for Article 19 and 20 in respect of those AIFs; and
- (b) appropriate cooperation arrangements are in place between the CSSF and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows the CSSF to carry out its duties in accordance with this Law.

## Article 35 AIFM Law

### Conditions for the marketing in Luxembourg or in another Member State with a passport of a non-EU AIF managed by an AIFM established in Luxembourg

[Art. 35 AIFMD]

▪ **FAQ CBDF – marketing communications published by CSSF (Appendix XVII)**

- (1) An AIFM established in Luxembourg authorised under this Law which intends to market to professional investors in Luxembourg or in another Member State units or shares of non-EU AIFs it manages and of EU feeder AIFs that do not fulfil the requirements referred to in the second subparagraph of Article 31(1) of Directive 2011/61/EU is required to comply with the provisions laid down in this Article.
- (2) AIFMs referred to in paragraph 1 must comply with all the requirements established in this Law, with the exception of Chapter 6. In addition, the following conditions must be met:
  - (a) appropriate cooperation arrangements must be in place between the CSSF and the supervisory authorities of the third country where the AIF is established in order to ensure at least an efficient exchange of information, taking into account Article 53(3), that allows the CSSF to carry out its duties in accordance with this Law;
  - (b) the third country where the AIF is established must not be listed as a Non-Cooperative Country and Territory by FATF;
  - (c) the third country where the AIF is established must have signed an agreement with Luxembourg and with each other Member State in which the units or shares of the AIF are intended to be marketed, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements.
- (3) The AIFM which intends to market units or shares of non-EU AIFs in Luxembourg must submit a notification to the CSSF in respect of each non-EU AIF that it intends to market.

↪ **Annex III AIFM Law**

That notification shall comprise the documentation and information set out in Annex III.

- (4) No later than twenty working days after receipt of a complete notification pursuant to paragraph 3, the CSSF shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 3 in the territory of Luxembourg. The CSSF shall prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Law or the AIFM otherwise does not or will not comply with this Law. In the case of a positive decision, the AIFM may start marketing the AIF in Luxembourg as of the date of the notification by the CSSF.

The CSSF shall also inform ESMA that the AIFM may start marketing the units or shares of the AIF in the territory of Luxembourg.

- (5) An AIFM which intends to market units or shares of non-EU AIFs in a Member State other than Luxembourg must submit a notification to the CSSF in respect of each non-EU AIF that it intends to market. ↪ **Annex IV AIFM Law**

That notification shall comprise the documentation and information set out in Annex IV.

- (6) The CSSF shall, no later than twenty working days after the date of receipt of the complete notification file referred to in paragraph 5, transmit it to the competent authorities of the Member State where the AIF is intended to be marketed. Such transmission will occur only if the AIFM's management of the AIF complies and will continue to comply with this Law and if the AIFM otherwise complies with this Law.

The CSSF shall enclose in the notification file a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

- (7) Upon transmission of the notification file, the CSSF shall, without delay, notify the AIFM about the transmission. The AIFM may start marketing the AIF in the relevant host Member States as of the date of that notification by the CSSF.

The CSSF shall also inform ESMA that the AIFM may start marketing the units or shares of the AIF in the relevant host Member States.

- (8) Arrangements referred to in point (h) of Annex IV shall be subject to the laws of the host Member States of the AIFM and shall be subject to the supervision of the competent authorities of that Member State.

#### [↪ Annex IV AIFM Law](#)

- (9) The notification letter referred to in paragraph 5 and the statement referred to in paragraph 6 are provided in a language customary in the sphere of international finance.

- (10) In the event of a material change to any of the particulars communicated in accordance with paragraph 3 or 5, the AIFM must give written notice of that change to the CSSF, at least one month before implementing a planned change, or immediately after an unplanned change has occurred.

If pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Law or the AIFM would no longer comply with this Law, the CSSF shall inform the AIFM without delay that it is not authorised to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs, or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with this Law or the AIFM otherwise would no longer comply with this Law, the CSSF shall take all due measures in accordance with Article 50, including, if necessary, the express prohibition of marketing of the AIF.

If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with this Law, or the compliance by the AIFM with this Law otherwise, the CSSF shall without delay inform ESMA, in so far as the changes concern the termination of the marketing of certain AIFs or additional AIFs marketed and, if applicable, the competent authorities of the host Member States of the AIFM of those changes.

- (11) Without prejudice to the provisions of Article 46 of this Law in case of marketing in Luxembourg and Article 43(1) of Directive 2011/61/EU in case of marketing in a Member State other than Luxembourg, the AIFs managed and marketed by the AIFM referred to in this Article may only be marketed to professional investors.

## Article 36 AIFM Law

### Conditions for the marketing in Luxembourg with a passport of a non-EU AIF managed by an AIFM established in another Member State

[Art. 35 AIFMD]

- **FAQ CBDF – marketing communications published by CSSF ([Appendix XVII](#))**

- (1) If an AIFM established in another Member State intends to market the shares or units of a non-EU AIF which it manages to professional investors in Luxembourg, the CSSF shall receive from the competent authorities of the home Member State of the AIFM the notification file as well as the statement referred to in Article 35(6) of Directive 2011/61/EU.

The AIFM may start marketing the AIF concerned in Luxembourg as of the date of the notification to the AIFM of the transmission to the CSSF, referred to in this paragraph, by the competent authorities of the home Member State of the AIFM.

- (2) Without prejudice to the provisions of Article 46 of this Law, AIFs managed and marketed by the AIFM referred to in this Article may only be marketed to professional investors.

## Article 37 AIFM Law

### Conditions for the marketing in Luxembourg without a passport of non-EU AIFs managed by an authorised AIFM established in Luxembourg or in another Member State

[Art. 36 AIFMD]

- **FAQ AIFM published by CSSF (Appendix XV) Section 19 Marketing (non-EU AIF) Question 19.a), Question 19.c), Question 19.d), Question 19.e), Question 19.f), Question 19.i), Question 19.j), Question 19.k), Section 21 Definition of marketing and reverse solicitation Question 21.c)**
- **FAQ CBDF – marketing communications published by CSSF (Appendix XVII)**

Without prejudice to Article 35 of Directive 2011/61/EU, an authorised AIFM established in Luxembourg or in another Member State is allowed to market to professional investors, in the territory of Luxembourg only, units or shares of non-EU AIFs it manages and of EU feeder AIFs that do not fulfil the requirements referred to in paragraph 1, second subparagraph of Article 31 of Directive 2011/61/EU, provided that:

- (a) the AIFM complies with all the requirements established in Directive 2011/61/EU with the exception of Article 21. That AIFM must however ensure that one or more entities are appointed to carry out the duties referred to in Article 21(7), (8) and (9). The AIFM shall not perform those functions. The AIFM is required to provide its supervisory authorities with information about the identity of those entities responsible for carrying out the duties referred to in Article 21(7), (8) and (9); when the marketing is performed by an authorised AIFM established in Luxembourg, the aforementioned information is to be provided to the CSSF;
- (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 AIF is established in order to ensure an efficient exchange of information that allows the competent authorities of the home Member State of the AIFM to carry out their duties in accordance with Directive 2011/61/EU; for the purpose of applying this paragraph, the CSSF is the competent authority of the home Member State of the AIFM, when the marketing is performed by an AIFM authorised and established in Luxembourg.
- (c) the third country where the AIF is established is not listed as a Non-Cooperative Country and Territory by FATF.

## Article 38 AIFM Law

### Authorisation of non-EU AIFMs intending to manage EU AIFs and/or market AIFs managed by them in the European Union in accordance with Articles 39 and 40 of Directive 2011/61/EU, where Luxembourg is defined as the home Member State of reference of the AIFM

[Art. 37 AIFMD]

- (1) Non-EU AIFMs intending to manage EU AIFs and/or to market AIFs managed by them in the European Union in accordance with Article 39 or Article 40 of Directive 2011/61/EU must acquire prior authorisation by the CSSF in accordance with this Article, in the case where Luxembourg is the Member State of reference of the AIFM as defined in accordance with the rules set out in paragraph 4 hereafter.
- (2) A non-EU AIFM which intends to obtain prior authorisation as referred to in paragraph 1 must comply with the provisions of this Law, with the exception of Chapter 6. If and to the extent that compliance with a provision of this Law is incompatible with compliance with the law to which the non-EU AIFM and/or the non-EU AIF marketed in the European Union is subject, there shall be no obligation on the AIFM to comply with that provision if it can demonstrate that:
  - (a) it is impossible to combine such compliance with compliance with a mandatory provision in the law to which the non-EU AIFM and/or the non-EU AIF marketed in the European Union is subject;
  - (b) the law to which the non-EU AIFM and/or the non-EU AIF is subject provides for an equivalent rule having the same regulatory purpose and offering the same level of protection to the investors of the relevant AIF; and
  - (c) the non-EU AIFM and/or the non-EU AIF complies with the equivalent rule referred to in point (b).
- (3) A non-EU AIFM which intends to obtain prior authorisation as referred to in paragraph 1 must have a legal representative established in Luxembourg. The legal representative shall be the contact point of the AIFM in the European Union. Any official correspondence between the competent authorities and the AIFM and between the investors in the European Union of the relevant AIF and the AIFM as set out in Directive 2011/61/EU must take place through that legal representative. The legal representative must perform the compliance function relating to the management and marketing activities performed by the AIFM under Directive 2011/61/EU together with the AIFM.
- (4) The Member State of reference of a non-EU AIFM shall be determined as follows:
  - (a) if the non-EU AIFM intends to manage only one EU AIF, or several EU AIFs established in the same Member State, and does not intend to market any AIF in accordance with Article 39 or Article 40 of Directive 2011/61/EU in the European Union, the home Member State of that or those AIFs is deemed to be the Member State of reference and the competent authorities of this Member State will be competent for the authorisation procedure and for the supervision of the AIFM;
  - (b) if the non-EU AIFM intends to manage several EU AIFs established in different Member States and does not intend to market any AIF in accordance with Article 39 or Article 40 of Directive 2011/61/EU in the European Union, the Member State of reference is either:
    - (i) the Member State where most of the AIFs are established; or
    - (ii) the Member State where the largest amount of assets is being managed;
  - (c) if the non-EU AIFM intends to market only one EU AIF in only one Member State, the Member State of reference is determined as follows:
    - (i) if the AIF is authorised or registered in a Member State, the home Member State of the AIF or the Member State where the AIFM intends to market the AIF;
    - (ii) if the AIF is not authorised or registered in a Member State, the Member State where the AIFM intends to market the AIF;
  - (d) if the non-EU AIFM intends to market only one non-EU AIF in only one Member State, the Member State of reference is that Member State;

- (e) if the non-EU AIFM intends to market only one EU AIF, but in different Member States, the Member State of reference is determined as follows:
  - (i) if the AIF is authorised or registered in a Member State, the home Member State of the AIF or one of the Member States where the AIFM intends to develop effective marketing; or
  - (ii) if the AIF is not authorised or registered in a Member State, one of the Member States where the AIFM intends to develop effective marketing;
- (f) if the non-EU AIFM intends to market only one non-EU AIF, but in different Member States, the Member State of reference is one of those Member States;
- (g) if the non-EU AIFM intends to market several EU AIFs in the European Union, the Member State of reference is determined as follows:
  - (i) in so far as those AIFs are all registered or authorised in the same Member State, the home Member State of those AIFs or the Member State where the AIFM intends to develop effective marketing for most of those AIFs;
  - (ii) in so far as those AIFs are not all registered or authorised in the same Member State, the Member State where the AIFM intends to develop effective marketing for most of those AIFs;
- (h) if the non-EU AIFM intends to market several EU and non-EU AIFs, or several non-EU AIFs in the European Union, the Member State of reference is the Member State where it intends to develop effective marketing for most of those AIFs.

In the cases where, in accordance with the criteria set out in points (b), (c) (i), (e), (f) and (g) (i) of the first subparagraph, more than one Member State of reference is possible, Member States shall require that the non-EU AIFM intending to manage EU AIFs without marketing them and/or market AIFs managed by it in the European Union in accordance with Article 39 or Article 40 of Directive 2011/61/EU submit a request to the competent authorities of all of the Member States that are possible Member States of reference in accordance with the criteria set out in those points, to determine its Member State of reference from among them. Those competent authorities shall jointly decide the Member State of reference for the non-EU AIFM, within one month of receipt of such request. The competent authorities of the Member State that is appointed as Member State of reference shall, without delay, inform the non-EU AIFM of that appointment. If the non-EU AIFM is not duly informed of the decision made by the relevant competent authorities within seven days of the decision or if the relevant competent authorities have not made a decision within the one-month period, the non-EU AIFM may itself choose its Member State of reference based on the criteria set out in this paragraph.

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

- (5) A non-EU AIFM intending to manage EU AIFs without marketing them and/or to market AIFs managed by it in the European Union in accordance with Article 39 or Article 40 of Directive 2011/61/EU must submit a request for authorisation to the CSSF, in the case where Luxembourg is the Member State of reference of the AIFM as defined in accordance with the rules set out in paragraph 4 of this Article.

After receiving the application for authorisation, the CSSF assesses whether the determination by the AIFM of Luxembourg as Member State of reference complies with the criteria laid down in paragraph 4. If the CSSF considers that this is not the case, it refuses the authorisation request of the AIFM concerned explaining the reasons for its refusal. If the CSSF considers that the criteria of paragraph 4 have been complied with, it notifies ESMA, requesting advice on this assessment. In its notification to ESMA, the CSSF provides ESMA with the justification by the AIFM of its assessment regarding the determination of the Member State of reference and with information on the marketing strategy of the AIFM.

Within one month of having received the notification referred to in the second subparagraph, ESMA shall issue advice to the CSSF about the assessment of the CSSF relating to the determination of the Member State of reference in accordance with the criteria set out in paragraph 4.

The term referred to in Article 7(5) of this Law is suspended during ESMA's deliberation in accordance with this paragraph.

If the CSSF proposes to grant authorisation contrary to ESMA's advice referred to in the third subparagraph it informs ESMA, stating its reasons.

If the CSSF proposes to grant authorisation contrary to ESMA's advice referred to in the third subparagraph and the AIFM intends to market units or shares of AIFs managed by it in Member States other than Luxembourg, determined as being the Member State of reference, the CSSF also informs the competent authorities of those Member States thereof, stating its reasons. Where applicable, the CSSF also informs the competent authorities of the home Member States of the AIFs managed by the AIFM thereof, stating its reasons.

- (6) Without prejudice to paragraph 7, the CSSF only grants the authorisation referred to in paragraph 1 where the following additional conditions are met:
- (a) Luxembourg is designated as the Member State of reference by the AIFM in accordance with the criteria set out in paragraph 4 of this Article. Such designation must moreover be supported by the disclosure of the marketing strategy, and the procedure set out in paragraph 5 must have been followed;
  - (b) the AIFM has appointed a legal representative established in Luxembourg;
  - (c) the legal representative is, together with the AIFM, the contact person of the non-EU AIFM for the investors of the relevant AIFs, for ESMA and for the competent authorities as regards the activities for which the AIFM is authorised in the European Union; the legal representative must be sufficiently equipped to perform the compliance function pursuant to this Law;
  - (d) appropriate cooperation arrangements are in place between the CSSF, the competent authorities of the home Member State of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established in order to ensure at least an efficient exchange of information that allows the respective competent authorities to carry out their duties in accordance with Directive 2011/61/EU;
  - (e) the third country where the non-EU AIFM is established is not listed as a Non-Cooperative Country and Territory by FATF;
  - (f) the third country where the non-EU AIFM is established has signed an agreement with Luxembourg, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements;
  - (g) the effective exercise by the respective competent authorities of their supervisory functions under Directive 2011/61/EU is neither prevented by the laws, regulations or administrative provisions of a third country governing the AIFM, nor by limitations in the supervisory and investigatory powers of that third country's supervisory authorities.
- (7) The authorisation referred to in paragraph 1 is granted by the CSSF in accordance with the provisions of Chapter 2 of this Law which shall apply *mutatis mutandis*, subject to the following provisions:
- (a) the information referred to in Article 6(2) shall be supplemented by:
    - (i) a justification by the AIFM of its assessment regarding the Member State of reference in accordance with the criteria set out in paragraph 4 with information on the marketing strategy;
    - (ii) a list of the provisions of this Law for which compliance by the AIFM is impossible as compliance by the AIFM with those provisions is, in accordance with point (b) of paragraph 2, incompatible with compliance with a mandatory provision in the law to which the non-EU AIFM or the non-EU AIF marketed in the European Union is subject;
    - (iii) written evidence based on the regulatory technical standards developed by ESMA that the relevant third country law provides for a rule equivalent to the provisions for which compliance is impossible, which has the same regulatory purpose and offers the same level of protection to the investors of the relevant AIFs and that the AIFM complies with that equivalent rule; such written evidence being supported by a legal opinion on the existence of the relevant incompatible mandatory provision in the law of the third country and

including a description of the regulatory purpose and the nature of the investor protection pursued by it; and

- (iv) the name of the legal representative of the AIFM and the place where it is established;
  - (b) the information referred to in Article 6(3) may be limited to the EU AIFs the AIFM intends to manage and to those AIFs managed by the AIFM that it intends to market in the European Union with a passport;
  - (c) point (a) of Article 7(1) shall be without prejudice to paragraph 2 of this Article;
  - (d) point (e) of Article 7(1) shall not apply;
  - (e) the second subparagraph of Article 7(5) shall be read as including a reference to 'the information referred to in point (a) of Article 38(7).
- (8) In case the CSSF considers that the AIFM may rely on paragraph 2 to be exempted from compliance with certain provisions of this Law, it shall notify ESMA without delay. The CSSF shall support this assessment by the information provided by the AIFM in accordance with points (a) (ii) and (a) (iii) of paragraph 7.

Within one month of receipt of the notification referred to in the first subparagraph, ESMA shall issue advice to the CSSF about the application of the exemption for compliance with certain provisions of this Law caused by the incompatibility in accordance with paragraph 2. The term referred to in Article 7(5) shall be suspended during the ESMA review in accordance with this paragraph.

If the CSSF proposes to grant authorisation contrary to ESMA's advice referred to in the second subparagraph it shall inform ESMA, stating its reasons.

If the CSSF proposes to grant authorisation contrary to the ESMA advice referred to in the second subparagraph and the AIFM intends to market units or shares of AIFs managed by it in Member States other than Luxembourg, determined as being the Member State of reference, the CSSF shall also inform the competent authorities of those Member States thereof, stating its reasons.

- (9) The CSSF, as the competent authority of the Member State of reference, shall, without delay, inform ESMA of the outcome of the initial authorisation process, about any changes in the authorisation of the AIFM and any withdrawal of authorisation.

The CSSF shall moreover inform ESMA about the applications for authorisation that it has rejected, providing data about the AIFM having asked for authorisation and the reasons for the rejection.

- (10) If an AIFM authorised by the CSSF by reason of this Article changes its marketing strategy within two years of its initial authorisation, and under the hypothesis that such change would have affected the determination of the Member State of reference if the modified marketing strategy had been the initial marketing strategy, the AIFM is required to inform the CSSF, as the competent authority of the original Member State of reference, of the change before implementing it. The AIFM concerned indicates its Member State of reference in accordance with the criteria set out in paragraph 4 and based on the new marketing strategy. The AIFM shall justify its assessment by disclosing its new marketing strategy to the CSSF as the competent authority of the original Member State of reference. At the same time, the AIFM shall provide information on its legal representative, including its name and the place where it is established. The legal representative shall be established in the new Member State of reference.

The CSSF shall assess whether the determination of the Member State of reference by the AIFM in accordance with the first subparagraph, is correct and shall notify ESMA thereof. In the notification to ESMA, the CSSF discloses the AIFM's justification of its assessment regarding the determination of the Member State of reference and information on the AIFM's new marketing strategy.

Within one month of receipt of the notification referred to in the second subparagraph, ESMA shall issue advice to the CSSF about its assessment.

After receipt of ESMA's advice in accordance with the third subparagraph, the CSSF shall inform the non-EU AIFM, its original legal representative and ESMA of its decision.

Where the CSSF agrees with the assessment made by the AIFM, it shall also inform the competent authorities of the new Member State of reference of the change. The CSSF shall, without delay, transfer a copy of the authorisation and the supervision file relating to the AIFM to the competent authorities of the new Member State of reference. From the date of transmission of the authorisation and supervision

file, the competent authorities of the new Member State of reference shall be competent for authorising and supervising the AIFM.

Where the CSSF's final assessment is contrary to ESMA's advice referred to in the third subparagraph:

- (a) the CSSF informs ESMA thereof, stating its reasons;
- (b) where the AIFM markets units or shares of AIFs managed by it in Member States other than Luxembourg, as the original Member State of reference, the CSSF shall inform the competent authorities of those other Member States thereof, stating its reasons. Where applicable, the CSSF also informs the competent authorities of the home Member States of the AIFs managed by the AIFM thereof, stating its reasons.

- (11) Where it appears from the actual course of the business development of the AIFM in the European Union within two years after its authorisation by reason of this Article that the marketing strategy as presented by the AIFM at the time of its authorisation was not followed, the AIFM made false statements in relation thereto or the AIFM has failed to comply with paragraph 10 when changing its marketing strategy, the CSSF, as the competent authority of the original Member State of reference, shall request the AIFM to indicate the Member State of reference based on its actual marketing strategy. The procedure set out in paragraph 10 shall apply *mutatis mutandis*. If the AIFM does not comply with the CSSF's request, the latter shall proceed to the withdrawal of its authorisation.

Where the AIFM changes its marketing strategy after the period referred to in paragraph 10 and intends to change its Member State of reference on the basis of its new marketing strategy, it may submit a request to change its Member State of reference to the CSSF as the competent authority of the original Member State of reference. The procedure referred to in paragraph 10 shall apply *mutatis mutandis*.

- (12) Any disputes arising between the CSSF, as the competent authority of the Member State of reference of the AIFM, and the AIFM shall be settled in accordance with Luxembourg law and subject to the Luxembourg courts.

Any disputes between the AIFM or the AIF and EU investors of the relevant AIF shall be settled in accordance with the law of and subject to the jurisdiction of a Member State.

## Article 39 AIFM Law

### Conditions for the marketing in the European Union with a passport of EU AIFs managed by a non-EU AIFM, where Luxembourg is defined as the Member State of reference of the AIFM

[Art. 39 AIFMD]

- (1) A duly authorised non-EU AIFM which intends to market the units or shares of an EU AIF it manages to professional investors in the European Union with a passport, is required to comply with the provisions of this Article, where Luxembourg is defined as the Member State of reference of the AIFM in accordance with the rules set out in Article 38(4).
- (2) In case the AIFM intends to market units or shares of the EU AIF in Luxembourg, defined as the Member State of reference of the AIFM, the AIFM must submit to the CSSF a notification in respect of each EU AIF that it intends to market. [↻ Annex III AIFM Law](#)  
That notification shall comprise the documentation and information set out in Annex III.
- (3) No later than twenty working days after receipt of a complete notification pursuant to paragraph 2, the CSSF shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 2 in the territory of Luxembourg. The CSSF may oppose the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Law or if the AIFM otherwise does not or will not comply with this Law. In the case of a positive decision, the AIFM may start marketing the AIF in Luxembourg as of the date of the notification by the CSSF to that effect.  
The CSSF shall also inform ESMA and the competent authorities of the AIF that the AIFM may start marketing units or shares of the AIF in Luxembourg defined as the Member State of reference of the AIFM.
- (4) In case the AIFM intends to market units or shares of the EU AIF in Member States other than Luxembourg, defined as the Member State of reference of the AIFM, the AIFM must submit a notification to the CSSF in respect of each EU AIF that it intends to market. [↻ Annex IV AIFM Law](#)  
That notification shall comprise the documentation and information set out in Annex IV.
- (5) No later than twenty working days after the date of receipt of the complete notification file referred to in paragraph 4, the CSSF shall transmit the complete notification file to the competent authorities of the Member States where the units or shares of the AIF are intended to be marketed. Such transmission shall be effected only if the AIFM's management of the AIF complies and will continue to comply with this Law and if the AIFM otherwise complies with this Law.  
The CSSF shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.
- (6) Upon transmission of the notification file, the CSSF shall, without delay, notify the AIFM about the transmission. The AIFM may start marketing the AIF in the relevant host Member States as of the date of that notification.  
The CSSF shall also inform ESMA and the competent authorities of the AIF that the AIFM may start marketing the units or shares of the AIF in the host Member States of the AIFM.
- (7) The arrangements referred to in point (h) of Annex IV are subject to the laws of the host Member States of the AIFM and are subject to supervision by the competent authorities of this Member State. [↻ Annex IV AIFM law](#)
- (8) The notification letter by the AIFM referred to in paragraph 4 and the statement referred to in paragraph 5 are provided in a language customary in the sphere of international finance.
- (9) In the event of a material change to any of the particulars communicated in accordance with paragraph 2 and/or 4, the AIFM must give written notice of that change to the CSSF at least one month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Law or the AIFM would otherwise no longer comply with this Law, the CSSF shall inform the AIFM, without delay, that it is not authorised to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with this Law or the AIFM otherwise no longer complies with this Law, the CSSF shall take all due measures in accordance with Article 50, including, if necessary, the express prohibition of marketing of the AIF.

If the changes are acceptable because they do not affect compliance of the AIFM's management of the AIF with this Law, or compliance by the AIFM with this Law otherwise, the CSSF shall, without delay, inform ESMA in so far as the changes concern the termination of the marketing of certain AIFs or additional AIFs being marketed and, in so far as applicable, the competent authorities of the host Member States of those changes.

- (10) Without prejudice to the provisions of Article 46 of this Law in case of marketing in Luxembourg and of Article 43(1) of Directive 2011/61/EU in case of marketing in a Member State other than Luxembourg, the AIFs managed and marketed by the AIFMs referred to in this Article may only be marketed to professional investors.

## Article 40 AIFM Law

### Conditions for the marketing in Luxembourg with a passport of EU AIFs managed by a non-EU AIFM, where Luxembourg is not the Member State of reference of the AIFM

[Art. 39 AIFMD]

- (1) If a duly authorised non-EU AIFM intends to market with a passport to professional investors, in Luxembourg, units or shares of an EU AIF that it manages, the competent authorities of the Member State of reference of the AIFM shall transmit to the CSSF the notification file as well as the statement referred to in paragraph 5 of Article 39 of Directive 2011/61/EU.

Upon notification to the AIFM of the transmission to the CSSF, referred to in this paragraph, by the competent authorities of the AIFM's Member State of reference, the AIFM may market the AIF concerned in Luxembourg from the date of this notification.

- (2) Without prejudice to the provisions of Article 46 of this Law, AIFs managed and marketed by the AIFMs referred to in this Article may be marketed only to professional investors.

## Article 41 AIFM Law

### Conditions for the marketing in the European Union with a passport of non-EU AIFs managed by a non-EU AIFM, where Luxembourg is defined as the Member State of reference of the AIFM

[Art. 40 AIFMD]

- (1) A duly authorised non-EU AIFM which intends to market units or shares of a non-EU AIF it manages to professional investors in the European Union with a passport is required to comply with the provisions of this Article, where Luxembourg is defined as the Member State of reference of the AIFM pursuant to the rules set out in Article 38(4) of this Law.
- (2) AIFMs referred to in paragraph 1 shall satisfy all requirements contained in this Law relating to AIFMs established in the European Union. In addition, the following conditions must be fulfilled:
  - (a) appropriate cooperation arrangements are in place between the CSSF and the supervisory authority of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows the CSSF to carry out its duties in accordance with this Law;
  - (b) the third country where the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF;
  - (c) the third country where the non-EU AIF is established has signed an agreement with Luxembourg and with each other Member State in which the units or shares of the non-EU AIF are intended to be marketed which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements.
- (3) If the AIFM intends to market the units or shares of non-EU AIFs in Luxembourg, defined as the Member State of reference of the AIFM, the AIFM must submit a notification to the CSSF in respect of each non-EU AIF that it intends to market. [↪ Annex III AIFM Law](#)

That notification shall comprise the documentation and information set out in Annex III.
- (4) No later than twenty working days after receipt of a complete notification pursuant to paragraph 3, the CSSF shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 3 in the territory of Luxembourg. The CSSF may prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Law or the AIFM otherwise does not or will not comply with this Law. In the case of a positive decision, the AIFM may start marketing the AIF in Luxembourg from the date of the notification by the CSSF to that effect.

The CSSF shall also inform ESMA that the AIFM may start marketing units or shares of the AIF in Luxembourg defined as the Member State of reference of the AIFM.
- (5) If the AIFM intends to market the units or shares of a non-EU AIF also in Member States other than Luxembourg, defined as the Member State of reference of the AIFM, the AIFM shall submit a notification to the CSSF in respect of each non-EU AIF that it intends to market. [↪ Annex IV AIFM Law](#)

That notification shall comprise the documentation and information set out in Annex IV.
- (6) No later than twenty working days after the date of receipt of the complete notification file referred to in paragraph 5, the CSSF shall transmit it to the competent authorities of the Member States where the units or shares of the AIF are intended to be marketed. Such transmission shall occur only if the AIFM's management of the AIF complies and will continue to comply with this Law and that in general the AIFM complies with this Law.

The CSSF shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.
- (7) Upon transmission of the notification file, the CSSF shall, without delay, notify the AIFM of the transmission. The AIFM may start marketing the AIF in the relevant host Member States of the AIFM as of the date of that notification.

The CSSF shall also inform ESMA that the AIFM may start marketing the units or shares of the AIF in the host Member States of the AIFM.

- (8) Arrangements referred to in point (h) of Annex IV shall be subject to the laws of the host Member States of the AIFM, and shall be subject to the supervision of the competent authorities of this Member State.  
[↪ Annex IV AIFM Law](#)

- (9) The notification letter by the AIFM referred to in paragraph 5 and the statement referred to in paragraph 6 are provided in a language customary in the sphere of international finance.

- (10) In the event of a material change to any of the particulars communicated in accordance with paragraph 3 or 5, the AIFM must give written notice of that change to the CSSF at least one month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Law, or the AIFM would otherwise no longer comply with this Law, the CSSF shall inform the AIFM, without delay, that it is not authorised to implement the change.

If the planned change is implemented notwithstanding the first and second subparagraphs, or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with this Law or the AIFM otherwise no longer complies with this Law, the CSSF shall take all due measures in accordance with Article 50, including, if necessary, the express prohibition of marketing of the AIF.

If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with this Law or the compliance by the AIFM with this Law otherwise, the CSSF shall, without delay, inform ESMA in so far as the changes concern the termination of the marketing of certain AIFs or additional AIFs being marketed and, in so far as applicable, the competent authorities of the host Member States of the AIFM of those changes.

- (11) Without prejudice to the provisions of Article 46 of this Law in case of marketing in Luxembourg and of Article 43(1) of Directive 2011/61/EU in case of marketing in a Member State other than Luxembourg, the AIFs managed and marketed by the AIFMs referred to in this Article may only be marketed to professional investors.

## Article 42 AIFM Law

### Conditions for the marketing in Luxembourg with a passport of non-EU AIFs managed by a non-EU AIFM, where Luxembourg is not the Member State of reference of the AIFM

[Art. 40 AIFMD]

- (1) If a duly authorised non-EU AIFM intends to market with a passport to professional investors in Luxembourg, units or shares of a non-EU AIF that it manages, the competent authorities of the Member State of reference of the AIFM shall transmit to the CSSF the notification file as well as the statement referred to in Article 40(4) of Directive 2011/61/EU.

Upon notification to the AIFM of the transmission to the CSSF, referred to in this paragraph, by the competent authorities of the AIFM's Member State of reference, the AIFM may market the AIF concerned in Luxembourg from the date of this notification.

- (2) Without prejudice to the provisions of Article 46 of this Law, AIFs managed and marketed by the AIFMs referred to in this Article may be marketed only to professional investors.

## Article 43 AIFM Law

### Conditions for managing AIFs established in Member States other than the Member State of reference by non-EU AIFMs, where Luxembourg is defined as the Member State of reference of the AIFM

[Art. 41 AIFMD]

- (1) An authorised non-EU AIFM which intends to manage EU AIFs established in a Member State other than Luxembourg, defined as the Member State of reference of the AIFM, either directly or via the establishment of a branch, must be authorised to manage that type of AIF.
- (2) Any AIFM referred to in paragraph 1 which intends to manage EU AIFs established in another Member State than Luxembourg, defined as the Member State of reference of the AIFM, for the first time, is required to communicate the following information to the CSSF:
  - (a) the Member State in which it intends to manage AIFs directly or establish a branch;
  - (b) a programme of operations stating in particular the services which it intends to perform and identifying the AIFs it intends to manage.
- (3) If the non-EU AIFM intends to establish a branch, it must provide, in addition to the information requested in paragraph 2, the following information:
  - (a) the organisational structure of the branch;
  - (b) the address in the home Member State of the AIF from which documents may be obtained;
  - (c) the names and contact details of persons responsible for the management of the branch.
- (4) The CSSF, if it considers that the AIFM's management of the AIF complies and will continue to comply with the provisions of this Law and the AIFM otherwise complies with the provisions of this Law, shall transmit, within one month of receiving the complete documentation in accordance with paragraph 2 or within two months of receiving the complete documentation in accordance with paragraph 3, that documentation to the competent authorities of the host Member States of the AIFM.

The CSSF shall enclose with the file a statement confirming having authorised the AIFM in accordance with the provisions of this Law.

After transmission of the file to the competent authorities of the host Member State of the AIFM, this transmission shall be notified without delay by the CSSF to the AIFM. Upon receipt of the transmission notification the AIFM may start to provide its services in the host Member States.

The CSSF shall also inform ESMA that the AIFM may start managing the AIF in the host Member States of the AIFM.

- (5) In the event of a change to any of the information communicated in accordance with paragraph 2 and, if relevant, paragraph 3, the AIFM must give written notice of that change to the CSSF at least one month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with the provisions of this Law or the AIFM would otherwise no longer comply with the provisions of this Law, the CSSF shall inform the AIFM without delay that it is not authorised to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with the provisions of this Law or the AIFM otherwise no longer complies with the provisions of this Law, the CSSF shall take all due measures in accordance with Article 50, including the express prohibition of marketing of the AIF.

If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with the provisions of this Law or the compliance by the AIFM with the provisions of this Law, the CSSF shall without delay inform the competent authorities of the host Member States of the AIFM of those changes.

## Article 44 AIFM Law

### Conditions for managing AIFs established in Luxembourg by non-EU AIFMs, where Luxembourg is not the Member State of reference of the AIFM

[Art. 41 AIFMD]

If an authorised non-EU AIFM intends to manage AIFs established in Luxembourg, either directly or via the establishment of a branch, the competent authorities of the Member State of reference of the AIFM shall transmit to the CSSF the information referred to in paragraphs 2 and 3, respectively, of Article 41 of Directive 2011/61/EU.

Upon notification to the AIFM of the transmission to the CSSF, as referred in this Article, by the competent authorities of the Member State of reference of the AIFM, the latter may start providing its services in Luxembourg from the date of this notification.

## Article 45 AIFM Law

### Conditions for the marketing in Luxembourg without a passport of AIFs managed by a non-EU AIFM

[Art. 42 AIFMD]

- **FAQ AIFM published by CSSF (Appendix XV) Section 14 Reporting Question 14.n), Question 14.o), Question 14.p), Question 14.q), Question 14.r), Section 18 Marketing (non-EU AIFM) Question 18.a), Question 18.b), Question 18.c), Question 18.d), Question 18.e), Question 18.f), Question 18.g), Question 18.h), Question 18.i), Question 18.j), Section 19 Marketing (non-EU AIF) Question 20.a), Question 20.g), Section 21 Definition of marketing and reverse solicitation Question 21.c)**

Without prejudice to Articles 37, 39 and 40 of Directive 2011/61/EU, non-EU AIFMs are authorised to market to professional investors, in the territory of Luxembourg, units or shares of AIFs they manage, subject at least to complying with the following conditions:

- (a) the non-EU AIFM complies with Articles 22, 23 and 24 of Directive 2011/61/EU in respect of each AIF marketed by it pursuant to this Article and with Articles 26 to 30 of Directive 2011/61/EU where an AIF marketed by it pursuant to this Article falls within the scope of Article 26(1) of that Directive;
- (b) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the Member States where the AIFs are marketed, in so far as applicable, the competent authorities of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows competent authorities of the relevant Member States to carry out their duties in accordance with Directive 2011/61/EU;
- (c) the third country where the non-EU AIFM or the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF.

## CHAPTER 8

### MARKETING TO RETAIL INVESTORS

#### Article 46 AIFM Law

##### Marketing of AIFs by AIFMs to retail investors

[Art. 43 AIFMD]

- *FAQ AIFM published by CSSF (Appendix XV) Section 11 Marketing (Lux AIFM) Question 11.c), Question 11.d), Section 12 Marketing (EU AIFM) Question 12.c), Question 12.d)*
- *CSSF Regulation N°15-03 (Appendix XVI) Article 4, Article 6, Article 10*
- *FAQ CBDF – marketing communications published by CSSF (Appendix XVII)*

(1) Authorised AIFMs established in Luxembourg, in another Member State or in a third country are authorised to market to retail investors in the territory of Luxembourg units or shares of AIFs they manage in accordance with Directive 2011/61/EU, irrespective of whether such AIFs are marketed on a cross-border basis or not, or whether they are EU or non-EU AIFs. In such case, the following preliminary conditions must be fulfilled:

- (a) the AIFs must be subject in their home State to a permanent supervision performed by a supervisory authority set up by law in order to ensure the protection of investors. For AIFs established in Luxembourg, this condition shall be deemed fulfilled by AIFs subject to part II of the Law of 17 December 2010 relating to undertakings for collective investment, as amended<sup>24</sup>, to the Law of 15 June 2004 relating to the investment company in risk capital (SICAR), as amended, and to the Law of 13 February 2007 relating to specialised investment funds, as amended<sup>24</sup>.

This paragraph is without prejudice to conditions of eligibility applicable to investors in AIFs which are subject to regulation by a law of the financial sector in Luxembourg.

- (b) AIFs established in a Member State other than Luxembourg or in a third country must be subject in their home State to regulation providing investors guarantees of protection at least equivalent to those provided by Luxembourg laws governing AIFs authorised to be marketed to retail investors in Luxembourg. These AIFs must also be subject in their home State to supervision considered by the CSSF to be equivalent to that provided in Luxembourg laws governing AIFs authorised to be marketed to retail investors in Luxembourg.

In such case, cooperation between the CSSF and the supervisory authority of the AIF must also be ensured.

(2) The means of implementation of this Article are laid down by way of a CSSF regulation.

*(Law of 21 July 2023)*

(3) "This Article shall be without prejudice to the provisions applicable to the marketing to investors in AIFs governed by Regulation (EU) 2015/760, Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on social entrepreneurship funds or by Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds."

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<sup>24</sup> Law of 21 July 2023.

(Law of 21 July 2021: A561)

## Article 46-1 AIFM Law

### "Arrangements to be made by AIFMs towards retail investors

[Art. 43a AIFMD]

▪ **FAQ CBDF – marketing communications published by CSSF (Appendix XVII)**

- (1) Without prejudice to Article 26 of Regulation (EU) 2015/760, authorised AIFMs established in Luxembourg, in another EU Member State or in a third country which market or intend to market in Luxembourg, to retail investors, units or shares of AIFs shall make the arrangements in Luxembourg allowing them to carry out the following tasks:
  - (a) process investors' subscription, payment, repurchase and redemption orders relating to the units or shares of the AIF, in accordance with the conditions set out in the AIF's documents;
  - (b) provide investors with information on how orders referred to in point (a) can be made and how repurchase and redemption proceeds are paid;
  - (c) facilitate the handling of information relating to the exercise of investors' rights arising from their investment in the AIF;
  - (d) make the information and documents required pursuant to Articles 22 and 23 of Directive 2011/61/EU available to investors for the purposes of inspection and obtaining copies thereof;
  - (e) provide investors with information relevant to the arrangements allowing to perform the tasks defined in points (a) to (f) of this paragraph in a durable medium as defined in point (m) of Article 2(1) of Directive 2009/65/EC; and
  - (f) act as a contact point for communicating with the CSSF.
- (2) For the purposes of paragraph 1, no physical presence in Luxembourg or appointment of a third party shall be required.
- (3) The AIFM shall ensure that the arrangements to perform the tasks referred to in paragraph 1, including electronically, are provided:
  - (a) in either Luxembourgish, French, German or English;
  - (b) by the AIFM itself, by a third party which is subject to regulation and supervision governing the tasks to be performed, or by both.

For the purposes of point (b), where the tasks are to be performed by a third party, the appointment of that third party shall be evidenced by a written contract, which specifies which of the tasks referred to in paragraph 1 are not to be performed by the AIFM and that the third party will receive all the relevant information and documents from the AIFM."

## CHAPTER 9

### ORGANISATION OF SUPERVISION

#### Section 1

#### Competent authority, supervisory and sanctioning powers

#### Article 47 AIFM Law

#### Competent authority

[Art. 44 AIFMD]

- (1) The CSSF is the authority in charge of carrying out the duties provided for in this Law.
- (2) The CSSF carries out these duties exclusively in the interest of the public.
- (3) Any person who works or who has worked for the CSSF, as well as the *réviseurs d'entreprises agréés* (approved statutory auditors) or experts mandated by the CSSF, shall be bound by the obligation of professional secrecy provided for by Article 16 of the Law of 23 December 1998 establishing a financial sector supervisory commission ("Commission de Surveillance du Secteur Financier"), as amended. This secrecy implies that confidential information which they may receive in the course of their duties may not be divulged to any person or authority whatsoever, save in summary or abridged form so that no person subject to this Law can be individually identified, without prejudice to cases covered by criminal law.

This paragraph shall not prevent the CSSF from exchanging confidential information with the supervisory authorities of other Member States, ESMA, EBA and ESRB within the limits, under the conditions and in accordance with the provisions of this Law, Directive 2011/61/EU and other legal provisions governing the CSSF's professional secrecy.

## Article 48 AIFM Law

### Responsibility of the CSSF as competent authority of the home Member State of the AIFM

[Art. 45 AIFMD]

- (1) The CSSF is in charge of prudential supervision of AIFMs established in Luxembourg, authorised under this Law, irrespective of whether such AIFM manages and/or markets AIFs in another Member State or not, without prejudice to those provisions of this Law which confer the responsibility for supervision on the competent authorities of the host Member State of the AIFM.
- (2) Where an AIFM established in Luxembourg and authorised pursuant to this Law, which manages or markets AIFs in the territory of another Member State, by operating or not through a branch, refuses to provide the competent authorities of the host Member State with the information falling under their responsibility, or fails to take the necessary steps to put an end to the breach of the rules falling under their responsibility, the CSSF is informed thereof. The CSSF 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 or puts an end to the breach. The CSSF shall request, where applicable, the necessary information from the competent supervisory authorities of third countries. The nature of the measures referred to in this paragraph shall be communicated by the CSSF to the competent authorities of the AIFM's host Member State.
- (3) The CSSF shall take appropriate measures, including requesting, if necessary, additional information from the relevant supervisory authorities of third countries, if the competent authorities of the AIFM's host Member State inform the CSSF that they have clear and demonstrable grounds for believing that the AIFM is in breach of the obligations arising from rules in relation to which they have no responsibility.

## Article 49 AIFM Law

### Responsibility of the CSSF as competent authority of the host Member State of the AIFM

[Art. 45 AIFMD]

- (1) Where an AIFM established in another Member State manages and/or markets AIFs through a branch in Luxembourg, the CSSF, as competent authority of the AIFM's host Member State, shall be responsible for supervising compliance with the provisions of Articles 11 and 13 of this Law.
- (2) The AIFM managing or marketing AIFs in Luxembourg, whether or not through a branch, is required to provide the CSSF with the information necessary for the monitoring of the AIFM's compliance with the rules which are applicable to it and which are under the responsibility of the CSSF.
- (3) Where the CSSF ascertains that an AIFM managing and/or marketing AIFs in Luxembourg, whether or not through a branch, is in breach of one of the rules falling under its responsibility, it shall require the AIFM concerned to put an end to that breach and informs the competent authorities of the home Member State thereof.
- (4) If the AIFM concerned refuses to provide the CSSF with information falling under its responsibility, or fails to take the necessary steps to put an end to the breach referred to in paragraph 3, the CSSF shall inform the competent authorities of the home Member State of the AIFM thereof. The nature of the measures taken by the competent authorities of the home Member State of the AIFM shall be communicated to the CSSF so that the AIFM provides the information requested by the CSSF or puts an end to the breach.
- (5) If, despite the measures taken by the competent authorities of the home Member State of the AIFM pursuant to paragraph 4 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 CSSF pursuant to paragraph 2, or persists in breaching the legal or regulatory provisions, referred to in paragraph 3, in force in Luxembourg, the CSSF shall, after informing the competent authorities of the home Member State of the AIFM, take the appropriate measures, including those laid down in Articles 50 and 51, to prevent or penalise further irregularities and, in so far as necessary, to prevent that AIFM from initiating any further transactions in Luxembourg. Where the function carried out in Luxembourg is the management of AIFs, the CSSF may require the AIFM to cease managing those AIFs.
- (6) Where the CSSF has clear and demonstrable grounds for believing that the AIFM is in breach of the obligations arising from rules which do not fall under its responsibility, it shall inform the competent authorities of the home Member State of the AIFM which shall take appropriate measures, including, if necessary, request additional information from the relevant supervisory authorities in third countries.
- (7) If despite the measures taken by the competent authorities of the home Member State of the AIFM or because such measures prove to be inadequate, or because the home Member State of the AIFM fails to act within a reasonable timeframe, the AIFM persists in acting in a manner that is clearly prejudicial to the interests of the investors of the relevant AIF, the financial stability or the integrity of the Luxembourg market, the CSSF shall, after informing the competent authorities of the home Member State of the AIFM, take all appropriate measures needed in order to protect the investors of the relevant AIF, the financial stability and the integrity of the Luxembourg market, including preventing the AIFM concerned from further marketing the units or shares of the relevant AIF in Luxembourg.
- (8) The procedure laid down in paragraphs 6 and 7 shall also apply in the event that the CSSF has clear and demonstrable grounds for disagreement with the authorisation of a non-EU AIFM by the Member State of reference.

## Article 50 AIFM Law

### Supervisory and investigatory powers

[Art. 46 AIFMD]

- (1) For the purpose of applying this Law, the CSSF is given all supervisory and investigatory powers that are necessary for the exercise of its functions.
- (2) The CSSF's powers include the right:
  - (a) to have access to any document in any form and to receive a copy of it;
  - (b) to 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) to carry out on-site inspections with or without prior announcements of persons subject to its prudential supervision under this Law;
  - (d) to require the communication of existing telephone and existing data traffic records;
  - (e) to require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Law;
  - (f) to request the freezing or the sequestration of assets by the President of the *Tribunal d'arrondissement* (District Court) of and in Luxembourg acting on request;
  - (g) to pronounce the temporary prohibition of professional activities of persons subject to its prudential supervision, as well as of the members of administrative, governing and management bodies, employees and agents linked to these persons;
  - (h) to require authorised AIFMs, depositaries or *réviseurs d'entreprises agréés* (approved statutory auditors) to provide information;
  - (i) to adopt, in accordance with national law, any type of measure to ensure that AIFMs or depositaries continue to comply with the requirements of this Law applicable to them;
  - (j) to require the suspension of the issue, repurchase or redemption of units of AIFs in the interest of the unitholders or of the public;
  - (k) to withdraw the authorisation granted to an AIFM or a depositary;
  - (l) to transmit information to the Public Prosecutor for criminal proceedings;
  - (m) to instruct *réviseurs d'entreprises agréés* (approved statutory auditors) or experts to carry out verifications or investigations of persons subject to this Law.
- (3) The CSSF shall in particular make use of the powers referred to in paragraph 2 in order to ensure the orderly functioning of markets in those cases where the activity of one or more AIFs in the market for a financial instrument might jeopardise the orderly functioning of that market.

## Article 51 AIFM Law

### Administrative penalties

[Art. 48 AIFMD]

- (1) Legal persons subject to the supervision of the CSSF under this Law and natural persons in charge of the administration or management of these legal persons as well as natural persons subject to the same supervision may be sanctioned by the CSSF in the case that:
- they fail to comply with the obligations provided for by Articles 3 (3), 4 (2), 5 (2) (3) (5) (7), 8, 9 (1), 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 32, 34, 35, 37 and 46 of this Law or by the implementing measures relating to these Articles;
  - they refuse to provide accounting documents or other requested information;
  - they have provided documents or other information that proves to be incomplete, incorrect or false;
  - they prevent the CSSF from exercising its powers of supervision, inspection and investigation;
  - they contravene the rules governing the publication of balance sheets and accounts;
  - they fail to act in response to injunctions of the CSSF;
  - they risk, with their behaviour, to jeopardise the sound and prudent management of the institution concerned;

*(Law of 6 June 2018)*

- "they do not comply with the requirements set out in Articles 13 and 14 of Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No. 648/2012."
- (2) The CSSF may impose the following sanctions, classed in order of severity:
- a warning,
  - a reprimand,
  - a fine of between EUR 250 and EUR 250,000,
  - and, in the cases referred to in the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> indents of paragraph 1, one or several of the following measures:
    - (a) a temporary or definitive prohibition on carrying out operations or activities, as well as any other restrictions on the activity of the person or entity,
    - (b) a temporary or definitive prohibition on acting as directors, managers or conducting persons, whether *de jure* or *de facto*, of persons or entities subject to the supervision of the CSSF.

The CSSF may disclose to the public the penalties imposed under this Article, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

When imposing a penalty, the CSSF shall take into account the nature, duration and the severity of the infringement, the conduct and past record of the natural or legal person to be sanctioned, the damage caused to third parties and the potential benefits or gain and/or those effectively deriving from the infringement.

## Article 52 AIFM Law

### Right of appeal

[Art. 49 AIFMD]

- (1) The decisions to be adopted by the CSSF in implementation of this Law shall state in writing the reasons on which they are based and, unless the delay entails risks, they shall be adopted after preparatory proceedings at which all parties are able to state their case. They shall be notified by registered letter or delivered by bailiff.
- (2) The decisions by the CSSF concerning the granting, refusal or withdrawal of the authorisations provided for in this Law as well as the decisions by the CSSF concerning the administrative penalties pursuant to Article 51, may be referred to the *Tribunal administratif* (Administrative Tribunal) which deals with the substance of the case. The action shall be filed within one month from the date of notification of the challenged decision, or else shall be time-barred.

## Section 2

### Cooperation between different competent authorities

#### Article 53 AIFM Law

##### Obligation to cooperate

[Art. 50 AIFMD]

- (1) The CSSF shall cooperate with the competent authorities of the other Member States as well as with ESMA and the ESRB in view of the accomplishment of their duties under Directive 2011/61/EU or the exercise of their powers under the aforementioned directive or under national law.
- (2) The CSSF shall cooperate with the competent authorities, even in cases where the conduct under investigation does not constitute an infringement of any regulation in force in Luxembourg.
- (3) The CSSF shall supply the competent authorities of the other Member States and shall supply immediately ESMA with the information required for the purposes of carrying out their duties under Directive 2011/61/EU.

The CSSF, as the competent authority of the home Member State of the AIFM, shall forward a copy of the relevant cooperation arrangements entered into by it in accordance with Articles 35, 37 and/or 40 of Directive 2011/61/EU to the competent authorities of the host Member States of the AIFM concerned. The CSSF shall, in accordance with procedures relating to the applicable regulatory technical standards referred to in paragraph 14 of Article 35, paragraph 17 of Article 37 or paragraph 14 of Article 40 of Directive 2011/61/EU, forward the information received from third-country supervisory authorities in accordance with cooperation arrangements with such supervisory authorities in respect of an AIFM, or, where relevant, pursuant to paragraphs 6 or 7 of Article 45 of that Directive, to the competent authorities of the host Member State of the AIFM concerned.

Where the CSSF, as the competent authority of the host Member State of the AIFM, considers that the contents of the cooperation arrangement entered into by the home Member State of the AIFM concerned in accordance with Article 35, 37 and/or 40 of Directive 2011/61/EU does not comply with what is required pursuant to the applicable regulatory technical standards, the CSSF may refer the matter to ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

- (4) Where the CSSF has clear and demonstrable grounds to suspect that acts contrary to Directive 2011/61/EU are being or have been carried out by an AIFM not subject to its supervision, 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.
- (5) If the competent authorities of another Member State have clear and demonstrable grounds to suspect that acts contrary to Directive 2011/61/EU are being or have been carried out by an AIFM authorised under this Law, the authorities concerned shall notify the CSSF thereof. The CSSF shall take appropriate measures, shall inform ESMA and the notifying competent authorities of the outcome of that action and, to the extent possible, of significant interim developments.

## Article 54 AIFM Law

### Transfer and retention of personal data

[Art. 51 AIFMD]

- (1) The provisions of Directive 95/46/EC are applicable to personal data transferred between the CSSF and the competent authorities concerned under Directive 2011/61/EU.
- (2) The CSSF shall retain the personal data referred to in paragraph 1 for a maximum period of five years.

## Article 55 AIFM Law

### Disclosure of information to the competent authorities of third countries

[Art. 52 AIFMD]

- (1) The CSSF is authorised to transfer to the competent authorities of third countries data and the analysis of data on a case-by-case basis where the conditions laid down in Article 25 or Article 26 of Directive 95/46/EC are met and where the CSSF is satisfied that this transfer is necessary for the purpose of the application of Directive 2011/61/EU. The competent authorities of the third country which receive information from the CSSF are only authorised to transfer the data to the competent authorities of another third country with the express written authorisation of the CSSF.
- (2) Information received by the CSSF under Directive 2011/61/EU may not be disclosed to a supervisory authority of a third country without the express agreement of the competent authorities which transmitted the information to the CSSF and solely for the purposes for which such authorities gave their agreement.

## Article 56 AIFM Law

### Exchange of information relating to the potential systemic consequences of AIFM activity

[Art. 53 AIFMD]

- (1) The CSSF shall communicate to the competent authorities of the other Member States concerned the information which is relevant for them for monitoring and responding to the potential implications of the activities of individual AIFMs or AIFMs collectively for the stability of systemically relevant financial institutions as well as the orderly functioning of markets on which AIFMs are active and to enable them to take appropriate measures. The CSSF also informs ESMA and the ESRB thereof which shall forward this information to the competent authorities of the other Member States.
- (2) Subject to the conditions laid down in Article 35 of Regulation (EU) No 1095/2010, aggregated information relating to the activities of AIFMs subject to the supervision of the CSSF under this Law shall be communicated by the CSSF to ESMA and the ESRB.

## Article 57 AIFM Law

### Cooperation in the accomplishment of supervisory missions

[Art. 54 AIFMD]

- (1) The competent authorities of one Member State may request the cooperation of the CSSF in the conduct of their supervisory mission or for an on-the-spot verification or in an investigation in Luxembourg within the framework of their powers pursuant to Directive 2011/61/EU.

Where the CSSF receives 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) If the verification or investigation is performed by the CSSF, the competent authority of the Member State which has requested cooperation may ask that members of its own personnel assist the CSSF carrying out the verification or investigation. The verification or investigation shall, however, be subject to the overall control of the CSSF.

If the verification or investigation is carried out by the authority which made the request, the CSSF may request that its own personnel assist the personnel in carrying out the verification or investigation.

- (3) The CSSF may refuse to exchange information or to act on a request to cooperate in an investigation or on-the-spot verification under Directive 2011/61/EU only where:
- (a) the investigation, on-the-spot verification or exchange of information might adversely affect the sovereignty, security or public order of Luxembourg;
  - (b) judicial proceedings have already been initiated in respect of the same actions and the same persons in Luxembourg;
  - (c) final judgement has already been delivered in Luxembourg in respect of the same persons and the same actions.

The CSSF shall notify the requesting competent authorities of any decision taken under this paragraph. Such notification shall contain information about the reasons of the decision.

## CHAPTER 10

### TRANSITIONAL PROVISIONS

#### Article 58 AIFM Law

##### Transitional provisions

[Art. 61 AIFMD]

- **FAQ AIFM published by CSSF (Appendix XV) Section 8 Entry into force/transitional provisions Question 8.a), Question 8.c), Question 8.d), Question 8.e), Section 10 Depository Question 10.a), Section XIV Reporting Question 14.d), Question 14.e), Question 18.j)**

- (1) The persons performing activities of AIFM within the meaning of this Law before 22 July 2013 shall take all necessary measures to comply with the provisions of this Law and shall have until 22 July 2014 to submit an application for authorisation to the CSSF.
- (2) Articles 29, 30 and 32 shall not apply to the marketing of units or shares of AIFs that are subject to a current offer to the public under a prospectus that has been drawn up and published in accordance with Directive 2003/71/EC before 22 July 2013 for the duration of validity of that prospectus.
- (3) AIFMs in so far as they manage AIFs of the closed-ended type before 22 July 2013 which do not make any additional investments after this date may continue to manage such AIFs without being authorised under this Law.
- (4) AIFMs in so far as they manage AIFs of the closed-ended type whose subscription period for investors has closed prior to 22 July 2011 and are constituted for a period of time which expires at the latest three years after 22 July 2013, may continue to manage such AIFs without needing to comply with the provisions of this Law except Article 20 and, where relevant, Articles 24 to 28, or to submit an application for authorisation under this Law.
- (5) Articles 35 to 36 and 38 to 44 of this Law will be applicable once the European Commission has adopted the delegated act referred to under Article 67(6) of Directive 2011/61/EU, and from the date disclosed therein. Articles 37 and 45 of this Law will cease to be applicable once the European Commission has adopted the delegated act referred to under Article 68(6) of Directive 2011/61/EU, and from the date disclosed therein.

*(Law of 10 May 2016)*

- (6) "AIFMs authorised under Chapter 2 before the entry into force of the Law of 10 May 2016 transposing Directive 2014/91/EU have until 15 September 2016 to appoint a *réviseur d'entreprises agréé* (approved statutory auditor) in accordance with Article 7a.

The provisions of Article 7a shall be binding in their entirety for the annual accounts relating to the financial years closing on or after 31 December 2016."

## **CHAPTER 11**

### **CRIMINAL LAW PROVISIONS**

#### **Article 59 AIFM Law**

##### **Criminal law provisions**

- (1) A penalty of imprisonment of eight days to five years and a fine of EUR 5,000 to EUR 125,000 or either of these penalties, shall be imposed upon any persons who carry out or attempt to carry out the activity of AIFM within the meaning of points (a) or (b) of Article 4(1) of this Law without being in possession of an authorisation from the CSSF under this Law.
- (2) A penalty of imprisonment of eight days to five years and a fine of EUR 5,000 to EUR 125,000 or either of these penalties, shall be imposed upon any persons who, in violation of Article 7(6), have used a designation or description giving the impression that they relate to the activities subject to this Law if they have not obtained the authorisation provided for in Article 7.

## CHAPTER 12 AIFM Law

### AMENDING AND VARIOUS PROVISIONS

[...]

## CHAPTER 13 AIFM Law

### REPEALING AND FINAL PROVISIONS

#### Article 215

Article 28-8 of the amended Law of 5 April 1993 on the financial sector shall be repealed with effect from 22 July 2014.

#### Article 216

Reference to this Law may be made under abbreviated form using the following title: "Law of 12 July 2013 on alternative investment fund managers".

#### Article 217

This Law enters into force upon its publication in the *Mémorial*. The amendments of Article 208, 1° and of Article 209 do not apply to *sociétés en commandite simple* (limited partnerships) incorporated prior to this Law entering into force.

## ANNEX I AIFM Law

[Annex I AIFMD] [Art. 5 AIFM Law] [Art. 21.1(f) AIFM Law]

- **FAQ AIFM published by CSSF (Appendix XV) Section 9 AIFM functions/services *Question 9.a), Question 9.b)***

1. Investment management functions which an AIFM must at least perform when managing an AIF:
  - (a) portfolio management;
  - (b) risk management.
2. Other functions that an AIFM may additionally perform in the course of the collective management of an AIF:
  - (a) administration:
    - (i) legal and fund management accounting services;
    - (ii) customer inquiries;
    - (iii) valuation and pricing, including tax returns;
    - (iv) regulatory compliance monitoring;
    - (v) maintenance of unit-/shareholder register;
    - (vi) distribution of income;
    - (vii) unit/shares issues and redemptions;
    - (viii) contract settlements, including certificate dispatch;
    - (ix) record keeping;
  - (b) marketing;
  - (c) activities related to the assets of AIFs, namely services necessary to meet the fiduciary duties of the AIFM, facilities management, real estate administration activities, advice to undertakings on capital structure, industrial strategy and related matters, advice and services relating to mergers and the purchase of undertakings and other services connected to the management of the AIF and the companies and other assets in which it has invested.

## ANNEX II AIFM Law: Remuneration policy

[Annex II AIFMD] [Art. 12 AIFM Law]

1. When establishing and applying the total remuneration policies, inclusive of salaries and discretionary pension benefits, for those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the AIFMs or of AIFs they manage, AIFMs must 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, management regulations<sup>25</sup> or instruments of incorporation of the AIFs they manage;
  - (b) the remuneration policy is in line with the business strategy, objectives, values and interests of the AIFM and the AIFs it manages or the investors of such AIFs, and includes measures to avoid conflicts of interest;
  - (c) the management body of the AIFM, in its supervisory function, adopts and periodically reviews the general principles of the remuneration policy and is responsible for its implementation;
  - (d) the implementation of the remuneration policy is, at least annually, subject to central and independent internal review for compliance with policies and procedures for remuneration adopted by the management body in its supervisory function;
  - (e) staff engaged in control functions are compensated in accordance with the achievement of the objectives linked to their functions, independent of the performance of the business areas they control;
  - (f) the remuneration of the senior officers in the risk management and compliance functions is directly overseen by the remuneration committee;
  - (g) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit or AIF concerned and of the overall results of the AIFM, and when assessing individual performance, financial as well as non-financial criteria are taken into account;
  - (h) the assessment of performance is set in a multi-year framework appropriate to the life-cycle of the AIFs managed by the AIFM in order to ensure that the assessment process is based on longer term performance and that the actual payment of performance-based components of remuneration is spread over a period which takes account of the redemption policy of the AIFs it manages and their investment risks;
  - (i) guaranteed variable remuneration is exceptional, occurs only in the context of hiring new staff and is limited to the first year;
  - (j) fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy, on variable remuneration components, including the possibility to pay no variable remuneration component;
  - (k) payments related to the early termination of a contract reflect performance achieved over time and are designed in a way that does not reward failure;
  - (l) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes a comprehensive adjustment mechanism to integrate all relevant types of current and future risks;
  - (m) subject to the legal structure of the AIF and its management regulations<sup>26</sup> or instruments of incorporation, a substantial portion, and in any event at least 50 % of any variable remuneration consists of units or shares of the AIF concerned, or equivalent ownership interests, or share-linked instruments or equivalent non-cash instruments, unless the management of AIFs accounts for less

<sup>25</sup> In the French version "règlement".

<sup>26</sup> In the French version "règlement".

than 50 % of the total portfolio managed by the AIFM, in which case the minimum of 50 % does not apply.

The instruments referred to in this point shall be subject to an appropriate retention policy designed to align incentives with the interests of the AIFM and the AIFs it manages and the investors of such AIFs. This point shall be applied to both the portion of the variable remuneration component deferred in line with point (n) and the portion of the variable remuneration component not deferred;

- (n) a substantial portion, and in any event at least 40 %, of the variable remuneration component, is deferred over a period which is appropriate in view of the life cycle and redemption policy of the AIF concerned and is correctly aligned with the nature of the risks of the AIF in question.

The period referred to in this point shall be at least three to five years unless the life cycle of the AIF concerned is shorter; remuneration payable under deferral arrangements vests no faster than on a pro-rata basis; in the case of a variable remuneration component of a particularly high amount, at least 60 % of the amount is deferred;

- (o) the variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the AIFM as a whole, and justified according to the performance of the business unit, the AIF and the individual concerned.

The total variable remuneration shall generally be considerably contracted where subdued or negative financial performance of the AIFM or of the AIF concerned occurs, taking into account both current compensation and reductions in payouts of amounts previously earned, including through malus or clawback arrangements;

- (p) the pension policy is in line with the business strategy, objectives, values and long-term interests of the AIFM and the AIFs it manages.

If the employee leaves the AIFM before retirement, discretionary pension benefits shall be held by the AIFM for a period of five years in the form of instruments defined in point (m). In the case of an employee reaching retirement, discretionary pension benefits shall be paid to the employee in the form of instruments defined in point (m), subject to a five year retention period;

- (q) staff are required to undertake not to use personal hedging strategies or remuneration- and liability-related insurance to undermine the risk alignment effects embedded in their remuneration arrangements;

- (r) variable remuneration is not paid through vehicles or methods that facilitate the avoidance of the requirements of this Directive.

2. The principles set out in point 1. shall apply to remuneration of any type paid by the AIFM, to any amount paid directly by the AIF itself, including carried interest, and to any transfer of units or shares of the AIF, made to the benefits of those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile or the risk profiles of the AIF that they manage.

3. AIFMs that are significant in terms of their size or the size of the AIFs they manage, their internal organisation and the nature, the scope and the complexity of their activities must establish a remuneration committee. The remuneration committee shall be constituted in a way that enables it to exercise competent and independent judgement on remuneration policies and practices and the incentives created for managing risk.

The remuneration committee shall be responsible for the preparation of decisions regarding remuneration, including those which have implications for the risk and risk management of the AIFM or the AIF concerned and which are to be taken by the management body in its supervisory function. The remuneration committee shall be chaired by a member of the management body who does not perform any executive functions in the AIFM concerned. The members of the remuneration committee shall be members of the management body who do not perform any executive functions in the AIFM concerned.

## **ANNEX III AIFM: Documentation and information to be provided in case of marketing in Luxembourg**

[Annex III AIFMD] [Art 29.2 AIFM Law] [Art. 35.3 AIFM Law] [Art. 39.2 AIFM Law]

[Art. 41.3 AIFM Law]

▪ ***FAQ AIFM published by CSSF (Appendix XV) Section 13 Marketing process (Lux AIFM) Question 13.c***

- (a) a notification letter, including a programme of operations identifying the AIFs the AIFM intends to market and information on where the AIFs are established;
- (b) the AIF management regulations 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 paragraph 1 of Article 21 for each AIF the AIFM intends to market;
- (g) where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF.

## **ANNEX IV AIFM: Documentation and information to be provided in case of marketing in a Member State other than Luxembourg**

[Annex IV AIFMD] [Art. 30.2 AIFM Law] [Art. 30.5 AIFM Law] [Art.35.5 AIFM Law]  
[Art.35.8 AIFM Law] [Art. 39.4 AIFM Law] [Art 39.7 AIFM Law] [Art. 41.5 AIFM Law]  
[Art. 41.8 AIFM Law]

▪ **FAQ AIFM published by CSSF (Appendix XV) Section 13 Marketing process (Lux AIFM) Question 13.c)**

- (a) a notification letter, including a programme of operations identifying the AIFs the AIFM intends to market and information on where the AIFs are established;
- (b) the AIF management regulations 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 paragraph 1 of Article 21 for each AIF the AIFM intends to market;
- (g) the indication of the Member State in which it intends to market the units or shares of the AIF to professional investors;
- (h) information about arrangements made for the marketing of AIFs and, where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF;

*(Law of 21 July 2021: A561)*

- (i) "the details necessary, including the address, for the invoicing or for the communication of any applicable regulatory fees or charges by the competent authorities of the host Member State;
- (j) information on the arrangements for performing the tasks referred to in Article 46-1."

## Part II: Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers

### Recitals

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Central Bank<sup>27</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>28</sup>,

Acting in accordance with the ordinary legislative procedure<sup>29</sup>,

Whereas:

- (1) Managers of alternative investment funds (AIFMs) are responsible for the management of a significant amount of invested assets in the Union, account for significant amounts of trading in markets for financial instruments, and can exercise an important influence on markets and companies in which they invest.
- (2) The impact of AIFMs on the markets in which they operate is largely beneficial, but recent financial difficulties have underlined how the activities of AIFMs may also serve to spread or amplify risks through the financial system. Uncoordinated national responses make the efficient management of those risks difficult. This Directive therefore aims at establishing common requirements governing the authorisation and supervision of AIFMs in order to provide a coherent approach to the related risks and their impact on investors and markets in the Union.
- (3) Recent difficulties in financial markets have underlined that many AIFM strategies are vulnerable to some or several important risks in relation to investors, other market participants and markets. In order to provide comprehensive and common arrangements for supervision, it is necessary to establish a framework capable of addressing those risks taking into account the diverse range of investment strategies and techniques employed by AIFMs. Consequently, this Directive should apply to AIFMs managing all types of funds that are not covered by Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to the undertakings for collective investment in transferable securities (UCITS) (<sup>30</sup>), irrespective of the legal or contractual manner in which the AIFMs are entrusted with this responsibility. AIFMs should not be entitled to manage UCITS within the meaning of Directive 2009/65/EC on the basis of an authorisation under this Directive.
- (4) This Directive aims to provide for an internal market for AIFMs and a harmonised and stringent regulatory and supervisory framework for the activities within the Union of all AIFMs, including those

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<sup>27</sup> OJ C 272, 13.11.2009, p. 1.

<sup>28</sup> OJ C 18, 19.1.2011, p. 90.

<sup>29</sup> Position of the European Parliament of 11 November 2010 (not yet published in the Official Journal) and decision of the Council of 27 May 2011.

<sup>30</sup> OJ L 302, 17.11.2009, p. 32.

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

- (5) 4 years after the deadline for transposition of this Directive, the Commission should review the application and the scope of this Directive taking into account its objectives and should assess whether or not the Union harmonised approach has caused any ongoing major market disruption and whether or not this Directive functions effectively in light of the principles of the internal market and of a level playing field. [↪ Art. 69 AIFMD](#)
- (6) The scope of this Directive should be limited to entities managing AIFs as a regular business – regardless of whether the AIF is of an open-ended or a closed-ended type, whatever the legal form of the AIF, and whether or not the AIF is listed – which raise capital from a number of investors with a view to investing that capital for the benefit of those investors in accordance with a defined investment policy. [↪ Art. 2 AIFMD](#)
- (7) Investment undertakings, such as family office vehicles which invest the private wealth of investors without raising external capital, should not be considered to be AIFs in accordance with this Directive. [↪ Art. 2 AIFMD](#)

▪ ***ESMA Final Report on guidelines on key concepts of the AIFMD (Section VII) (Appendix IX)***

- (8) The entities not considered to be AIFMs pursuant to this Directive fall outside its scope. As a consequence, this Directive should not apply to holding companies as defined herein. However, managers of private equity funds or AIFMs managing AIFs whose shares are admitted to trading on a regulated market should not be excluded from its scope. Further, this Directive should not apply to the management of pension funds; employee participation or savings schemes; supranational institutions; national central banks; national, regional and local governments and bodies or institutions which manage funds supporting social security and pension systems; securitisation special purpose entities; or insurance contracts and joint ventures. [↪ Art. 2 AIFMD](#) | [↪ Art. 4 AIFMD](#)

▪ ***Q&A published by EU Commission (Appendix X) ID 1148 and 1160 Scope and exemptions***

- (9) Investment firms authorised under Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments<sup>31</sup> 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<sup>32</sup> should not be required to obtain an authorisation under this Directive in order to provide investment services such as individual portfolio management in respect of AIFs. However, investment firms should be able, directly or indirectly, to offer units or shares of an AIF to, or place such units or shares with, investors in the Union only to the extent that the units or shares can be marketed in accordance with this Directive. When transposing this Directive into national law, the Member States should take into account the regulatory purpose of that requirement and should

<sup>31</sup> OJ L 145, 30.4.2004, p.1.

<sup>32</sup> OJ L 177, 30.6.2006, p. 1.

ensure that investment firms established in a third country that, pursuant to the relevant national law, can provide investment services in respect of AIFs also fall within the scope of that requirement. The provision of investment services by those entities in respect of AIFs should never amount to a de facto circumvention of this Directive by means of turning the AIFM into a letter-box entity, irrespective of whether the AIFM is established in the Union or in a third country. [↪ Art. 6 AIFMD](#)

- (10) This Directive does not regulate AIFs. AIFs should therefore be able to continue to be regulated and supervised at national level. It would be disproportionate to regulate the structure or composition of the portfolios of AIFs managed by AIFMs at Union level and it would be difficult to provide for such extensive harmonisation due to the very diverse types of AIFs managed by AIFMs. This Directive therefore does not prevent Member States from adopting or from continuing to apply national requirements in respect of AIFs established in their territory. The fact that a Member State may impose requirements additional to those applicable in other Member States on AIFs established in its territory should not prevent the exercise of rights of AIFMs authorised in accordance with this Directive in other Member States to market to professional investors in the Union certain AIFs established outside the Member State imposing additional requirements and which are therefore not subject to and do not need to comply with those additional requirements.
- (11) Several provisions of this Directive require AIFMs to ensure compliance with requirements for which, in some fund structures, AIFMs are not responsible. An example of such fund structures is where the responsibility for appointing the depositary rests with the AIF or another entity acting on behalf of the AIF. In such cases, the AIFM has no ultimate control over whether a depositary is in fact appointed unless the AIF is internally managed. Since this Directive does not regulate AIFs, it cannot require an AIF to appoint a depositary. In cases of failure of an AIFM to ensure compliance with the applicable requirements of an AIF or another entity on its behalf, the competent authorities should require the AIFM to take the necessary steps to remedy the situation. If, despite such steps, the non-compliance persists, and in so far as it concerns an EU AIFM or an authorised non-EU AIFM managing an EU AIF, the AIFM should resign as manager of that AIF. If the AIFM fails to resign, the competent authorities of its home Member State should require such resignation and the marketing in the Union of the AIF concerned should no longer be permitted. The same prohibition should apply to authorised non-EU AIFMs marketing non-EU AIFs in the Union. [↪ Art. 45 AIFMD](#)
- (12) Unless specifically provided for otherwise, where this Directive refers to the interests of the investors of an AIF the investors' interests in their specific capacity as investors of the AIF, and not their individual interests, are envisaged. [↪ Art. 12 AIFMD](#) | [↪ Art. 20 AIFMD](#) | [↪ Art. 48 AIFMD](#)
- (13) Subject to the exceptions and restrictions provided for, this Directive should be applicable to all EU AIFMs managing EU AIFs or non-EU AIFs, irrespective of whether or not they are marketed in the Union, to non-EU AIFMs managing EU AIFs, irrespective of whether or not they are marketed in the Union, and to non-EU AIFMs marketing EU AIFs or non-EU AIFs in the Union. [↪ Art. 2 AIFMD](#)
- (14) This Directive lays down requirements regarding the manner in which AIFMs should manage AIFs under their responsibility. For non-EU AIFMs this is limited to the management of EU AIFs and other AIFs the units or shares of which are also marketed to professional investors in the Union.
- (15) The authorisation of EU AIFMs in accordance with this Directive covers the management of EU AIFs established in the home Member State of the AIFM. Subject to further notification requirements, this also includes the marketing to professional investors within the Union of EU AIFs managed by the EU AIFM and the management of EU AIFs established in Member States other than the home Member State of the AIFM. This Directive also provides for the conditions subject to which authorised EU AIFMs are entitled to market non-EU AIFs to professional investors in the Union and the conditions subject to which a non-EU AIFM can obtain an authorisation to manage EU AIFs and/or to market AIFs to professional investors in the Union with a passport. During a period that is intended to be transitional, Member States should also be able to allow EU AIFMs to market non-EU AIFs in their territory only and/or to allow non-EU AIFMs to manage EU AIFs, and/or market AIFs to professional investors, in their territory only, subject to national law, in so far as certain minimum conditions pursuant to this Directive are met.

[↪ Art. 32 AIFMD](#) | [↪ Art. 36 AIFMD](#) | [↪ Art. 37 AIFMD](#) | [↪ Art. 40 AIFMD](#) | [↪ Art. 42 AIFMD](#)

(16) This Directive should not apply to AIFMs in so far as they manage AIFs whose only investors are the AIFMs themselves or their parent undertakings, their subsidiaries or other subsidiaries of their parent undertaking and where those investors are not themselves AIFs. [↪ Art. 3 AIFMD](#)

(17) This Directive further provides for a lighter regime for AIFMs where the cumulative AIFs under management fall below a threshold of EUR 100 million and for AIFMs that manage only unleveraged AIFs that do not grant investors redemption rights during a period of 5 years where the cumulative AIFs under management fall below a threshold of EUR 500 million. Although the activities of the AIFMs concerned are unlikely to have individually significant consequences for financial stability, it is possible that aggregation causes their activities to give rise to systemic risks. Consequently, those AIFMs should not be subject to full authorisation but to registration in their home Member States and should, inter alia, provide their competent authorities with relevant information regarding the main instruments in which they are trading and on the principal exposures and most important concentrations of the AIFs they manage. However, in order to be able to benefit from the rights granted under this Directive, those smaller AIFMs should be allowed to be treated as AIFMs subject to the opt-in procedure provided for by this Directive. That exemption should not limit the ability of Member States to impose stricter requirements on those AIFMs that have not opted in. [↪ Art. 3 AIFMD](#)

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

[↪ Art. 6 AIFMD](#)

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

[↪ Art. 36 AIFMD](#) | [↪ Art. 37 AIFMD](#) | [↪ Art. 40 AIFMD](#) | [↪ Art. 42 AIFMD](#)

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

[↪ Art. 5 AIFMD](#)

(21) Management of AIFs should mean providing at least investment management services. The single AIFM to be appointed pursuant to this Directive should never be authorised to provide portfolio management without also providing risk management or vice versa. Subject to the conditions set out in this Directive, an authorised AIFM should not, however, be prevented from also engaging in the activities of administration and marketing of an AIF or from engaging in activities related to the assets of the AIF. An external AIFM should not be prevented from also providing the service of management of portfolios of investments with mandates given by investors on a discretionary, client-by-client basis, including portfolios owned by pension funds and institutions for occupational retirement provision which are covered by Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the

activities and supervision of institutions for occupational retirement provision<sup>33</sup>, or from providing the non-core services of investment advice, safe-keeping and administration in relation to units of collective investment undertakings and reception and transmission of orders. Pursuant to authorisation under Directive 2009/65/EC, an external AIFM should be allowed to manage UCITS.

[↪ Art. 6 AIFMD](#)

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

[↪ Art. 14 AIFMD](#) | [↪ Art. 18 AIFMD](#)

- (23) It is necessary to provide for the application of minimum capital requirements to ensure the continuity and the regularity of the management of AIFs provided by an AIFM and to cover the potential exposure of AIFMs to professional liability in respect of all their activities, including the management of AIFs under a delegated mandate. AIFMs should be free to choose whether to cover potential risks of professional liability by additional own funds or by an appropriate professional indemnity insurance. [↪ Art. 9 AIFMD](#)
- (24) In order to address the potentially detrimental effect of poorly designed remuneration structures on the sound management of risk and control of risk-taking behaviour by individuals, there should be an express obligation for AIFMs to establish and maintain, for those categories of staff whose professional activities have a material impact on the risk profiles of AIFs they manage, remuneration policies and practices that are consistent with sound and effective risk management. Those categories of staff should at least include senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers. [↪ Art. 13 AIFMD](#)
- (25) The principles governing remuneration policies should recognise that AIFMs are able to apply those policies in different ways according to their size and the size of the AIFs they manage, their internal organisation and the nature, the scope and the complexity of their activities.
- (26) The principles regarding sound remuneration policies set out in the Commission Recommendation 2009/384/EC of 30 April 2009 on remuneration policies in the financial services sector<sup>34</sup> are consistent with and complement the principles of this Directive.
- (27) In order to promote supervisory convergences in the assessment of remuneration policies and practices, the European Supervisory Authority (European Securities and Markets Authority), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>35</sup> (ESMA) should ensure the existence of guidelines on sound remuneration policies in the AIFM sector. The European Supervisory Authority (European Banking Authority) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council<sup>36</sup> should assist it in the elaboration of such guidelines.
- (28) The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by the Treaties, in particular Article 153(5) TFEU, general principles of national contract and labour law, applicable legislation regarding shareholders' rights and involvement and the general responsibilities of the administrative and supervisory bodies of the institution concerned, as well as the right, where applicable, of social partners to conclude and enforce collective agreements, in accordance with national laws and traditions. [↪ Art. 13 AIFMD](#)
- (29) Reliable and objective asset valuation is crucial for the protection of investor interests. AIFMs employ different methodologies and systems for valuing assets, depending on the assets and markets in which

<sup>33</sup> OJ L 235, 23.9.2003, p. 10.

<sup>34</sup> OJ L 120, 15.5.2009, p. 22.

<sup>35</sup> OJ L 331, 15.12.2010, p. 84.

<sup>36</sup> OJ L 331, 15.12.2010, p. 12.

they predominantly invest. It is appropriate to recognise those differences but, nevertheless, to require in all cases AIFMs to implement valuation procedures resulting in the proper valuation of assets of AIFs. The process for valuation of assets and calculation of the net asset value should be functionally independent from the portfolio management and the remuneration policy of the AIFM and other measures should ensure that conflicts of interest are prevented and that undue influence on the employees is prevented. Subject to certain conditions, AIFMs should be able to appoint an external valuer to perform the valuation function. [↪ Art. 19 AIFMD](#)

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

[↪ Art. 20 AIFMD](#)

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

[↪ Art. 20 AIFMD](#)

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

[↪ Art. 21 AIFMD](#)

- (33) The provisions of this Directive relating to the appointment and the tasks of a depositary should apply to all AIFs managed by an AIFM subject to this Directive and therefore to all AIF business models. They should, however, be adapted to the specificities of different business models. For some business models certain depositary tasks are more relevant than for others, depending on the type of assets the AIFs are investing in and the tasks related to those assets. [↪ Art. 21 AIFMD](#)

- (34) For AIFs that have no redemption rights exercisable during the period of 5 years from the date of the initial investments and that, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with this Directive or generally invest in issuers or non-listed companies in order potentially to acquire control over such companies in accordance with this Directive, such as private equity, venture capital funds and real estate funds, Member States should be able to allow a notary, a lawyer, a registrar or another entity to be appointed to carry out depositary functions. In such cases the depositary functions should be part of professional or business activities in respect of which the appointed entity is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct and can provide sufficient financial and professional guarantees to enable it to perform effectively the relevant depositary functions and meet the commitments inherent in those functions. This takes account of current practice for certain types of closed-ended funds. However, for all other AIFs, the depositary should be a credit institution, an investment firm or another entity permitted under Directive 2009/65/EC, given the importance of the custody function. For non-EU AIFs only, it should also be possible for the depositary to be a credit institution or any other entity of the same nature as the entities referred to in this recital as long as it is subject to effective prudential regulation and supervision which have the same effect as Union law and are effectively enforced. [↪ Art. 21 AIFMD](#)

- (35) The depositary should have its registered office or a branch in the same country as the AIF. It should be possible for a non-EU AIF to have a depositary established in the relevant third country only if certain additional conditions are met. On the basis of the criteria set out in delegated acts, the Commission should be empowered to adopt implementing measures, stating that prudential regulation and supervision of a third country have the same effect as Union law and are effectively enforced. Further,

the mediation procedure set out in Article 19 of Regulation (EU) No 1095/2010 should apply in the event that competent authorities disagree on the correct application of the other additional conditions. Alternatively, for non-EU AIFs, the depositary should also be able to be established in the home Member State or in the Member State of reference of the AIFM managing the AIF. [↪ Art. 21 AIFMD](#)

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

[↪ Art. 21 AIFMD](#)

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

[↪ Art. 21 AIFMD](#)

- (38) A depositary should act honestly, fairly, professionally, independently and in the interest of the AIF or of the investors of the AIF. [↪ Art. 21 AIFMD](#)

- (39) It should be possible for a depositary to delegate the safe-keeping of assets to a third party which, in its turn, should be able to delegate that function. However, delegation and sub-delegation should be objectively justified and subject to strict requirements in relation to the suitability of the third party entrusted with the delegated function, and in relation to the due skill, care and diligence that the depositary should employ to select, appoint and review that third party. [↪ Art. 21 AIFMD](#)

- (40) A third party to whom the safe-keeping of assets is delegated should be able to maintain a common segregated account for multiple AIFs, a so-called "omnibus account". [↪ Art. 21 AIFMD](#)

- (41) Entrusting the custody of assets to the operator of a securities settlement system as designated for the purposes of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems<sup>38</sup> or entrusting the provision of similar services to third-country securities settlement systems should not be considered to be a delegation of custody functions. [↪ Art. 21 AIFMD](#)

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

[↪ Art. 21 AIFMD | Q&A published by ESMA \(Appendix XIV\) Section VI Question 2, Question 10](#)

- (43) This Directive also takes account of the fact that many AIFs, and in particular hedge funds, currently make use of a prime broker. This Directive ensures that AIFs may continue to use the function of prime

<sup>37</sup> OJ L 241, 2.9.2006, p. 26.

<sup>38</sup> OJ L 166, 11.6.1998, p. 45.

brokers. However, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as prime broker and the potential conflicts of interest are properly identified, managed and disclosed to the investors of the AIF, no prime broker should be appointed as a depositary, since prime brokers act as counterparties to AIFs and therefore cannot at the same time act in the best interest of the AIF as is required of a depositary. Depositaries should be able to delegate custody tasks to one or more prime brokers or other third parties. In addition to the delegated custody tasks prime brokers should be allowed to provide prime brokerage services to the AIF. Those prime brokerage services should not form part of the delegation arrangement.

[↪ Art. 21.4 AIFMD](#) | [↪ Art. 21.8\(b\) AIFMD - Art. 91 Level 2 AIFM Regulation](#)

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

[↪ Art. 21.12 AIFMD](#)

- (45) Where the depositary delegates custody tasks and the financial instruments held in custody by a third party are lost, the depositary should be liable. However, provided that the depositary is expressly allowed to discharge itself of liability subject to a contractual transfer of such liability to that third party, pursuant to a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, in which such a discharge is objectively justified, and that the third party can be held liable for the loss based on a contract between the depositary and the third party, the depositary should be able to discharge itself of liability if it can prove that it has exercised due skill, care and diligence and that the specific requirements for delegation are met. By imposing the requirement of a contractual transfer of liability to the third party, this Directive intends to attach external effects to such contract, making the third party directly liable to the AIF, or to the investors of the AIF, for the loss of the financial instruments held in custody. [↪ Art.21.12 AIFMD](#) | [↪ Art. 21.13 AIFMD](#)

- (46) Further, where the law of a third country requires that certain financial instruments be held in custody by a local entity and there are no local entities that satisfy all depositary delegation requirements, the depositary should be able to discharge itself of liability provided that: the rules or instruments of incorporation of the AIF concerned expressly allow for such a discharge; the investors have been duly informed of that discharge and the circumstances justifying the discharge prior to their investment; the AIF or the AIFM on behalf of the AIF instructed the depositary to delegate the custody of such financial instruments to a local entity; there is a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, which expressly allows such a discharge; and there is a written contract between the depositary and the third party which expressly transfers the liability of the depositary to that third party and makes it possible for the AIF, or the AIFM acting on behalf of the AIF, to make a claim against the third party in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf. [↪ Art. 21.12 AIFMD](#) | [↪ Art.21.14 AIFMD](#)

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

- (48) An AIFM should, for each of the EU AIFs it manages and for each of the AIFs it markets in the Union, make available an annual report for each financial year no later than 6 months following the end of the financial year in accordance with this Directive. That 6-month period should be without prejudice to the right of the Member States to impose a shorter period. [↪ Art. 22 AIFMD](#)

- (49) Given that it is possible for an AIFM to employ leverage and, under certain conditions, to contribute to the build up of systemic risk or disorderly markets, special requirements should be imposed on AIFMs employing leverage. The information needed to detect, monitor and respond to those risks has not been

collected in a consistent way throughout the Union, and shared across Member States so as to identify potential sources of risk to the stability of financial markets in the Union. To remedy that situation, special requirements should apply to AIFMs which employ leverage on a substantial basis at the level of the AIF. Such AIFMs should be required to disclose information regarding the overall level of leverage employed, the leverage arising from borrowing of cash or securities and the leverage arising from positions held in derivatives, the reuse of assets and the main sources of leverage in their AIFs. Information gathered by competent authorities should be shared with other authorities in the Union, with ESMA and with the European Systemic Risk Board (ESRB) established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board<sup>39</sup> so as to facilitate a collective analysis of the impact of the leverage of AIFs managed by AIFMs on the financial system in the Union, as well as a common response. If one or more AIFs managed by an AIFM could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions in other Member States, such information should also be shared with the relevant authorities. [↪ Art. 25 AIFMD](#)

- (50) In order to ensure a proper assessment of the risks induced by the use of leverage by an AIFM with respect to the AIFs it manages, the AIFM should demonstrate that the leverage limits for each AIF it manages are reasonable and that it complies with those limits at all times. Where the stability and integrity of the financial system may be threatened, the competent authorities of the home Member State of the AIFM should be able to impose limits to the level of leverage that an AIFM can employ in AIFs under its management. ESMA and the ESRB should be informed about any actions taken in this respect.
- (51) It is also considered necessary to allow ESMA, after taking into account the advice of the ESRB, to determine that the leverage used by an AIFM or by a group of AIFMs poses a substantial risk to the stability and the integrity of the financial system and to issue advice to competent authorities specifying the remedial measures to be taken. [↪ Art. 25 AIFMD](#)
- (52) It is necessary to ensure that the competent authorities of the home Member State of the AIFM, the companies over which AIFs managed by an AIFM exercise control and the employees of such companies receive certain information necessary for those companies to assess how that control will impact their situation. [↪ Art. 27 AIFMD](#) | [↪ Art. 28 AIFMD](#) | [↪ Art. 29 AIFMD](#)
- (53) Where AIFMs manage AIFs which exercise control over an issuer whose shares are admitted to trading on a regulated market, information should generally be disclosed in accordance with Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids<sup>40</sup> and Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market<sup>41</sup>. Specific requirements should apply to AIFMs managing AIFs which exercise control over a non-listed company. In order to ensure transparency regarding the controlled company, enhanced transparency, disclosure and reporting requirements should apply. Further, the annual reports of the relevant AIF should be supplemented with regard to the controlled company or such additional information should be included in the annual report of the controlled company. Such information should be made available to the employees' representatives or, where there are none, the employees themselves, and to the investors of the relevant AIF.
- (54) Specific information requirements towards employees of certain companies apply in cases where AIFs acquire control over such companies in accordance with this Directive. However, in most cases the AIFM has no control over the AIF, unless it is an internally managed AIF. Furthermore, there is, in accordance with the general principles of company law, no direct relationship between the shareholders and the employees' representatives or, where there are none, the employees themselves. For those reasons, no direct information requirements towards the employees' representatives or, where there are none,

<sup>39</sup> OJ L 331, 15.12.2010, p. 1.

<sup>40</sup> OJ L 142, 30.4.2004, p. 12.

<sup>41</sup> OJ L 390, 31.12.2004, p. 38.

the employees themselves, can be imposed pursuant to this Directive on a shareholder or its manager, namely the AIF and the AIFM. As regards the information requirements towards such employees' representatives or, where there are none, the employees themselves, this Directive should provide for an obligation on the AIFM concerned to use its best efforts to ensure that the board of directors of the company concerned discloses the relevant information to the employees' representatives or, where there are none, the employees themselves.

[↪ Art. 27 AIFMD](#)

- (55) The Commission is invited to examine the need and the possibilities to amend the information and disclosure requirements applicable in cases of control over non-listed companies or issuers set out in this Directive on a general level, regardless of the type of investor. [↪ Art. 29 AIFMD](#)
- (56) Where an AIFM manages one or more AIFs which acquire control over a non-listed company, the AIFM should provide the competent authorities of its home Member State with information on the financing of the acquisition. That obligation to provide information on financing should also apply when an AIFM manages AIFs which acquire control over an issuer of shares admitted to trading on a regulated market. [↪ Art. 28 AIFMD](#)
- (57) Where an AIFM manages one or more AIFs which acquire control over a non-listed company or an issuer, the AIFM should, for a period of 24 months following the acquisition of control of the company by the AIFs, first, not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company in accordance with this Directive; second, in so far as the AIFM is authorised to vote on behalf of the AIFs at the meetings of governing bodies of the company, not vote in favour of a distribution, capital reduction, share redemption and/or acquisition of own shares by the company in accordance with this Directive; and third, in any event, use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares by the company in accordance with this Directive. When transposing this Directive into national law, the Member States should take into account the regulatory purpose of the provisions of Section 2 of Chapter V of this Directive and take due account in this context of the need for a level playing field between EU AIFs and non-EU AIFs when acquiring control in companies established in the Union. [↪ Art. 30 AIFMD](#)
- (58) The notification and disclosure requirements and the specific safeguards against asset stripping in the case of control over a non-listed company or an issuer should be subject to a general exception for control over small and medium-sized enterprises and special purpose vehicles with the purpose of purchasing, holding or administrating real estate. Further, those requirements do not aim at making public proprietary information which would put the AIFM at a disadvantage vis-à-vis potential competitors such as sovereign wealth funds or competitors that may want to put the target company out of business by using the information to their advantage. The obligations to notify and disclose information should therefore apply subject to the conditions and restrictions relating to confidential information set out in Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community<sup>42</sup> and without prejudice to Directives 2004/25/EC and 2004/109/EC. This means that Member States should provide that within the limits and conditions laid down by national law the employees' representatives, and anyone assisting them, are not authorised to reveal to employees and to third parties any information affecting the legitimate interests of the company that has expressly been provided to them in confidence. Member States should, however, be able to authorise the employees' representatives and anyone assisting them to pass on confidential information to employees and to third parties bound by an obligation of confidentiality. Member States should provide that the relevant AIFMs do not request the communication of information by the board of directors to the employees' representatives or, where there are none, the employees themselves, when the nature of that information is such that, according to objective criteria, it would seriously harm the functioning of the company concerned or would be prejudicial to it. The notification and disclosure requirements

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<sup>42</sup> OJ L 80, 23.3.2002, p. 29.

and the specific safeguards against asset stripping should also apply without prejudice to any stricter rules adopted by Member States.

[↪ Art. 26 AIFMD](#) | [↪ Art. 27 AIFMD](#) | [↪ Art. 28 AIFMD](#) | [↪ Art. 29 AIFMD](#)

- (59) This Directive also lays down the conditions subject to which EU AIFMs may market the units or shares of EU AIFs to professional investors in the Union. Such marketing by EU AIFMs should be allowed only in so far as the AIFM complies with this Directive and the marketing occurs with a passport, without prejudice to the marketing of AIFs by AIFMs falling below the thresholds provided for in this Directive. It should be possible for Member States to allow marketing of AIFs by AIFMs falling below those thresholds subject to national provisions. [↪ Art. 3 AIFMD](#) | [↪ Art. 31 AIFMD](#) | [↪ Art. 32 AIFMD](#)
- (60) It should be possible for units or shares of an AIF to be listed on a regulated market in the Union, or offered or placed by third parties acting on behalf of the AIFM, in a particular Member State only if the AIFM which manages the AIF is itself permitted to market the units or shares of the AIF in that Member State. In addition, other national and Union law, such as Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading<sup>43</sup> and Directive 2004/39/EC, may also regulate the distribution of AIFs to investors in the Union. [↪ Art. 31 AIFMD](#) | [↪ Art. 32 AIFMD](#)
- (61) Many EU AIFMs currently manage non-EU AIFs. It is appropriate to allow authorised EU AIFMs to manage non-EU AIFs without marketing them in the Union without imposing on them the strict depositary requirements and the requirements relating to the annual report provided for in this Directive, as those requirements have been included for the protection of Union investors.
- [↪ Art. 34 AIFMD](#)
- (62) After the entry into force of a delegated act adopted by the Commission in this regard, which will, in principle, taking into account the advice provided by ESMA, occur 2 years after the deadline for transposition of this Directive, authorised EU AIFMs intending to market non-EU AIFs to professional investors in their home Member State and/or in other Member States should be allowed to do so with a passport in so far as they comply with this Directive. That right should be subject to notification procedures and conditions in relation to the third country of the non-EU AIF. [↪ Art. 35 AIFMD](#)
- (63) During a transitional period, which will, in principle, taking into account ESMA's advice, be brought to an end by means of a delegated act 3 years after the establishment of the passport for non-EU AIFMs, EU AIFMs intending to market non-EU AIFs in certain Member States, but without a passport, should also be permitted to do so by the relevant Member States, but only in so far as they comply with this Directive with the exception of the depositary requirements. Such EU AIFMs should, however, ensure that one or more entities are appointed to carry out the duties of the depositary. In addition, appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards should be in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows the competent authorities of the home Member State of the AIFM to carry out their duties in accordance with this Directive. The cooperation arrangements should not be used as a barrier to impede non-EU AIFs from being marketed in a Member State. Further, the third country where the non-EU AIF is established should not be listed as a Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing (FATF). [↪ Art. 36 AIFMD](#)
- (64) After the entry into force of a delegated act adopted by the Commission in that regard, which will, in principle, taking into account advice given by ESMA, occur 2 years after the deadline for transposition of this Directive, a basic principle of this Directive should be that a non-EU AIFM is to benefit from the rights conferred under this Directive, such as to market units or shares of AIFs throughout the Union with a passport, subject to its compliance with this Directive. This should ensure a level playing field between EU and non-EU AIFMs. This Directive therefore provides for an authorisation applicable to non-EU AIFMs which will become applicable after the entry into force of the delegated act adopted by the

<sup>43</sup> OJ L 345, 31.12.2003, p. 64.

Commission in this regard. To ensure that such compliance is enforced, the competent authorities of a Member State should enforce compliance with this Directive. For such non-EU AIFMs the competent supervisory authorities should be the competent authorities of the Member State of reference, as defined in this Directive. [↪ Art. 37 AIFMD](#)

- (65) Therefore, where a non-EU AIFM intends to manage EU AIFs and/or market AIFs in the Union with a passport, it should also be required to comply with this Directive, so that it is subject to the same obligations as EU AIFMs. In very exceptional circumstances, if and to the extent compliance with a provision of this Directive is incompatible with compliance with the law to which the non-EU AIFM or the non-EU AIF marketed in the Union is subject, it should be possible for the non-EU AIFM to be exempted from compliance with the relevant provision of this Directive if it can demonstrate that: it is impossible to combine compliance with a provision of this Directive with compliance with a mandatory provision in the law to which the non-EU AIFM or the non-EU AIF marketed in the Union is subject; the law to which the non-EU AIFM or the non-EU AIF is subject provides for an equivalent rule having the same regulatory purpose and offering the same level of protection to the investors of the relevant AIF; and the non-EU AIFM or the non-EU AIF complies with that equivalent rule.
- (66) Further, a non-EU AIFM intending to manage EU AIFs and/or market AIFs in the Union with a passport should comply with a specific authorisation procedure and certain specific requirements concerning the third country of the non-EU AIFM and, as appropriate, the third country of the non-EU AIF should be satisfied.
- (67) ESMA should provide advice on the determination of the Member State of reference, and, where relevant, the exemption as regards compatibility with an equivalent rule. Specific requirements for the exchange of information between the competent authorities of the Member State of reference and the competent authorities of the host Member States of the AIFM should apply. Further, the mediation procedure provided for in Article 19 of Regulation (EU) No 1095/2010 should apply in case of disagreement between competent authorities of Member States on the determination of the Member State of reference, the application of the exemption in case of incompatibility between compliance with this Directive and compliance with equivalent rules of a third country, and the assessment regarding the fulfilment of the specific requirements concerning the third country of the non-EU AIFM and, as appropriate, the third country of the non-EU AIF. [↪ Art. 37 AIFMD](#)
- (68) ESMA should, on an annual basis, conduct a peer review analysis of the supervisory activities of the competent authorities in relation to the authorisation and the supervision of non-EU AIFMs, to further enhance consistency in supervisory outcomes, in accordance with Article 30 of Regulation (EU) No 1095/2010. [↪ Art. 38 AIFMD](#)
- (69) During a transitional period which will, in principle, taking into account ESMA's advice, be brought to an end by means of a delegated act 3 years after the establishment of the passport for non-EU AIFMs, a non-EU AIFM intending to market AIFs in certain Member States only and without such a passport should also be permitted to do so by the relevant Member States, but only in so far as certain minimum conditions are met. Those non-EU AIFMs should be subject at least to rules similar to those applicable to EU AIFMs managing EU AIFs with respect to the disclosure to investors. In order to facilitate the monitoring of systemic risk those non-EU AIFMs should also be subject to reporting obligations vis-à-vis the competent authorities of the Member State in which AIFs are marketed. Such AIFMs should therefore comply with the transparency requirements laid down in this Directive and the obligations on AIFMs managing AIFs which acquire control of non-listed companies and issuers. Further, appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards should be in place between the competent authorities of the Member States where the AIFs are marketed, if applicable, the competent authorities of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, if applicable, the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows competent authorities of the relevant Member States to carry out their duties in accordance with this Directive. The cooperation arrangements should not be used as a barrier to impede third country funds from being marketed in a Member State. Finally, the third country where the non-EU AIFM or the non-EU AIF is established should not be listed as a Non-Cooperative Country and Territory by FATF. [↪ Art. 42 AIFMD](#)

- (70) This Directive should not affect the current situation, whereby a professional investor established in the Union may invest in AIFs on its own initiative, irrespective of where the AIFM and/or the AIF is established.
- [↪ Art. 31 AIFMD](#) | [↪ Art. 32 AIFMD](#) | [↪ Chapter VII AIFMD](#)
- (71) Member States should be able to allow the marketing of all or certain types of AIFs managed by AIFMs to retail investors in their territory. If a Member State allows the marketing of certain types of AIF, the Member State should make an assessment on a case-by-case basis to determine whether a specific AIF should be considered as a type of AIF which may be marketed to retail investors in its territory. Without prejudice to the application of other instruments of Union law, Member States should in such cases be able to impose stricter requirements on AIFs and AIFMs as a precondition for marketing to retail investors than is the case for AIFs marketed to professional investors in their territory, irrespective of whether such AIFs are marketed on a domestic or cross-border basis. Where a Member State allows the marketing of AIFs to retail investors in its territory, this possibility should be available regardless of the Member State where the AIFM managing the AIFs is established, and Member States should not impose stricter or additional requirements on EU AIFs established in another Member State and marketed on a cross-border basis than on AIFs marketed domestically. In addition, AIFMs, investment firms authorised under Directive 2004/39/EC and credit institutions authorised under Directive 2006/48/EC which provide investment services to retail clients should take into account any additional requirements when assessing whether a certain AIF is suitable or appropriate for an individual retail client or whether it is a complex or non-complex financial instrument.
- [↪ Art. 43 AIFMD](#)
- (72) It is necessary to clarify the powers and duties of the competent authorities responsible for implementing this Directive, and to strengthen the mechanisms necessary to ensure effective cross-border supervisory cooperation. Under certain circumstances it should be possible for the competent authorities of the host Member States of an AIFM to take direct action to supervise compliance with provisions for which they are responsible. For other provisions the competent authorities of the host Member States should under certain circumstances be allowed to request action from the competent authorities of the home Member State and to intervene if no such action is undertaken.
- [↪ Art. 45 AIFMD](#)
- (73) This Directive provides for a general coordinating role for ESMA, and the possibility of binding mediation procedures, chaired by ESMA, to resolve disputes between competent authorities.
- [↪ Art. 47 AIFMD](#)
- (74) ESMA should develop draft regulatory technical standards on the contents of the cooperation arrangements that must be concluded by the home Member State or by the Member State of reference of the AIFM and the relevant third-country supervisory authorities and on the procedures for the exchange of information. The draft regulatory technical standards should ensure that pursuant to those cooperation arrangements all necessary information is to be provided to enable the competent authorities of both the home and the host Member States to exercise their supervisory and investigatory powers under this Directive. ESMA should also have a facilitating role in the negotiation and conclusion of the cooperation arrangements. For example, ESMA should be able to use its facilitating role by providing for a standard format for such cooperation arrangements.
- [↪ Art. 34 AIFMD](#) | [↪ Art. 35 AIFMD](#) | [↪ Art. 36 AIFMD](#) | [↪ Art. 37 AIFMD](#) | [↪ Art. 40 AIFMD](#) | [↪ Art. 42 AIFMD](#)
- (75) Member States should lay down rules on penalties applicable to infringements of this Directive and ensure that they are implemented. The penalties should be effective, proportionate and dissuasive.
- [↪ Art. 48 AIFMD](#)
- (76) This Directive respects the fundamental rights and observes the principles recognised, in particular, in the TFEU and in the Charter of Fundamental Rights of the European Union (Charter), in particular the right to the protection of personal data recognised in Article 16 TFEU and in Article 8 of the Charter. Any

exchange or transmission of information by competent authorities should be in accordance with the rules on the transfer of personal data as laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>44</sup>. Any exchange or transmission of information by ESMA should be in accordance with the rules on the transfer of personal data as laid down in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data<sup>45</sup>, which should be fully applicable to the processing of personal data for the purposes of this Directive. [↪ Art. 52 AIFMD](#)

- (77) In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers<sup>46</sup>.
- (78) The Commission should be empowered to adopt delegated acts in accordance with Article 290 TFEU where expressly provided for in this Directive. In particular, the Commission should be empowered to adopt delegated acts to specify the methods of leverage as defined in this Directive, including any financial and/or legal structures involving third parties controlled by the relevant AIF where those structures are specifically set up to directly or indirectly create leverage at the level of the AIF. In particular for private equity and venture capital funds this means that leverage that exists at the level of a portfolio company is not intended to be included when referring to such financial or legal structures. [↪ Art. 3 AIFMD](#) | [↪ Art. 25 AIFMD](#) | [Appendix XIV \(Q&A published by ESMA Section VII Calculation of Leverage Question 1\)](#)
- (79) Delegated acts should also be adopted to specify how to calculate the thresholds for the lighter regime and how to treat AIFMs whose assets under management, including any assets acquired through use of leverage, in one and the same calendar year occasionally exceed and/or fall below the relevant threshold; to specify the obligations to register for the AIFMs falling below the thresholds and to provide information in order to effectively monitor systemic risk and the obligation for such AIFMs to notify the relevant competent authorities where they no longer fulfil the conditions for application of the lighter regime.
- (80) Delegated acts should also be adopted to clarify the methods of leverage, including any financial and/or legal structures involving third parties controlled by the relevant AIF and how leverage is to be calculated; to specify the risks the additional own funds or the professional indemnity insurance must cover, the conditions for determining the appropriateness of additional own funds or the coverage of the professional indemnity insurance, and the manner of determining ongoing adjustments of the additional own funds or of the coverage of the professional indemnity insurance. Delegated acts should also be adopted to specify the criteria to be used by competent authorities to assess whether AIFMs comply with their obligations as regards their conduct of business, their obligation to act in the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market; to have and employ effectively the resources and procedures that are necessary for the proper performance of their business activities; to take all reasonable steps to avoid conflicts of interest and, where such conflicts cannot be avoided, to identify, manage and monitor, and where applicable, disclose, those conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors and to ensure that the AIFs they manage are fairly treated; to comply with all regulatory requirements applicable to the conduct of their business activities so as to promote the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market; and to treat all AIF investors fairly. [↪ Art. 3 AIFMD](#) | [↪ Art. 9 AIFMD](#) | [↪ Art. 12 AIFMD](#)

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<sup>44</sup> OJ L 281, 23.11.1995, p. 31.

<sup>45</sup> OJ L 8, 12.1.2001, p. 1.

<sup>46</sup> OJ L 55, 28.2.2011, p. 13.

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

[↪ Art. 14 AIFMD](#) | [↪ Art. 15 AIFMD](#) | [↪ Art. 16 AIFMD](#)

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

[↪ Art. 18 AIFMD](#) | [↪ Art. 19 AIFMD](#)

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

[↪ Art. 20 AIFMD](#) | [↪ Art. 21 AIFMD](#) | [↪ Art. 22 AIFMD](#) | [↪ Art. 23 AIFMD](#) | [↪ Art. 24 AIFMD](#)

- (84) Delegated acts should also be adopted to specify when leverage is considered to be employed on a substantial basis and the principles competent authorities should use when considering imposing limits to the level of leverage that an AIFM can apply. Delegated acts should also be adopted to specify the cooperation arrangements in relation to non-EU AIFMs and/or non-EU AIFs in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries. Delegated acts should also be adopted to specify the content of exchange of information regarding AIFMs between competent authorities and the provision of certain information to ESMA.

[↪ Art. 25 AIFMD](#) | [↪ Art. 34 AIFMD](#) | [↪ Art. 35 AIFMD](#) | [↪ Art. 36 AIFMD](#) | [↪ Art. 37 AIFMD](#) | [↪ Art. 40 AIFMD](#) | [↪ Art. 42 AIFMD](#) | [↪ Art. 53 AIFMD](#)

- (85) Depending on the advice of ESMA in this regard and the criteria set out in this Directive, a delegated act should also be adopted in order to extend the passport to EU AIFMs marketing non-EU AIFs in the Union

and to non-EU AIFMs managing and/or marketing AIFs in the Union, and another delegated act should be adopted to terminate the application of national private placement regimes in this regard.

[↪ Art. 67 AIFMD](#) | [↪ Art. 68 AIFMD](#)

- (86) The European Parliament and the Council should have 3 months from the date of notification to object to a delegated act. At the initiative of the European Parliament or the Council, it should be possible to prolong that period by 3 months in regard to significant areas of concern. It should also be possible for the European Parliament and the Council to inform the other institutions of their intention not to raise objections. Such early approval of delegated acts is particularly important where deadlines need to be met, for example to allow Member States to transpose delegated acts within the transposition period laid down in this Directive. [↪ Art. 58 AIFMD](#)
- (87) In the Declaration on Article 290 of the Treaty on the Functioning of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, the Conference took note of the Commission's intention to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area, in accordance with its established practice.
- (88) 2 years after the deadline for transposition of this Directive, ESMA should issue an opinion on the functioning of the passport then in force and on the functioning of national private placement regimes. It should also issue advice on the extension of the passport to EU AIFMs marketing non-EU AIFs in the Union and to non-EU AIFMs managing and/or marketing AIFs in the Union. The Commission should adopt a delegated act within 3 months after having received that opinion and advice from ESMA and taking into account the criteria listed in, and the objectives of, this Directive, inter alia, regarding the internal market, investor protection and the effective monitoring of systemic risk, specifying the date when the rules relating to the extension of the passport provided for in this Directive should become applicable in all Member States. [↪ Art. 67 AIFMD](#)
- (89) At the April 2009 summit in London, G20 Leaders agreed that hedge funds or their managers should be registered and should be required to disclose appropriate information on an ongoing basis to supervisors or regulators. They should be subject to oversight to ensure that they have adequate risk management. In June 2010, G20 Leaders in Toronto reaffirmed their commitment and also committed to accelerate the implementation of strong measures to improve transparency and regulatory oversight of hedge funds in an internationally consistent and non-discriminatory way. In order to support the G20 objectives, the International Organization of Securities Commissions issued high level principles of hedge fund oversight in June 2009 to guide the development of internationally consistent regulation in this area. On 16 September 2010 the European Council agreed on the need for Europe to promote its interest and values more assertively and in a spirit of reciprocity and mutual benefit in the context of the Union's external relations and to take steps to, inter alia, secure greater market access for European business and deepen regulatory cooperation with major trade partners. The Commission will endeavour to ensure that these commitments are implemented in a similar way by the Union's international partners.
- (90) 3 years after the entry into force of the delegated act pursuant to which the passport is to apply to all AIFMs, ESMA should issue an opinion on the functioning of the passport then in force and on the functioning of national private placement regimes. It should also issue advice on the termination of those national regimes. The Commission should adopt a delegated act within 3 months of receipt of the opinion and advice from ESMA, taking into account the criteria listed in, and the objectives of, this Directive, inter alia, relating to the internal market, investor protection and the effective monitoring of systemic risk, specifying the date when the national regimes referred to in this Directive should be brought to an end in all Member States. [↪ Art. 68 AIFMD](#)
- (91) 4 years after the deadline for transposition of this Directive, the Commission should, on the basis of public consultation and in the light of the discussions with competent authorities, commence a review of the application and the scope of this Directive. That review should analyse the experience acquired in applying this Directive, its impact on investors, AIFs or AIFMs, in the Union and in third countries, and the extent to which the objectives of this Directive have been achieved, if necessary proposing appropriate amendments. That review should include a general survey of the functioning of the rules

laid down in this Directive and the experience acquired in applying them. The Commission should in its review examine the functions of ESMA and the Union competent authorities in ensuring effective supervision of all AIFMs operating in the Union markets in the context of this Directive, including, inter alia – in accordance with Regulation (EU) No 1095/2010 – entrusting ESMA with further supervisory responsibilities in the field of authorisation and supervision of non-EU AIFMs. In this context the Commission should assess the costs and benefits of entrusting ESMA with such tasks.

[↪ Art. 69 AIFMD](#)

- (92) This Directive aims at establishing a framework capable of addressing the potential risks which might arise from the activities of AIFMs and ensuring the effective monitoring of those risks by the competent authorities within the Union. It is necessary to provide for a stringent regulatory and supervisory framework which leaves no gaps in financial regulation. In that regard reference is made to the existing due diligence requirements applicable to professional investors pursuant to the relevant regulation applicable to such investors. The Commission is invited to review the relevant legislation with respect to professional investors in order to assess the need for tighter requirements regarding the due diligence process to be undertaken by Union professional investors investing on their own initiative in non-EU financial products, such as non-EU AIFs.
- (93) At the end of its review, the Commission should present a report to the European Parliament and the Council including, if appropriate, proposed amendments taking into account the objectives of this Directive and potential impacts on investors, AIFs or AIFMs, in the Union and in third countries.

[↪ Art. 69 AIFMD](#)

- (94) Since the objective of this Directive, namely to ensure a high level of investor protection by laying down a common framework for the authorisation and supervision of AIFMs, cannot be sufficiently achieved by the Member States, as evidenced by the deficiencies of existing nationally based regulation and oversight of those actors, and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (95) Directives 2003/41/EC and 2009/65/EC, Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies<sup>47</sup> and Regulation (EU) No 1095/2010 should therefore be amended accordingly.

[↪ Art. 62 AIFMD](#) | [↪ Art. 63 AIFMD](#) | [↪ Art. 64 AIFMD](#) | [↪ Art. 65 AIFMD](#)

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<sup>47</sup> OJ L 302, 17.11.2009, p. 1.

**HAVE ADOPTED THIS DIRECTIVE:**

**CHAPTER I**

**GENERAL PROVISIONS**

**Article 1 AIFMD**

**Subject matter**

[Art. 2 AIFM Law]

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

## Article 2 AIFMD

### Scope

[Art. 2 AIFM Law]

- **Recitals 6, 7, 8 and 13 of the Level 1 AIFM Directive**
- **Q&A published by EU Commission (Appendix X) ID 1164 And 1169 Scope and exemptions**

1. Subject to paragraph 3 of this Article and to Article 3, this Directive shall apply to:
  - (a) EU AIFMs which manage one or more AIFs irrespective of whether such AIFs are EU AIFs or non-EU AIFs;
  - (b) non-EU AIFMs which manage one or more EU AIFs; and
  - (c) non-EU AIFMs which market one or more AIFs in the Union irrespective of whether such AIFs are EU AIFs or non-EU AIFs.
2. For the purposes of paragraph 1, the following shall be of no significance:
  - (a) whether the AIF belongs to the open-ended or closed-ended type;
  - (b) whether the AIF is constituted under the law of contract, under trust law, under statute, or has any other legal form;
  - (c) the legal structure of the AIFM.
3. This Directive shall not apply to the following entities:

- **Q&A published by EU Commission (Appendix X) ID 1145 and 1160 Scope and exemptions**

- (a) holding companies;

- **Q&A published by EU Commission (Appendix X) ID 1146 Scope and exemptions**

- (b) institutions for occupational retirement provision which are covered by Directive 2003/41/EC, including, where applicable, the authorised entities responsible for managing such institutions and acting on their behalf referred to in Article 2(1) of that Directive or the investment managers appointed pursuant to Article 19(1) of that Directive, in so far as they do not manage AIFs;

- **Q&A published by EU Commission (Appendix X) ID 1148 Scope and exemptions**

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

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

- ***Q&A published by EU Commission (Appendix X) ID 1148 Scope and exemptions***

(f) employee participation schemes or employee savings schemes;

- ***Q&A published by EU Commission (Appendix X) ID 1155 Scope and exemptions***

(g) securitisation special purpose entities.

- ***Q&A published by EU Commission (Appendix X) ID 1157 Scope and exemptions***

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

## Article 3 AIFMD

### Exemptions

[Art. 3 AIFM Law]

- **Recitals 16, 17, 59, and 78 to 80 of the Level 1 AIFM Directive**
- **Explanatory Memorandum section 3.2.1 (Appendix I) and Recitals 4 to 10 of the Level 2 AIFM Regulation (Appendix II)**
- **Annex IV of the Level 2 AIFM Regulation: Reporting templates (Appendix VI)**
- **ESMA Guidelines on reporting obligations under Articles 3 and 24 of the AIFMD (Appendix XIII)**
- **Q&A published by EU Commission (Appendix X) ID 1152 Own funds ID 1165, 1166, 1167 and 1168 Scope and exemptions ID 1193 Marketing to retail investors, ID 1206 Passport issues**
- **Commission Implementing Regulation (EU) 447/2013 of 15 May 2013 establishing the procedure for AIFMs which choose to opt in (Appendix XI)**
- **Q&A published by ESMA (Appendix XIV) Section II, Notifications of AIFs Question 10, Section III Reporting, Section IX Calculation of the total value of assets under management Question 3, Section XVI, Exemptions Question 1**

1. This Directive shall not apply to AIFMs in so far as they manage one or more AIFs whose only investors are the AIFM or the parent undertakings or the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, provided that none of those investors is itself an AIF.
2. Without prejudice to the application of Article 46, only paragraphs 3 and 4 of this Article shall apply to the following AIFMs:
  - (a) AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million; or
  - (b) AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management in total do not exceed a threshold of EUR 500 million when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.

#### *Article 2 Calculation of the total value of assets under management (Level 2 AIFM Regulation)*

1. In order to qualify for the exemption provided for in Article 3(2) of Directive 2011/61/EU an AIFM shall:

- (a) identify all AIFs for which it is appointed as the external AIFM or the AIF for which it is the AIFM, where the legal form of the AIF permits internal management, in accordance with Article 5 of Directive 2011/61/EU;
- (b) identify for each managed AIF the portfolio of assets and determine in accordance with the valuation rules laid down in the law of the country where the AIF is established and, as the case may be or in the AIF rules or instruments of incorporation the corresponding value of assets under management, including all assets acquired through use of leverage;
- (c) aggregate the determined values of assets under management for all AIFs managed and compare the resulting total value of assets under management to the relevant threshold laid down in Article 3(2) of Directive 2011/61/EU.

2. For the purposes of paragraph 1, undertakings for collective investment in transferable securities (UCITS) for which the AIFM acts as the designated management company under Directive 2009/65/EC shall not be included in the calculation.

For the purposes of paragraph 1, AIFs managed by the AIFM for which the AIFM has delegated functions in accordance with Article 20 of Directive 2011/61/EU shall be included in the calculation. However, portfolios of AIFs that the AIFM is managing under delegation shall be excluded from the calculation.

3. For the purpose of calculating the total value of assets under management, each derivative instrument position, including any derivative embedded in transferable securities shall be converted into its equivalent position in the underlying assets of that derivative using the conversion methodologies set out in Article 10. The absolute value of that equivalent position shall then be used for the calculation of the total value of assets under management.

4. Where an AIF invests in other AIFs managed by the same externally appointed AIFM, that investment may be excluded from the calculation of the AIFM's assets under management.

5. Where one compartment within an internally or externally managed AIF invests in another compartment of that AIF, that investment may be excluded from the calculation of the AIFM's assets under management.

6. The total value of assets under management shall be calculated in accordance with paragraphs 1 to 4 at least annually and using the latest available asset values. The latest available asset value for each AIF shall be produced during the twelve months preceding the date of the calculation of the threshold in accordance with the first sentence of this paragraph. The AIFM shall determine a threshold calculation date and apply it in a consistent manner. Any subsequent change to the date chosen must be justified to the competent authority. In selecting the threshold calculation date, the AIFM shall take into account the time and frequency of the valuation of the assets under management.

- **Q&A published by ESMA (Appendix XIV) Section III Reporting Question 71, Section IX Calculation of the total value of assets under management Question 1, Question 2, Question 3**

### **Article 3 Ongoing monitoring of assets under management (Level 2 AIFM Regulation)**

AIFMs shall establish, implement and apply procedures to monitor on an ongoing basis the total value of assets under management. Monitoring shall reflect an up-to-date overview of the assets under management and shall include the observation of subscription and redemption activity or, where applicable, capital draw downs, capital distributions and the value of the assets invested in for each AIF.

The proximity of the total value of assets under management to the threshold set in Article 3(2) of Directive 2011/61/EU and the anticipated subscription and redemption activity shall be taken into account in order to assess the need for more frequent calculations of the total value of assets under management.

### **Article 4 Occasional breach of the threshold (Level 2 AIFM Regulation)**

1. The AIFM shall assess situations where the total value of assets under management exceeds the relevant threshold in order to determine whether or not they are of a temporary nature.

2. Where the total value of assets under management exceeds the relevant threshold and the AIFM considers that the situation is not of a temporary nature, the AIFM shall notify the competent authority without delay

*stating that the situation is considered not to be of a temporary nature and shall seek authorisation within 30 calendar days in accordance with Article 7 of Directive 2011/61/EU.*

*3. Where the total value of assets under management exceeds the relevant threshold and the AIFM considers that the situation is of a temporary nature, the AIFM shall notify the competent authority without delay, stating that the situation is considered to be of a temporary nature. The notification shall include supporting information to justify the AIFM's assessment of the temporary nature of the situation, including a description of the situation and an explanation of the reasons for considering it temporary.*

*4. A situation shall not be considered of a temporary nature if it is likely to continue for a period in excess of three months.*

*5. Three months after the date on which the total value of assets under management exceeds the relevant threshold the AIFM shall recalculate the total value of assets under management in order to demonstrate that it is below the relevant threshold or demonstrate to the competent authority that the situation which resulted in the assets under management exceeding the threshold has been resolved and an application for authorisation of the AIFM is not required.*

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

- (a) are subject to registration with the competent authorities of their home Member State;
- (b) identify themselves and the AIFs that they manage to the competent authorities of their home Member State at the time of registration;
- (c) provide information on the investment strategies of the AIFs that they manage to the competent authorities of their home Member State at the time of registration;
- (d) regularly provide the competent authorities of their home Member State with information on the main instruments in which they are trading and on the principal exposures and most important concentrations of the AIFs that they manage in order to enable the competent authorities to monitor systemic risk effectively; and
- (e) notify the competent authorities of their home Member State in the event that they no longer meet the conditions referred to in paragraph 2.

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

### *Article 5 Information to be provided as part of registration (Level 2 AIFM Regulation)*

*1. As part of the requirement in Article 3(3)(b) of Directive 2011/61/EU, AIFMs shall communicate to the competent authorities the total value of assets under management calculated in accordance with the procedure set out in Article 2.*

*2. As part of the requirement in Article 3(3)(c) of Directive 2011/61/EU AIFMs shall provide for each AIF the offering document or a relevant extract from the offering document or a general description of the investment strategy. The relevant extract from the offering document and the description of the investment strategy shall include at least the following information:*

- (a) the main categories of assets in which the AIF may invest;*
- (b) any industrial, geographic or other market sectors or specific classes of assets which are the focus of the investment strategy;*
- (c) a description of the AIF's borrowing or leverage policy.*

3. Information to be provided by the AIFM under point (d) of Article 3(3) of Directive 2011/61/EU is listed in Article 110(1) of this Regulation. It shall be provided in accordance with the pro-forma reporting template as set out in the Annex IV.

4. Information collected in accordance with Article 3(3)(d) of Directive 2011/61/EU shall be shared between competent authorities in the Union, with the European Securities and Markets Authority (ESMA) and the European Systemic Risk Board (ESRB) where necessary for the fulfilment of their duties.

5. The information required for registration purposes shall be updated and provided on an annual basis. For reasons relating to the exercise of their powers under Article 46 of Directive 2011/61/EU, the competent authorities may require an AIFM to provide the information referred to in Article 3 of Directive 2011/61/EU on a more frequent basis.

### *Article 110 Reporting to competent authorities (Level 2 AIFM Regulation)*

1. In order to comply with the requirements of the second subparagraph of Article 24(1) and of point (d) of Article 3(3) of Directive 2011/61/EU, an AIFM shall provide the following information when reporting to competent authorities:

- (a) the main instruments in which it is trading, including a break-down of financial instruments and other assets, including the AIF's investment strategies and their geographical and sectoral investment focus;
- (b) the markets of which it is a member or where it actively trades;
- (c) the diversification of the AIF's portfolio, including, but not limited to, its principal exposures and most important concentrations.

The information shall be provided as soon as possible and not later than one month after the end of the period referred to in paragraph 3. Where the AIF is a fund of funds this period may be extended by the AIFM by 15 days.

2. For each of the EU AIFs they manage and for each of the AIFs they market in the Union, AIFMs shall provide to the competent authorities of their home Member State the following information in accordance with Article 24(2) of Directive 2011/61/EU:

- (a) the percentage of the AIF's assets which are subject to special arrangements as defined in Article 1(5) of this Regulation arising from their illiquid nature as referred to in point (a) of Article 23(4) of Directive 2011/61/EU;
- (b) any new arrangements for managing the liquidity of the AIF;
- (c) the risk management systems employed by the AIFM to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk;
- (d) the current risk profile of the AIF, including:
  - (i) the market risk profile of the investments of the AIF, including the expected return and volatility of the AIF in normal market conditions;
  - (ii) the liquidity profile of the investments of the AIF, including the liquidity profile of the AIF's assets, the profile of redemption terms and the terms of financing provided by counterparties to the AIF;

- (e) *information on the main categories of assets in which the AIF invested including the corresponding short market value and long market value, the turnover and performance during the reporting period; and*
- (f) *the results of periodic stress tests, under normal and exceptional circumstances, performed in accordance with point (b) of Article 15(3) and the second subparagraph of Article 16(1) of Directive 2011/61/EU.*

3. *The information referred to in paragraphs 1 and 2 shall be reported as follows:*

- (a) *on a half-yearly basis by AIFMs managing portfolios of AIFs whose assets under management calculated in accordance with Article 2 in total exceed the threshold of either EUR 100 million or EUR 500 million laid down in points (a) and (b) respectively of Article 3(2) of Directive 2011/61/EU but do not exceed EUR 1 billion, for each of the EU AIFs they manage and for each of the AIFs they market in the Union;*
- (b) *on a quarterly basis by AIFMs managing portfolios of AIFs whose assets under management calculated in accordance with Article 2 in total exceed EUR 1 billion, for each of the EU AIFs they manage, and for each of the AIFs they market in the Union;*
- (c) *on a quarterly basis by AIFMs which are subject to the requirements referred to in point (a) of this paragraph, for each AIF whose assets under management, including any assets acquired through use of leverage, in total exceed EUR 500 million, in respect of that AIF;*
- (d) *on an annual basis by AIFMs in respect of each unleveraged AIF under their management which, in accordance with its core investment policy, invests in non-listed companies and issuers in order to acquire control.*

4. *By way of derogation from paragraph 3, the competent authority of the home Member State of the AIFM may deem it appropriate and necessary for the exercise of its function to require all or part of the information to be reported on a more frequent basis.*

5. *AIFMs managing one or more AIFs which they have assessed to be employing leverage on a substantial basis in accordance with Article 111 of this Regulation shall provide the information required under Article 24(4) of Directive 2011/61/EU at the same time as that required under paragraph 2 of this Article.*

6. *AIFMs shall provide the information specified under paragraphs 1, 2 and 5 in accordance with the pro-forma reporting template set out in the Annex IV.*

7. *In accordance with point (a) of Article 42(1) of Directive 2011/61/EU, for non-EU AIFMs, any reference to the competent authorities of the home Member State shall mean the competent authority of the Member State of reference.*

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

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

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

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

- (a) how the thresholds referred to in paragraph 2 are to be calculated and the treatment of AIFMs which manage AIFs whose assets under management, including any assets acquired through the use of leverage, occasionally exceed and/or fall below the relevant threshold in the same calendar year;
- (b) the obligation to register and to provide information in order to allow effective monitoring of systemic risk as set out in paragraph 3; and
- (c) the obligation to notify competent authorities as set out in paragraph 3.

## Article 4 AIFMD

### Definitions

[Art. 1 AIFM Law]

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

- (a) "AIFs" means collective investment undertakings, including investment compartments thereof, which:
- (i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
  - (ii) do not require authorisation pursuant to Article 5 of Directive 2009/65/EC;

- *ESMA Final Report on guidelines on key concepts of the AIFMD (Appendix IX)*
- *Q&A published by EU Commission (Appendix X) ID 1164 Scope and exemptions, ID 1170, 1171 and 1172 Definition of an AIF*
- *Q&A published by ESMA (Appendix XIV), Section XI Scope Question 3*

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

#### *Article 1 Definitions (Level 2 AIFM Regulation)*

*In addition to the definitions laid down in Article 2 of Directive 2011/61/EU, the following definitions apply for the purposes of this Regulation*

*(1) "capital commitment" means the contractual commitment of an investor to provide the alternative investment fund (AIF) with an agreed amount of investment on request by the AIFM;*

*(...)*

- (d) "carried interest" means a share in the profits of the AIF accrued to the AIFM as compensation for the management of the AIF and excluding any share in the profits of the AIF accrued to the AIFM as a return on any investment by the AIFM into the AIF;
- (e) "close links" means a situation in which two or more natural or legal persons are linked by:
- (i) participation namely ownership, directly or by way of control, of 20% or more of the voting rights or capital of an undertaking;
  - (ii) control, namely the relationship between a parent undertaking and a subsidiary, as referred to in Article 1 of the Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts<sup>48</sup>, or a similar relationship between a natural or legal person and an undertaking; for the purposes of this point a subsidiary undertaking of a subsidiary undertaking shall also be considered to be a subsidiary of the parent undertaking of those subsidiaries.

<sup>48</sup> OJ L 193, 18.7.1983, p. 1.

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

- (f) "competent authorities" means the national authorities of Member States which are empowered by law or regulation to supervise AIFMs;
- (g) "competent authorities" in relation to a depositary means:
  - (i) if the depositary is a credit institution authorised under Directive 2006/48/EC, the competent authorities as defined in point (4) of Article 4 thereof;
  - (ii) if the depositary is an investment firm authorised under Directive 2004/39/EC, the competent authorities as defined in point (22) of Article 4(1) thereof;
  - (iii) if the depositary falls within a category of institution referred to in point (c) of the first subparagraph of Article 21(3) of this Directive, the national authorities of its home Member State which are empowered by law or regulation to supervise such categories of institution;
  - (iv) if the depositary is an entity referred to in the third subparagraph of Article 21(3) of this Directive, the national authorities of the Member State in which that entity has its registered office and which are empowered by law or regulation to supervise such entity or the official body competent to register or supervise such entity pursuant to the rules of professional conduct applicable thereto;
  - (v) if the depositary is appointed as depositary for a non-EU AIF in accordance with point (b) of Article 21(5) of this Directive and does not fall within the scope of points (i) to (iv) of this point, the relevant national authorities of the third country where the depositary has its registered office;
- (h) "competent authorities of the EU AIF" means the national authorities of a Member State which are empowered by law or regulation to supervise AIFs;
- (i) "control" means control as defined in Article 1 of Directive 83/349/EEC;
- (j) "established" means:
  - (i) for AIFMs "having its registered office in";
  - (ii) for AIFs, "being authorised or registered in", or, if the AIF is not authorised or registered, "having its registered office in";
  - (iii) for depositaries, "having its registered office or branch in";

▪ **Q&A published by EU Commission (Appendix X) ID 1174 Depositary**

- (iv) for legal representatives that are legal persons, "having its registered office or branch in";
- (v) for legal representatives that are natural persons, "domiciled in";
- (k) "EU AIF" means:
  - (i) an AIF which is authorised or registered in a Member State under the applicable national law; or
  - (ii) an AIF which is not authorised or registered in a Member State, but has its registered office and/or head office in a Member State;

▪ **Q&A published by EU Commission (Appendix X) ID 1191 Definition of an AIF**

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

- (m) "feeder AIF" means an AIF which:
- (i) invests at least 85% of its assets in units or shares of another AIF (the "master AIF");
  - (ii) invests at least 85% of its assets in more than one master AIFs where those master AIFs have identical investment strategies; or
  - (iii) has otherwise an exposure of at least 85% of its assets to such a master AIF;
- (n) "financial instrument" means an instrument as specified in Section C of Annex I to Directive 2004/39/EC;

*Article 1 Definitions  
(Level 2 AIFM Regulation)*

(...)

*(4) "governing body" means the body with ultimate decision making authority in an AIFM, comprising the supervisory and the managerial functions, or only the managerial function if the two functions are separated;*

(...)

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

- **Recital 8 of the Level 1 AIFM Directive**
- **Q&A published by EU Commission (Appendix X) ID 1146 Scope and exemptions**
- **Q&A published by ESMA (Appendix XIV), Section XI Scope Question 3**

- (i) operating on its own account and whose shares are admitted to trading on a regulated market in the Union; or
  - (ii) not established for the main purpose of generating returns for its investors by means of divestment of its subsidiaries or associated companies, as evidenced in its annual report or other official documents;
- (p) "home Member State of the AIF" means:
- (i) the Member State in which the AIF is authorised or registered under applicable national law, or in case of multiple authorisations or registrations, the Member State in which the AIF has been authorised or registered for the first time; or
  - (ii) if the AIF is neither authorised nor registered in a Member State, the Member State in which the AIF has its registered office and/or head office;
- (q) "home Member State of the AIFM" means the Member State in which the AIFM has its registered office; for non-EU AIFMs, all references to "home Member State of the AIFM" in this Directive shall be read as the "Member State of reference", as provided for in Chapter VII;
- (r) "host Member State of the AIFM" means any of the following:
- (i) a Member State, other than the home Member State, in which an EU AIFM manages EU AIFs;
  - (ii) a Member State, other than the home Member State, in which an EU AIFM markets units or shares of an EU AIF;

- (iii) a Member State, other than the home Member State, in which an EU AIFM markets units of shares of a non-EU AIF;
  - (iv) a Member State, other than the Member State of reference, in which a non-EU AIFM manages EU AIFs;
  - (v) a Member State, other than the Member State of reference, in which a non-EU AIFM markets units or shares of an EU AIF;
  - (vi) a Member State, other than the Member State of reference, in which a non-EU AIFM markets units or shares of a non-EU AIF; or
  - (vii) a Member State, other than the home Member State, in which an EU AIFM provides the services referred to in Article 6(4);
- (s) "initial capital" means funds as referred to in points (a) and (b) of the first paragraph of Article 57 of Directive 2006/48/EC;
- (t) "issuer" means an issuer within the meaning of point (d) of Article 2(1) of Directive 2004/109/EC where that issuer has its registered office in the Union, and where its shares are admitted to trading on a regulated market within the meaning of point (14) of Article 4(1) of Directive 2004/39/EC;
- (u) "legal representative" means a natural person domiciled in the Union or a legal person with its registered office in the Union, and which, expressly designated by a non-EU AIFM, acts on behalf of such non-EU AIFM vis-à-vis the authorities, clients, bodies and counterparties to the non-EU AIFM in the Union with regard to the non-EU AIFM's obligations under this Directive;
- (v) "leverage" means any method by which the AIFM increases the exposure of an AIF it manages whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means;

- **Article 23.5, 24 and 25 of the Level I AIFM Directive**
- **Explanatory Memorandum section 3.2.2 (Appendix I) and Recitals 11 to 31 of the Level 2 AIFM Regulation (Appendix II)**
- **Annex I of the Level 2 AIFM Regulation: Methods of increasing the exposure of an AIF (Appendix III)**
- **Annex II of the Level 2 AIFM Regulation: Conversion methodologies for derivative instruments (Appendix IV)**
- **Annex III of the Level 2 AIFM Regulation: Duration netting rules (Appendix V)**

### **Article 6 General provisions on the calculation of leverage (Level 2 AIFM Regulation)**

*1. Leverage of an AIF shall be expressed as the ratio between the exposure of an AIF and its net asset value.*

*2. AIFMs shall calculate the exposure of the AIFs managed in accordance with the gross method as set out in Article 7 and the commitment method as set out in Article 8.*

*The Commission shall review, in the light of market developments and no later than 21 July 2015, the calculation methods referred to in the first sub-paragraph in order to decide whether these methods are sufficient and appropriate for all types of AIFs, or an additional and optional method for calculating leverage should be developed.*

*3. Exposure contained in any financial or legal structures involving third parties controlled by the relevant AIF shall be included in the calculation of the exposure where the structures referred to are specifically set up to directly or indirectly increase the exposure at the level of the AIF. For AIFs whose core investment policy is to acquire control of non-listed companies or issuers, the AIFM shall not include in the calculation of the leverage*

*any exposure that exists at the level of those non-listed companies and issuers provided that the AIF or the AIFM acting on behalf of the AIF does not have to bear potential losses beyond its investment in the respective company or issuer.*

*4. AIFMs shall exclude borrowing arrangements entered into if these are temporary in nature and are fully covered by contractual capital commitments from investors in the AIF.*

*5. An AIFM shall have appropriately documented procedures to calculate the exposure of each AIF under its management in accordance with the gross method and the commitment method. The calculation shall be applied consistently over time.*

- **Q&A published by ESMA (Appendix XIV) Section VII Calculation of Leverage [Question 1](#), [Question 7](#), [Question 8](#)**

### *Article 7 Gross method for calculating the exposure of the AIF (Level 2 AIFM Regulation)*

*The exposure of an AIF calculated in accordance with the gross method shall be the sum of the absolute values of all positions valued in accordance with Article 19 of Directive 2011/61/EU and all delegated acts adopted pursuant to it.*

*For the calculation of the exposure of an AIF in accordance with the gross method an AIFM shall:*

- (a) exclude the value of any cash and cash equivalents which are highly liquid investments held in the base currency of the AIF, that are readily convertible to a known amount of cash, are subject to an insignificant risk of change in value and provide a return no greater than the rate of a three-month high quality government bond;*
- (b) convert derivative instruments into the equivalent position in their underlying assets using the conversion methodologies set out in Article 10 and the methods set out in paragraphs (4) to (9) and (14) of Annex I;*
- (c) exclude cash borrowings that remain in cash or cash equivalent as referred to in point (a) and where the amounts of that payable are known;*
- (d) include exposure resulting from the reinvestment of cash borrowings, expressed as the higher of the market value of the investment realised or the total amount of the cash borrowed as referred to in paragraphs (1) and (2) of Annex I;*
- (e) include positions within repurchase or reverse repurchase agreements and securities lending or borrowing or other arrangements in accordance with paragraphs (3) and (10) to (13) of Annex I.*

- **Q&A published by ESMA (Appendix XIV) Section VII Calculation of Leverage [Question 4](#)**

### *Article 8 Commitment method for calculating the exposure of an AIF (Level 2 AIFM Regulation)*

*1. The exposure of an AIF calculated in accordance with the commitment method shall be the sum of the absolute values of all positions valued in accordance with Article 19 of Directive 2011/61/EU and its corresponding delegated acts, subject to the criteria provided for in paragraphs 2 to 9.*

2. For the calculation of the exposure of an AIF in accordance with the commitment method an AIFM shall:

- (a) convert each derivative instrument position into an equivalent position in the underlying asset of that derivative using the conversion methodologies set out in Article 10 and paragraphs (4) to (9) and (14) of Annex II;
- (b) apply netting and hedging arrangements;
- (c) calculate the exposure created through the reinvestment of borrowings where such reinvestment increases the exposure of the AIF as defined in paragraphs (1) and (2) of Annex I;
- (d) include other arrangements in the calculation in accordance with paragraphs (3) and (10) to (13) of Annex I;

3. For the purposes of calculating the exposure of an AIF according to the commitment method:

- (a) netting arrangements shall include combinations of trades on derivative instruments or security positions which refer to the same underlying asset, irrespective - in the case of derivative instruments - of the maturity date of the derivative instruments and where those trades on derivative instruments or security positions are concluded with the sole aim of eliminating the risks linked to positions taken through the other derivative instruments or security positions;
- (b) hedging arrangements shall include combinations of trades on derivative instruments or security positions which do not necessarily refer to the same underlying asset and where those trades on derivative instruments or security positions are concluded with the sole aim of offsetting risks linked to positions taken through the other derivative instruments or security positions.

4. By way of derogation from paragraph 2, a derivative instrument shall not be converted into an equivalent position in the underlying asset if it has all of the following characteristics:

- (a) it swaps the performance of financial assets held in the AIF's portfolio for the performance of other reference financial assets;
- (b) it totally offsets the risks of the swapped assets held in the AIF's portfolio so that the AIF's performance does not depend on the performance of the swapped assets;
- (c) it includes neither additional optional features, nor leverage clauses nor other additional risks as compared to a direct holding of the reference financial assets.

5. By way of derogation from paragraph 2, a derivative instrument shall not be converted into an equivalent position in the underlying asset when calculating the exposure according to the commitment method if it meets both of the following conditions:

- (a) the combined holding by the AIF of a derivative instrument relating to a financial asset and cash which is invested in cash equivalent as defined in Article 7(a) is equivalent to holding a long position in the given financial asset;
- (b) the derivative instrument shall not generate any incremental exposure and leverage or risk.

6. Hedging arrangements shall be taken into account when calculating the exposure of an AIF only if they comply with all the following conditions:

- (a) the positions involved within the hedging relationship do not aim to generate a return and general and specific risks are offset;
- (b) there is a verifiable reduction of market risk at the level of the AIF;
- (c) the risks linked to derivative instruments, general and specific, if any, are offset;

(d) the hedging arrangements relate to the same asset class;

(e) they are efficient in stressed market conditions.

7. Subject to paragraph 6, derivative instruments used for currency hedging purposes and that do not add any incremental exposure, leverage or other risks shall not be included in the calculation.

8. An AIFM shall net positions in any of the following cases:

(a) between derivative instruments, provided they refer to the same underlying asset, even if the maturity date of the derivative instruments is different;

(b) between a derivative instrument whose underlying asset is a transferable security, money market instrument or units in a collective investment undertaking as referred to in points 1 to 3 of Section C of Annex I of Directive 2004/39/EC, and that same corresponding underlying asset.

9. AIFMs managing AIFs that, in accordance with their core investment policy, primarily invest in interest rate derivatives shall make use of specific duration netting rules in order to take into account the correlation between the maturity segments of the interest rate curve as set out in Article 11.

- **Q&A published by ESMA (Appendix XIV) Section VII Calculation of Leverage [Question 5](#), [Question 6](#)**

### *Article 10 Conversion methodologies for derivative instruments (Level 2 AIFM Regulation)*

AIFMs shall use the conversion methodologies set out in Annex II for the derivative instruments referred to therein.

- **Q&A published by ESMA (Appendix XIV) Section III Reporting [Question 48](#)**

### *Article 11 Duration netting rules (Level 2 AIFM Regulation)*

1. Duration netting rules shall be applied by AIFMs when calculating the exposure of AIFs according to Article 8(9).

2. The duration-netting rules shall not be used where they would lead to a misrepresentation of the risk profile of the AIF. AIFMs availing themselves of those netting rules shall not include other sources of risk such as volatility in their interest rate strategy. Consequently, interest rate arbitrage strategies shall not apply those netting rules.

3. The use of those duration-netting rules shall not generate any unjustified level of leverage through investment in short-term positions. Short-dated interest rate derivatives shall not be the main source of performance for an AIF with medium duration which uses the duration netting rules.

4. Interest rate derivatives shall be converted into their equivalent underlying asset position and netted in accordance with Annex III.

*5. An AIF making use of the duration-netting rules may still make use of the hedging framework. Duration netting rules may be applied only to the interest rate derivatives which are not included in hedging arrangements.*

- (w) "managing AIFs" means performing at least investment management functions referred to in point 1(a) or (b) of Annex I for one or more AIFs;
- (x) "marketing" means a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the Union;
- (y) "master AIF" means an AIF in which another AIF invests or has an exposure in accordance with point (m);
- (z) "Member State of reference" means the Member State determined in accordance with Article 37(4);
- (aa) "non-EU AIF" means an AIF which is not an EU AIF;
- (ab) "non-EU AIFM" means an AIFM which is not an EU AIFM;
- (ac) "non-listed company" means a company which has its registered office in the Union and the shares of which are not admitted to trading on a regulated market within the meaning of point (14) of Article 4(1) of Directive 2004/39/EC;
- (ad) "own funds" means own funds as referred to in Articles 56 to 67 of Directive 2006/48/EC;
- (ae) "parent undertaking" means a parent undertaking within the meaning of Articles 1 and 2 of Directive 83/349/EEC;
- (aea) "pre-marketing" means provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM or on its behalf, to potential professional investors domiciled or with a registered office in the Union in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with Article 31 or 32, in that Member State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment;
- (af) "prime broker" means a credit institution, a regulated investment firm or another entity subject to prudential regulation and ongoing supervision, offering services to professional investors primarily to finance or execute transactions in financial instruments as counterparty and which may also provide other services such as clearing and settlement of trades, custodial services, securities lending, customised technology and operational support facilities;
- (ag) "professional investor" means an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to Directive 2004/39/EC;
- (ah) "qualifying holding" means a direct or indirect holding in an AIFM which represents 10 % or more of the capital or of the voting rights, in accordance with Articles 9 and 10 of Directive 2004/109/EC, taking into account the conditions regarding aggregation of the holding laid down in Article 12(4) and (5) thereof, or which makes it possible to exercise a significant influence over the management of the AIFM in which that holding subsists;
- (ai) "employees' representatives" means employees' representatives as defined in point (e) of Article 2 of Directive 2002/14/EC;

**Article 1 Definitions**  
**(Level 2 AIFM Regulation)**

(...)

(2) "relevant person" in relation to an AIFM means any of the following:

- (a) a director, partner or equivalent, or manager of the AIFM;
- (b) an employee of the AIFM, or any other natural person whose services are placed at the disposal and under the control of the AIFM and who is involved in the provision of collective portfolio management services by the AIFM;
- (c) a natural or legal person who is directly involved in the provision of services to the AIFM under a delegation arrangement to third parties for the purpose of the provision of collective portfolio management by the AIFM; (...)

- **FAQ AIFM published by CSSF (Appendix XV) Section 17 Initial capital and own funds [Question 17.c](#)**

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

**Article 1 Definitions**  
**(Level 2 AIFM Regulation)**

(...)

(3) "senior management" means the person or persons who effectively conduct the business of an AIFM in accordance with Article 8(1)(c) of Directive 2011/61/EU and, as the case may be, the executive member or members of the governing body;

(...)

(5) "special arrangement" means an arrangement that arises as a direct consequence of the illiquid nature of the assets of an AIF which impacts the specific redemption rights of investors in a type of units or shares of the AIF and which is a bespoke or separate arrangement from the general redemption rights of investors;

(...)

- (ak) "subsidiary" means a subsidiary undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC;
- (al) "supervisory authorities" in relation to non-EU AIFs means the national authorities of a third country which are empowered by law or regulation to supervise AIFs;
- (am) "supervisory authorities" in relation to non-EU AIFMs means the national authorities of a third country which are empowered by law or regulation to supervise AIFMs;

*Article 1 Definitions  
(Level 2 AIFM Regulation)*

(...)

(6) "sustainability risk" means sustainability risk as defined in Article 2, point (22), of Regulation (EU) 2019/2088 of the European Parliament and of the Council<sup>49</sup>;

(7) "sustainability factors" means sustainability factors as defined in Article 2, point (24), of Regulation (EU) 2019/2088.

(...)

(an) "securitisation special purpose entities" means entities whose sole purpose is to carry on a securitisation or securitisations within the meaning of Article 1(2) of Regulation (EC) No 24/2009 of the European Central Bank of 19 December 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions<sup>50</sup> and other activities which are appropriate to accomplish that purpose;

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

2. For the purposes of point (ad) of paragraph 1 of this Article, Articles 13 to 16 of Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions<sup>51</sup> shall apply *mutatis mutandis*.

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

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

(b) how leverage is to be calculated.

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

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

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<sup>49</sup> Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (OJ L 317, 9.12.2019, p. 1).

<sup>50</sup> OJ L 15, 20.1.2009, p. 1.

<sup>51</sup> OJ L 177, 30.6.2006, p. 201.

## Article 5 AIFMD

### Determination of the AIFM

[Art. 4 AIFM Law]

- **Recital 20 of the Level 1 AIFM Directive**
- **Q&A published by EU Commission (Appendix X) ID 1167 Scope and exemptions**
- **Q&A published by ESMA (Appendix XIV) Section VIII Delegation Question 2, Question 3**

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

- (a) an external manager, which is the legal person appointed by the AIF or on behalf of the AIF and which through this appointment is responsible for managing the AIF (external AIFM); or
- (b) where the legal form of the AIF permits an internal management and where the AIF's governing body chooses not to appoint an external AIFM, the AIF itself, which shall then be authorised as AIFM.

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

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

## CHAPTER II

### AUTHORISATION OF AIFMs

#### Article 6 AIFMD

#### Conditions for taking up activities as AIFM

[Art. 5 AIFM Law]

- *Recitals 9, 18 and 21 of the Level 1 AIFM Directive*
- *Q&A published by EU Commission (Appendix X), 1142, 1143 and 1144 MiFID firms and MiFID activities*
- *Q&A published by ESMA (Appendix XIV) Section V MiFID: Question 1, Section XIX Branches: Question 1*
- *CSSF Regulation N°15-03 (Appendix XVI) Article 3, Article 6*

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

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

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

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

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

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

(b) non-core services comprising:

(i) investment advice

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

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

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

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

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

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

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

6. Article 2(2) and Articles 12, 13 and 19 of Directive 2004/39/EC shall apply to the provision of the services referred to in paragraph 4 of this Article by AIFMs.

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

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

**Article 7 AIFMD**  
**Application for authorisation**  
[Art. 6 AIFM Law]

▪ **Q&A published by EU Commission (Appendix X) ID 1209 Passport issues**

1. Member States shall require that AIFMs apply for authorisation from the competent authorities of their home Member State.
2. Member States shall require that an AIFM applying for an authorisation shall 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's shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and on the amounts of those holdings;
  - (c) a programme of activity setting out the organisational structure of the AIFM, including information on how the AIFM intends to comply with its obligations under Chapters II, III, IV, and, where applicable, Chapters V, VI, VII and VIII;
  - (d) information on the remuneration policies and practices pursuant to Article 13;
  - (e) information on arrangements made for the delegation and sub-delegation to third parties of functions as referred to in Article 20.
3. Member States shall require that an AIFM applying for authorisation further provide the following information on the AIFs it intends to manage to the competent authorities of its home Member State:
  - (a) information about the investment strategies including the types of underlying funds if the AIF is a fund of funds, and the AIFM's policy as regards the use of leverage, and the risk profiles and other characteristics of the AIFs it manages or intends to manage, including information about the Member States or third countries in which such AIFs are established or are expected to be established;
  - (b) information on where the master AIF is established if the AIF is a feeder AIF;
  - (c) the rules or instruments of incorporation of each AIF the AIFM intends to manage;
  - (d) information on the arrangements made for the appointment of the depositary in accordance with Article 21 for each AIF the AIFM intends to manage;
  - (e) any additional information referred to in Article 23(1) for each AIF the AIFM manages or intends to manage.
4. Where a management company is authorised pursuant to Directive 2009/65/EC (UCITS management company) and applies for authorisation as an AIFM under this Directive, the competent authorities shall not require the UCITS management company to provide information or documents which the UCITS management company has already provided when applying for authorisation under Directive 2009/65/EC, provided that such information or documents remain up-to-date.
5. The competent authorities shall, on a quarterly basis, inform ESMA of authorisations granted or withdrawn in accordance with this Chapter.

ESMA shall keep a central public register identifying each AIFM authorised under this Directive, a list of the AIFs managed and/or marketed in the Union by such AIFMs and the competent authority for each such AIFM. The register shall be made 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 regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

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 for in the first subparagraph of paragraph 6.

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

## Article 8 AIFMD

### Conditions for granting authorisation

[Art. 7 AIFM Law]

[Art. 7bis AIFM Law]

1. The competent authorities of the home Member State of the AIFM shall not grant authorisation unless:
  - (a) they are satisfied that the AIFM will be able to meet the conditions of this Directive;
  - (b) the AIFM has sufficient initial capital and own funds in accordance with Article 9;
  - (c) the persons who effectively conduct the business of the AIFM are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the AIFs 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 the 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

▪ ***Q&A published by EU Commission (Appendix X) ID 1190 Scope and exemptions***

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

Authorisation shall be valid for all Member States.

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

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

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

- (a) close links between the AIFM and other natural or legal persons;
- (b) the laws, regulations or administrative provisions of a third country governing natural or legal persons with which the AIFM has close links;
- (c) difficulties involved in the enforcement of those laws, regulations and administrative provisions.

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

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

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

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

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

- (a) requirements applicable to the AIFMs under paragraph 3;
- (b) requirements applicable to shareholders and members with qualifying holdings referred to in point (d) of paragraph 1;
- (c) obstacles which may prevent effective exercise of the supervisory functions of the competent authorities.

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

## Article 9 AIFMD

### Initial capital and own funds

[Art. 8 AIFM Law]

1. Member States shall require that an AIFM which is an internally managed AIF has an initial capital of at least EUR 300 000.
2. Where an AIFM is appointed as external manager of AIFs, the AIFM shall have an initial capital of at least EUR 125 000.
3. Where the value of the portfolios of AIFs managed by the AIFM exceeds EUR 250 million, the AIFM shall provide an additional amount of own funds. That additional amount of own funds shall be equal to 0,02 % of the amount by which the value of the portfolios of the AIFM exceeds EUR 250 million but the required total of the initial capital and the additional amount shall not, however, exceed EUR 10 million.

- **Q&A published by EU Commission (Appendix X) ID 1147 and 1149 Own funds**
- **Q&A published by ESMA (Appendix XIV) Section X Additional own funds Question 1, Question 3**

4. For the purpose of paragraph 3, AIFs managed by the AIFM, including AIFs for which the AIFM has delegated functions in accordance with Article 20 but excluding AIF portfolios that the AIFM is managing under delegation, shall be deemed to be the portfolios of the AIFM.
5. Irrespective of paragraph 3, the own funds of the AIFM shall never be less than the amount required under Article 13 of Regulation (EU) 2019/2033 of the European Parliament and of the Council<sup>52</sup>.
6. Member States may authorise AIFMs not to provide up to 50 % of the additional amount of own funds referred to in paragraph 3 if they benefit from a guarantee of the same amount given by a credit institution or an insurance undertaking which has its registered office in a Member State, or in a third country where it is subject to prudential rules considered by the competent authorities as equivalent to those laid down in Union law.
7. To cover potential professional liability risks resulting from activities AIFMs may carry out pursuant to this Directive, both internally managed AIFs and external AIFMs shall either:
  - (a) have additional own funds which are appropriate to cover potential liability risks arising from professional negligence; or
  - (b) hold a professional indemnity insurance against liability arising from professional negligence which is appropriate to the risks covered.

- **Recitals 23 and 80 of the Level 1 AIFM Directive**
- **Explanatory Memorandum section 3.2.3 (Appendix I) and Recitals 32 to 38 of the Level 2 AIFM Regulation (Appendix II)**
- **Q&A published by EU Commission (Appendix X) ID 1150 and 1151 Own funds**
- **FAQ AIFM published by CSSF (Appendix XV) Section 17 Initial capital and own funds Question 17.c), Question 17.d)**
- **Q&A published by ESMA (Appendix XIV) Section X Additional own funds Question 2, Question 3**

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<sup>52</sup>Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 (OJ L 314, 5.12.2019, p. 1).

### *Article 12 Professional liability risks (Level 2 AIFM Regulation)*

1. The professional liability risks to be covered pursuant to Article 9(7) of Directive 2011/61/EU shall be risks of loss or damage caused by a relevant person through the negligent performance of activities for which the AIFM has legal responsibility.

2. Professional liability risks as defined in paragraph 1 shall include, without being limited to, risks of:

- (a) loss of documents evidencing title of assets of the AIF;
- (b) misrepresentations or misleading statements made to the AIF or its investors;
- (c) acts, errors or omissions resulting in a breach of:
  - (i) legal and regulatory obligations;
  - (ii) duty of skill and care towards the AIF and its investors;
  - (iii) fiduciary duties;
  - (iv) obligations of confidentiality;
  - (v) AIF rules or instruments of incorporation;
  - (vi) terms of appointment of the AIFM by the AIF;
- (d) failure to establish, implement and maintain appropriate procedures to prevent dishonest, fraudulent or malicious acts;
- (e) improperly carried out valuation of assets or calculation of unit/share prices;
- (f) losses arising from business disruption, system failures, failure of transaction processing or process management.

3. Professional liability risks shall be covered at all times either through appropriate additional own funds determined in accordance with Article 14 or through appropriate coverage of professional indemnity insurance determined in accordance with Article 15.

- **FAQ AIFM published by CSSF (Appendix XV) Section 17 Initial capital and own funds [Question 17.a\)](#), [Question 17.b\)](#), [Question 17.c\)](#)**

### *Article 13 Qualitative requirements addressing professional liability risks (Level 2 AIFM Regulation)*

1. An AIFM shall implement effective internal operational risk management policies and procedures in order to identify, measure, manage and monitor appropriately operational risks including professional liability risks to which the AIFM is or could be reasonably exposed. The operational risk management activities shall be performed independently as part of the risk management policy.

2. An AIFM shall set up a historical loss database, in which any operational failures, loss and damage experience shall be recorded. This database shall record, without being limited to, any professional liability risks as referred to in Article 12(2) that have materialised.

3. Within the risk management framework the AIFM shall make use of its internal historical loss data and where appropriate of external data, scenario analysis and factors reflecting the business environment and internal control systems.

4. Operational risk exposures and loss experience shall be monitored on an ongoing basis and shall be subject to regular internal reporting.

5. An AIFM's operational risk management policies and procedures shall be well documented. An AIFM shall have arrangements in place for ensuring compliance with its operational risk management policies and effective measures for the treatment of non-compliance with these policies. An AIFM shall have procedures in place for taking appropriate corrective action.

6. The operational risk management policies and procedures and measurement systems shall be subject to regular review, at least on an annual basis.

7. An AIFM shall maintain financial resources adequate to its assessed risk profile.

#### **Article 14 Additional own funds (Level 2 AIFM Regulation)**

1. This Article shall apply to AIFMs that choose to cover professional liability risks through additional own funds.

2. The AIFM shall provide additional own funds for covering liability risks arising from professional negligence at least equal to 0.01 % of the value of the portfolios of AIFs managed.

The value of the portfolios of AIFs managed shall be the sum of the absolute value of all assets of all AIFs managed by the AIFM, including assets acquired through use of leverage, whereby derivative instruments shall be valued at their market value.

3. The additional own funds requirement referred to in paragraph 2 shall be recalculated at the end of each financial year and the amount of additional own funds shall be adjusted accordingly.

The AIFM shall establish, implement and apply procedures to monitor on an on-going basis the value of the portfolios of AIFs managed, calculated in accordance with the second sub-paragraph of paragraph 2. Where, before the annual recalculation referred to in the first subparagraph, the value of the portfolios of AIFs managed increases significantly, the AIFM shall without undue delay recalculate the additional own funds requirement and shall adjust the additional own funds accordingly.

4. The competent authority of the home Member State of the AIFM may authorise the AIFM to provide additional own funds lower than the amount referred to in paragraph 2 only if it is satisfied - on the basis of the historical loss data of the AIFM as recorded over an observation period of at least three years prior to the assessment - that the AIFM provides sufficient additional own funds to appropriately cover professional liability risks. The authorised lower amount of additional own funds shall be not less than 0.008% of the value of the portfolios of AIFs managed by the AIFM.

5. The competent authority of the home Member State of the AIFM may request the AIFM to provide additional own funds higher than the amount referred to in paragraph 2 if it is not satisfied that the AIFM has sufficient additional own funds to appropriately cover professional liability risks. The competent authority shall give reasons why it considers that the AIFM's additional own funds are insufficient.

▪ **Q&A published by ESMA (Appendix XIV) Section X Additional own funds Question 3**

**Article 15 Professional indemnity insurance  
(Level 2 AIFM Regulation)**

1. This Article shall apply to AIFMs that choose to cover professional liability risks through professional indemnity insurance.

2. The AIFM shall take out and maintain at all times professional indemnity insurance that:

- (a) shall have an initial term of no less than one year;
- (b) shall have a notice period for cancellation of at least 90 days;
- (c) shall cover professional liability risks as defined in Article 12(1) and (2);
- (d) is taken out from an EU or non-EU undertaking authorised to provide professional indemnity insurance, in accordance with Union law or national law;
- (e) is provided by a third party entity.

Any agreed defined excess shall be fully covered by own funds which are in addition to the own funds to be provided in accordance with Article 9(1) and (3) of Directive 2011/61/EU.

3. The coverage of the insurance for an individual claim shall be equal to at least 0.7 % of the value of the portfolios of AIFs managed by the AIFM calculated as set out in the second subparagraph of Article 14(2).

4. The coverage of the insurance for claims in aggregate per year shall be equal to at least 0.9 % of the value of the portfolios of AIFs managed by the AIFM calculated as set out in the second subparagraph of Article 14(2).

5. The AIFM shall review the professional indemnity insurance policy and its compliance with the requirements laid down in this Article at least once a year and in the event of any change which affects the policy's compliance with the requirements in this Article.

- **FAQ AIFM published by CSSF (Appendix XV) Section 17 Initial capital and own funds Question 17.a), Question 17.b)**

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

- **Q&A published by EU Commission (Appendix X) ID 1153 Own funds**

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

- (a) the risks the additional own funds or the professional indemnity insurance must cover;
- (b) the conditions for determining the appropriateness of additional own funds or the coverage of the professional indemnity insurance; and
- (c) the manner of determining ongoing adjustments of the additional own funds or of the coverage of the professional indemnity insurance.

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

## Article 10 AIFMD

### Changes in the scope of the authorisation

[Art. 9 AIFM Law]

1. Member States shall require that AIFMs, before implementation, notify the competent authorities of their home Member State of any material changes to the conditions for initial authorisation, in particular material changes to the information provided in accordance with Article 7.
2. If the competent authorities of the home Member State decide to impose restrictions or reject those changes, they shall, within 1 month of receipt of that notification, inform the AIFM. The competent authorities may prolong that period for up to 1 month where they consider this to be necessary because of the specific circumstances of the case and after having notified the AIFM accordingly. The changes shall be implemented if the relevant competent authorities do not oppose the changes within the relevant assessment period.

## Article 11 AIFMD

### Withdrawal of the authorisation

[Art. 10 AIFM Law]

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

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased the activity covered by this Directive for the preceding 6 months, unless the Member State concerned has provided for authorisation to lapse in such cases;
- (b) obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which authorisation was granted;
- (d) no longer complies with Directive 2006/49/EC if its authorisation also covers the discretionary portfolio management service referred to in point (a) of Article 6(4) of this Directive;
- (e) has seriously or systematically infringed the provisions adopted pursuant to this Directive; or
- (f) falls within any of the cases where national law, in respect of matters outside the scope of this Directive, provides for withdrawal.

**CHAPTER III**  
**OPERATING CONDITIONS FOR AIFMs**

**SECTION 1**  
**General requirements**

**Article 12 AIFMD**

**General principles**

[Art. 11 AIFM Law]

- *Recitals 12 and 80 of the Level 1 AIFM Directive*
- *Explanatory Memorandum section 3.2.4 (Appendix I) and Recitals 39 to 46 of the Level 2 AIFM Regulation (Appendix II)*

1. Member States shall ensure that, at all times, AIFMs:
  - (a) act honestly, with due skill, care and diligence and fairly in conducting their activities;
  - (b) act in the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;
  - (c) have and employ effectively the resources and procedures that are necessary for the proper performance of their business activities;
  - (d) take all reasonable steps to avoid conflicts of interest and, when they cannot be avoided, to identify, manage and monitor and, where applicable, disclose, those conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors and to ensure that the AIFs they manage are fairly treated;
  - (e) comply with all regulatory requirements applicable to the conduct of their business activities so as to promote the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;
  - (f) treat all AIF investors fairly.

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

*Article 16 General obligations for competent authorities  
(Level 2 AIFM Regulation)*

*When assessing the AIFM's compliance with Article 12(1) of Directive 2011/61/EU, the competent authorities shall use at least the criteria laid down in this Section.*

*Article 17 Duty to act in the best interests of the AIF or the investors in the AIF and the integrity of the market  
(Level 2 AIFM Regulation)*

- 1. AIFMs shall apply policies and procedures for preventing malpractices, including those that might reasonably be expected to affect adversely the stability and integrity of the market.*
- 2. AIFMs shall ensure that the AIFs they manage or the investors in these AIFs are not charged undue costs.*

*Article 18 Due diligence  
(Level 2 AIFM Regulation)*

- 1. AIFMs shall apply a high standard of diligence in the selection and ongoing monitoring of investments.*
- 2. AIFMs shall ensure that they have adequate knowledge and understanding of the assets in which the AIF is invested.*
- 3. AIFMs shall establish, implement and apply written policies and procedures on due diligence and implement effective arrangements for ensuring that investment decisions on behalf of the AIFs are carried out in compliance with the objectives, the investment strategy and, where applicable, the risk limits of the AIF.*
- 4. The policies and procedures on due diligence referred to in paragraph 3 shall be regularly reviewed and updated.*
- 5. AIFMs shall take into account sustainability risks when complying with the requirements set out in paragraphs 1 to 3.*
- 6. Where AIFMs consider principal adverse impacts of investment decisions on sustainability factors as described in Article 4(1), point (a) of Regulation (EU) 2019/2088, or as required by paragraphs 3 or 4 of Article 4 of that Regulation, those AIFMs shall take into account such principal adverse impacts when complying with the requirements set out in paragraphs 1 to 3 of this Article.*

*Article 19 Due diligence when investing in assets of limited liquidity  
(Level 2 AIFM Regulation)*

- 1. Where AIFMs invest in assets of limited liquidity and where such investment is preceded by a negotiation phase, they shall, in relation to the negotiation phase, in addition to the requirements laid down in Article 18:*
  - (a) set out and regularly update a business plan consistent with the duration of the AIF and market conditions;*
  - (b) seek and select possible transactions consistent with the business plan referred to in point (a);*
  - (c) assess the selected transactions in consideration of opportunities, if any, and overall related risks, all relevant legal, tax-related, financial or other value affecting factors, human and material resources, and strategies, including exit strategies;*
  - (d) perform due diligence activities related to the transactions prior to arranging execution;*

(e) monitor the performance of the AIF with respect to the business plan referred to in point (a).

2. AIFMs shall retain records of the activities carried out pursuant to paragraph 1 for at least five years.

### *Article 20 Due diligence in the selection and appointment of counterparties and prime brokers*

#### *(Level 2 AIFM Regulation)*

1. When selecting and appointing counterparties and prime brokers, AIFMs shall exercise due skill, care and diligence before entering into an agreement and on an ongoing basis thereafter taking into account the full range and quality of their services.

2. When selecting prime brokers or counterparties of an AIFM or an AIF in an OTC derivatives transaction, in a securities lending or in a repurchase agreement, AIFMs shall ensure that those prime brokers and counterparties fulfil all of the following conditions:

(a) they are subject to ongoing supervision by a public authority;

(b) they are financially sound;

(c) they have the necessary organisational structure and resources for performing the services which are to be provided by them to the AIFM or the AIF.

3. When appraising the financial soundness referred to in paragraph 2(b), the AIFM shall take into account whether or not the prime broker or counterparty is subject to prudential regulation, including sufficient capital requirements, and effective supervision.

4. The list of selected prime brokers shall be approved by the AIFM's senior management. In exceptional cases prime brokers not included in the list may be appointed provided that they fulfil the requirements laid down in paragraph 2 and subject to approval by senior management. The AIFM shall be able to demonstrate the reasons for such a choice and the due diligence that it exercised in selecting and monitoring the prime brokers which had not been listed.

### *Article 21 Acting honestly, fairly and with due skills*

#### *(Level 2 AIFM Regulation)*

In order to establish whether an AIFM conducts its activities honestly, fairly and with due skills, competent authorities shall assess, at least, whether the following conditions are met:

(a) the governing body of the AIFM possesses adequate collective knowledge, skills and experience to be able to understand the AIFM's activities, in particular the main risks involved in those activities and the assets in which the AIF is invested;

(b) the members of the governing body commit sufficient time to properly perform their functions in the AIFM;

(c) each member of the governing body acts with honesty, integrity and independence of mind;

(d) the AIFM devotes adequate resources to the induction and training of members of the governing body.

### *Article 22 Resources (Level 2 AIFM Regulation)*

- 1. AIFMs shall employ sufficient personnel with the skills, knowledge and expertise necessary for discharging the responsibilities allocated to them.*
- 2. For the purposes of paragraph 1, AIFMs shall take into account the nature, scale and complexity of their business and the nature and range of services and activities undertaken in the course of that business.*
- 3. For the purposes of paragraph 1, AIFMs shall retain the necessary resources and expertise for the effective integration of sustainability risks.*

### *Article 23 Fair treatment of investors in the AIF (Level 2 AIFM Regulation)*

- 1. The AIFM shall ensure that its decision-making procedures and its organisational structure, referred to in Article 57, ensure fair treatment of investors.*
- 2. Any preferential treatment accorded by an AIFM to one or more investors shall not result in an overall material disadvantage to other investors.*

### *Article 24 Inducements (Level 2 AIFM Regulation)*

- 1. AIFMs shall not be regarded as acting honestly, fairly and in accordance with the best interests of the AIFs they manage or the investors in these AIFs if, in relation to the activities performed when carrying out the functions referred to in Annex I of Directive 2011/61/EU, they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit, other than the following:*
  - (a) a fee, commission or non-monetary benefit paid or provided to or by the AIF or a person on behalf of the AIF;*
  - (b) a fee, commission or non-monetary benefit paid or provided to or by a third party or a person acting on behalf of a third party, where the AIFM can demonstrate that the following conditions are satisfied:*
    - (i) the existence, nature and amount of the fee, commission or benefit, or, where the amount cannot be ascertained, the method of calculating that amount, is clearly disclosed to the investors in the AIF in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant service;*
    - (ii) the payment of the fee or commission, or the provision of the non-monetary benefit are designed to enhance the quality of the relevant service and not impair compliance with the AIFM's duty to act in the best interests of the AIF it manages or the investors in the AIF.*
  - (c) proper fees which enable or are necessary for the provision of the relevant service, including custody costs, settlement and exchange fees, regulatory levies or legal fees, and which, by their nature, do not give rise to conflicts with the AIFM's duties to act honestly, fairly and in accordance with the best interests of the AIF it manages or the investors of the AIF.*

*2. The disclosure of the essential terms of the arrangements relating to the fee, commission or non-monetary benefit in summary form shall be considered as satisfactory for the purposes of point (i) of paragraph 1(b), provided that the AIFM commits to disclose further details at the request of the investor in the AIF it manages and provided that it fulfils this commitment.*

**Article 25 Effective employment of resources and procedures - handling of orders  
(Level 2 AIFM Regulation)**

*1. AIFMs shall establish, implement and apply procedures and arrangements which provide for the prompt, fair and expeditious execution of orders on behalf of the AIF.*

*2. The procedures and arrangements referred to in paragraph 1 shall satisfy the following requirements:*

- (a) they shall ensure that orders executed on behalf of AIFs are promptly and accurately recorded and allocated;*
- (b) they shall execute otherwise comparable AIF orders sequentially and promptly unless the characteristics of the order or prevailing market conditions make this impracticable, or the interests of the AIF or of the investors in the AIF require otherwise.*

*3. The financial instruments, sums of money or other assets received in settlement of the executed orders shall be promptly and correctly delivered to or registered in the account of the relevant AIF.*

*4. AIFMs shall not misuse information related to pending AIF orders, and shall take all reasonable steps to prevent the misuse of such information by any of their relevant persons.*

**Article 26 Reporting obligations in respect of execution of subscription and redemption orders  
(Level 2 AIFM Regulation)**

*1. Where AIFMs have carried out a subscription or, where relevant, a redemption order from an investor, they shall promptly provide the investor, by means of a durable medium, with the essential information concerning the execution of that order or the acceptance of the subscription offer, as the case may be.*

*2. Paragraph 1 shall not apply where a third person is required to provide the investor with a confirmation concerning the execution of the order and where the confirmation contains the essential information.*

*AIFMs shall ensure that the third person complies with its obligations.*

*3. The essential information referred to in paragraphs 1 and 2 shall include the following information:*

- (a) the identification of the AIFM;*
- (b) the identification of the investor;*
- (c) the date and time of receipt of the order;*
- (d) the date of execution;*
- (e) the identification of the AIF;*

- (f) *the gross value of the order including charges for subscription or the net amount after charges for redemptions.*

4. *AIFMs shall supply the investor, upon request, with information about the status of the order or the acceptance of the subscription offer, or both as the case may be.*

### *Article 27 Execution of decisions to deal on behalf of the managed AIF (Level 2 AIFM Regulation)*

1. *AIFMs shall act in the best interests of the AIFs or the investors in the AIFs they manage when executing decisions to deal on behalf of the managed AIF in the context of the management of their portfolio.*

2. *Whenever AIFMs buy or sell financial instruments or other assets for which best execution is relevant, and for the purposes of paragraph 1, they shall take all reasonable steps to obtain the best possible result for the AIFs they manage or the investors in these AIFs, taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. The relative importance of such factors shall be determined by reference to the following criteria:*

- (a) *the objectives, investment policy and risks specific to the AIF, as indicated in the AIF's rules or articles of association, prospectus or offering documents of the AIF;*
- (b) *the characteristics of the order;*
- (c) *the characteristics of the financial instruments or other assets that are the subject of that order;*
- (d) *the characteristics of the execution venues to which that order can be directed.*

3. *AIFMs shall establish and implement effective arrangements for complying with the obligations referred to in paragraphs 1 and 2. In particular, the AIFM shall establish in writing and implement an execution policy to allow AIFs and their investors to obtain, for AIF orders, the best possible result in accordance with paragraph 2.*

4. *AIFMs shall monitor on a regular basis the effectiveness of their arrangements and policy for the execution of orders with a view to identifying and, where appropriate, correcting any deficiencies.*

5. *AIFMs shall review their execution policy on an annual basis. A review shall also be carried out whenever a material change occurs that affects the AIFM's ability to continue to obtain the best possible result for the managed AIFs.*

6. *AIFMs shall be able to demonstrate that they have executed orders on behalf of the AIF in accordance with their execution policy.*

7. *Whenever there is no choice of different execution venues paragraphs 2 to 5 shall not apply. However, AIFMs shall be able to demonstrate that there is no choice of different execution venues.*

**Article 28 Placing orders to deal on behalf of AIFs with other entities for execution  
(Level 2 AIFM Regulation)**

1. Whenever the AIFM buys or sells financial instruments or other assets for which best execution is relevant, it shall act in the best interest of the AIFs it manages or the investors in the AIFs when placing orders to deal on behalf of the managed AIFs with other entities for execution, in the context of the management of their portfolio.

2. AIFMs shall take all reasonable steps to obtain the best possible result for the AIF or the investors in the AIF taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. The relative importance of such factors shall be determined by reference to the criteria laid down in Article 27(2).

AIFMs shall establish, implement and apply a policy to enable them to comply with the obligation referred to in the first subparagraph. The policy shall identify, in respect of each class of instruments, the entities with which the orders may be placed. The AIFM shall only enter into arrangements for execution where such arrangements are consistent with the obligations laid down in this Article. The AIFM shall make available to investors in the AIFs it manages appropriate information on the policy established in accordance with this paragraph and on any material changes to that policy.

3. AIFMs shall monitor on a regular basis the effectiveness of the policy established in accordance with paragraph 2 and, in particular, the quality of the execution by the entities identified in that policy and, where appropriate, correct any deficiencies.

In addition, AIFMs shall review the policy on an annual basis. Such a review shall also be carried out whenever a material change occurs that affects the AIFM's ability to continue to obtain the best possible result for the managed AIFs.

4. AIFMs shall be able to demonstrate that they have placed orders on behalf of the AIF in accordance with the policy established pursuant to paragraph 2.

5. Whenever there is no choice of different execution venues paragraphs 2 to 5 shall not apply. However, AIFMs shall be able to demonstrate that there is no choice of different execution venues.

**Article 29 Aggregation and allocation of trading orders  
(Level 2 AIFM Regulation)**

1. AIFMs can only carry out an AIF order in aggregate with an order of another AIF, a UCITS or a client or with an order made when investing their own funds where:

- (a) it can be reasonably expected that the aggregation of orders will not work overall to the disadvantage of any AIF, UCITS or clients whose order is to be aggregated;
- (b) an order allocation policy is established and implemented, providing in sufficiently precise terms for the fair allocation of aggregated orders, including how the volume and price of orders determines allocations and the treatment of partial executions.

2. Where an AIFM aggregates an AIF order with one or more orders of other AIFs, UCITS or clients and the aggregated order is partially executed, it shall allocate the related trades in accordance with its order allocation policy.

3. Where an AIFM aggregates transactions for its own account with one or more orders of AIFs, UCITS or clients, it shall not allocate the related trades in a way that is detrimental to the AIF, UCITS or a client.

*4. Where an AIFM aggregates an order of an AIF, UCITS or another client with a transaction for its own account and the aggregated order is partially executed, it shall allocate the related trades to the AIF, UCITS or to clients in priority over those for own account.*

*However, if the AIFM is able to demonstrate to the AIF or to the client on reasonable grounds that it would not have been able to carry out the order on such advantageous terms without aggregation, or at all, it may allocate the transaction for its own account proportionally, in accordance with the policy referred to in point (b) of paragraph 1.*

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

- (a) not be permitted to invest all or part of the client's portfolio in units or shares of the AIFs it manages, unless it receives prior general approval from the client;
- (b) with regard to the services referred to in Article 6(4), be subject to Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes<sup>53</sup>.

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

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<sup>53</sup> OJ L 84, 26.3.1997, p. 22.

## Article 13 AIFMD

### Remuneration

[Art. 12 AIFM Law]

- *Recitals 24 to 28 of the Level 1 AIFM Directive*
- *Article 22 2 e) and 22 2 f) of the level 1 AIFM Directive*
- *Recital 127 of the Level 2 AIFM Regulation (Appendix II)*
- *ESMA Guidelines on sound remuneration policies under the AIFMD ESMA/2013/232 (Appendix VII)*
- *Q&A published by EU Commission (Appendix X) ID 1154 Remuneration*
- *Q&A published by ESMA (Appendix XIV) Section I Remuneration*

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

The AIFMs shall determine the remuneration policies and practices in accordance with [Annex II](#).

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

## Article 14 AIFMD

### Conflicts of interest

[Art. 13 AIFM Law]

- *Recitals 22 and 81 of the Level 1 AIFM Directive*
- *Explanatory Memorandum section 3.2.4 (Appendix I) and Recitals 47 to 50 of the Level 2 AIFM Regulation (Appendix II)*

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

- (a) the AIFM, including its managers, employees or any person directly or indirectly linked to the AIFM by control, and the AIF managed by the AIFM or the investors in that AIF;
- (b) the AIF or the investors in that AIF, and another AIF or the investors in that AIF;
- (c) the AIF or the investors in that AIF, and another client of the AIFM;
- (d) the AIF or the investors in that AIF, and a UCITS managed by the AIFM or the investors in that UCITS; or
- (e) two clients of the AIFM.

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

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

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

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

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

#### *Article 30 Types of conflicts of interest (Level 2 AIFM Regulation)*

*For the purpose of identifying the types of conflicts of interest that arise in the course of managing an AIF, AIFMs shall take into account, in particular, whether the AIFM, a relevant person or a person directly or indirectly linked by way of control to the AIFM:*

- (a) *is likely to make a financial gain, or avoid a financial loss, at the expense of the AIF or its investors;*

- (b) *has an interest in the outcome of a service or an activity provided to the AIF or its investors or to a client or of a transaction carried out on behalf of the AIF or a client, which is distinct from the AIF's interest in that outcome;*
- (c) *has a financial or other incentive to favour:*
  - *the interest of a UCITS, a client or group of clients or another AIF over the interest of the AIF;*
  - *the interest of one investor over the interest of another investor or group of investors in the same AIF;*
- (d) *carries out the same activities for the AIF and for another AIF, a UCITS or client; or*
- (e) *receives or will receive from a person other than the AIF or its investors an inducement in relation to collective portfolio management activities provided to the AIF, in the form of monies, goods or services other than the standard commission or fee for that service.*

*AIFMs shall ensure that when identifying the types of conflicts of interest, the existence of which may damage the interests of an AIF, they shall include those types of conflicts of interest that may arise as a result of the integration of sustainability risks in their processes, systems and internal controls.*

### **Article 31 Conflicts of interest policy (Level 2 AIFM Regulation)**

*1. The AIFM shall establish, implement and apply an effective conflicts of interest policy. That policy shall be set out in writing and shall be appropriate to the size and organisation of the AIFM and the nature, scale and complexity of its business.*

*Where the AIFM is a member of a group, the policy shall also take into account any circumstances of which the AIFM is or should be aware which may give rise to a conflict of interest resulting from the structure and business activities of other members of the group.*

*2. The conflicts of interest policy established in accordance with paragraph 1 shall include the following:*

- (a) *with reference to the activities carried out by or on behalf of the AIFM, including activities carried out by a delegate, sub-delegate, external valuer or counterparty, identification of the circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interests of the AIF or its investors;*
- (b) *procedures to be followed and measures to be adopted in order to prevent, manage and monitor such conflicts.*

### **Article 32 Conflicts of interest related to the redemption of investments (Level 2 AIFM Regulation)**

*The AIFM that manages an open-ended AIF shall identify, manage and monitor conflicts of interest arising between investors wishing to redeem their investments and investors wishing to maintain their investments in the AIF, and any conflicts between the AIFM's incentive to invest in illiquid assets and the AIF's redemption policy in accordance with its obligations under Article 14(1) of Directive 2011/61/EU.*

### *Article 33 Procedures and measures preventing or managing conflicts of interest (Level 2 AIFM Regulation)*

*1. The procedures and measures established for the prevention or management of conflicts of interest shall be designed to ensure that the relevant persons engaged in different business activities involving a risk of conflict of interest carry out these activities having a degree of independence which is appropriate to the size and activities of the AIFM and of the group to which it belongs, and to the materiality of the risk of damage to the interests of the AIF or its investors.*

*2. Where necessary and appropriate for the AIFM to ensure the requisite degree of independence, the procedures to be followed and measures to be adopted in accordance with point (b) of Article 31(2) shall include the following:*

- (a) effective procedures to prevent or control the exchange of information between relevant persons engaged in collective portfolio management activities or other activities pursuant to Article 6(2) and (4) of Directive 2011/61/EU involving a risk of conflict of interest where the exchange of information may harm the interest of one or more AIFs or their investors;*
- (b) the separate supervision of relevant persons, whose principal functions involve carrying out collective portfolio management activities on behalf of, or providing services to, clients or investors, whose interests may conflict, or who otherwise represent different interests that may conflict, including those of the AIFM;*
- (c) the removal of any direct link between the remuneration of relevant persons principally engaged in one activity and the remuneration of, or revenues generated by, different relevant persons principally engaged in another activity, where a conflict of interest may arise in relation to those activities;*
- (d) measures to prevent or restrain any person from exercising inappropriate influence over the way in which a relevant person carries out collective portfolio management activities;*
- (e) measures to prevent or control the simultaneous or sequential involvement of a relevant person in separate collective portfolio management activities or other activities pursuant to Article 6(2) and (4) of Directive 2011/61/EU where such involvement may impair the proper management of conflicts of interest.*

*Where the adoption or the application of one or more of those measures and procedures does not ensure the requisite degree of independence, the AIFM shall adopt such alternative or additional measures and procedures as are necessary and appropriate for those purposes.*

### *Article 34 Managing conflicts of interest (Level 2 AIFM Regulation)*

*Where the organisational or administrative arrangements made by the AIFM are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of the AIF or investors in the AIF are prevented, the senior management or other competent internal body of the AIFM shall be promptly informed in order to take any necessary decision or action to ensure that the AIFM acts in the best interests of the AIF or the investors in that AIF.*

*Article 35 Monitoring conflicts of interest  
(Level 2 AIFM Regulation)*

- 1. The AIFM shall keep and regularly update a record of the types of activities undertaken by or on behalf of the AIFM in which a conflict of interest entailing a material risk of damage to the interests of one or more AIFs or its investors has arisen or, in the case of an ongoing activity, may arise.*
- 2. Senior management shall receive on a frequent basis, and at least annually, written reports on activities referred to in paragraph 1.*

*Article 36 Disclosure of conflicts of interest  
(Level 2 AIFM Regulation)*

- 1. The information to be disclosed to investors in accordance with Article 14(1) and (2) of Directive 2011/61/EU shall be provided to investors in a durable medium or by means of a website.*
- 2. Where information referred to in paragraph 1 is provided by means of a website and is not addressed personally to the investor, the following conditions shall be satisfied:*
  - (a) the investor has been notified of the address of the website, and the place on the website where the information may be accessed, and has consented to the provision of the information by such means;*
  - (b) the information must be up to date;*
  - (c) the information must be accessible continuously by means of that website for such period of time as the investor may reasonably need to inspect it.*

*Article 37 Strategies for the exercise of voting rights  
(Level 2 AIFM Regulation)*

- 1. An AIFM shall develop adequate and effective strategies for determining when and how any voting rights held in the AIF portfolios it manages are to be exercised, to the exclusive benefit of the AIF concerned and its investors.*
- 2. The strategy referred to in paragraph 1 shall determine measures and procedures for:*
  - (a) monitoring relevant corporate actions;*
  - (b) ensuring that the exercise of voting rights is in accordance with the investment objectives and policy of the relevant AIF;*
  - (c) preventing or managing any conflicts of interest arising from the exercise of voting rights.*
- 3. A summary description of the strategies and details of the actions taken on the basis of those strategies shall be made available to the investors on their request.*

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

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

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

## Article 15 AIFMD

### Risk management

[Art. 14 AIFM Law]

- **Recital 81 of the Level 1 AIFM Directive**
- **Explanatory Memorandum section 3.2.5 (Appendix I) and Recitals 51 to 56 and 89 of the Level 2 AIFM Regulation (Appendix II)**
- **Q&A published by ESMA (Appendix XIV) Section III Reporting Question 55**

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

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

2. AIFMs shall implement adequate risk management systems in order to identify, measure, manage and monitor appropriately all risks relevant to each AIF investment strategy and to which each AIF is or may be exposed. In particular, AIFMs shall not solely or mechanistically rely on credit ratings issued by credit rating agencies as defined in Article 3(1)(b) of Regulation (EC) No. 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies<sup>54</sup>, for assessing the creditworthiness of the AIFs' assets.

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

#### *Article 38 Risk management systems (Level 2 AIFM Regulation)*

*For the purposes of this Section, risk management systems shall be understood as systems comprised of relevant elements of the organisational structure of the AIFM, with a central role for a permanent risk management function, policies and procedures related to the management of risk relevant to each AIF's investment strategy, and arrangements, processes and techniques related to risk measurement and management employed by the AIFM in relation to each AIF it manages.*

#### *Article 39 Permanent risk management function (Level 2 AIFM Regulation)*

1. An AIFM shall establish and maintain a permanent risk management function that shall:

- implement effective risk management policies and procedures in order to identify, measure, manage and monitor on an ongoing basis all risks relevant to each AIF's investment strategy to which each AIF is or may be exposed;*
- ensure that the risk profile of the AIF disclosed to investors in accordance with point (c) of Article 23(4) of Directive 2011/61/EU is consistent with the risk limits that have been set in accordance with Article 44 of this Regulation;*

<sup>54</sup> OJ L 302, 17.11.2009, p.1.

- (c) *monitor compliance with the risk limits set in accordance with Article 44 and notify the AIFM's governing body and, where it exists, the AIFM's supervisory function in a timely manner when it considers the AIF's risk profile inconsistent with these limits or sees a material risk that the risk profile will become inconsistent with these limits;*
- (d) *provide the following regular updates to the governing body of the AIFM and where it exists the AIFM's supervisory function at a frequency which is in accordance with the nature, scale and complexity of the AIF or the AIFM's activities:*
  - (i) *the consistency between and compliance with the risk limits set in accordance with Article 44 and the risk profile of the AIF as disclosed to investors in accordance with Article 23(4)(c) of Directive 2011/61/EU;*
  - (ii) *the adequacy and effectiveness of the risk management process, indicating in particular whether appropriate remedial measures have been or will be taken in the event of any actual or anticipated deficiencies;*
- (e) *provide regular updates to the senior management outlining the current level of risk incurred by each managed AIF and any actual or foreseeable breaches of any risk limits set in accordance with Article 44, so as to ensure that prompt and appropriate action can be taken.*

*2. The risk management function shall have the necessary authority and access to all relevant information necessary to fulfil the tasks set out in paragraph 1.*

#### *Article 40 Risk management policy (Level 2 AIFM Regulation)*

*1. An AIFM shall establish, implement and maintain an adequate and documented risk management policy which identifies all the relevant risks to which the AIFs it manages are or may be exposed.*

*2. The risk management policy shall comprise such procedures as are necessary to enable the AIFM to assess for each AIF it manages the exposure of that AIF to market, liquidity, sustainability and counterparty risks, and the exposure of the AIF to all other relevant risks, including operational risks, which may be material for each AIF it manages.*

*3. The AIFM shall address at least the following elements in the risk management policy:*

- (a) *the techniques, tools and arrangements that enable it to comply with Article 45;*
- (b) *the techniques, tools and arrangements that enable liquidity risk of the AIF to be assessed and monitored under normal and exceptional liquidity conditions including through the use of regularly conducted stress tests in accordance with Article 48;*
- (c) *the allocation of responsibilities within the AIFM pertaining to risk management;*
- (d) *the limits set in accordance with Article 44 of this Regulation and a justification of how these are aligned with the risk profile of the AIF disclosed to investors in accordance with Article 23(4)(c) of Directive 2011/61/EU;*
- (e) *the terms, contents, frequency and addressees of reporting by the permanent risk management function referred to in Article 39.*

*4. The risk management policy shall include a description of the safeguards referred to in Article 43, in particular:*

- (a) the nature of the potential conflicts of interest;*
- (b) the remedial measures put in place;*
- (c) the reasons why these measures should be reasonably expected to result in independent performance of the risk management function;*
- (d) how the AIFM expects to ensure that the safeguards are consistently effective.*

*5. The risk management policy referred to in paragraph 1 shall be appropriate to the nature, scale and complexity of the business of the AIFM and of the AIF it manages.*

### ***Article 41 Assessment, monitoring and review of the risk management systems (Level 2 AIFM Regulation)***

*1. AIFMs shall assess, monitor and periodically, at least once a year, review:*

- (a) the adequacy and effectiveness of the risk management policy and of the arrangements, processes and techniques referred to in Article 45;*
- (b) the degree of compliance by the AIFM with the risk management policy and with the arrangements, processes and techniques referred to in Article 45;*
- (c) the adequacy and effectiveness of measures taken to address any deficiencies in the performance of the risk management process;*
- (d) the performance of the risk management function;*
- (e) the adequacy and effectiveness of measures aiming to ensure the functional and hierarchical separation of the risk management function in accordance with Article 42.*

*The frequency of the periodic review referred to in the first subparagraph shall be decided by the senior management in accordance with the principle of proportionality given the nature, scale and complexity of the AIFM's business and the AIF it manages.*

*2. In addition to the periodic review referred to in paragraph 1, the risk management systems shall be reviewed where:*

- (a) material changes are made to the risk management policies and procedures and to the arrangements, processes and techniques referred to in Article 45;*
- (b) internal or external events indicate that an additional review is required;*
- (c) material changes are made to the investment strategy and objectives of an AIF that the AIFM manages.*

*3. The AIFM shall update the risk management systems on the basis of the outcome of the review referred to in paragraphs 1 and 2.*

*4. The AIFM shall notify the competent authority of its home Member State of any material changes to the risk management policy and of the arrangements, processes and techniques referred to in Article 45.*

**Article 42 Functional and hierarchical separation of the risk management function  
(Level 2 AIFM Regulation)**

1. The risk management function shall be considered as functionally and hierarchically separated from the operating units, including the portfolio management function, only where all the following conditions are satisfied:

- (a) persons engaged in the performance of the risk management function are not supervised by those responsible for the performance of the operating units, including the portfolio management function, of the AIFM;
- (b) persons engaged in the performance of the risk management function are not engaged in the performance of activities within the operating units, including the portfolio management function;
- (c) persons engaged in the performance of the risk management function are compensated in accordance with the achievement of the objectives linked to that function, independently of the performance of the operating units, including the portfolio management function;
- (d) the remuneration of senior officers in the risk management function is directly overseen by the remuneration committee, where such a committee has been established.

2. The functional and hierarchical separation of the risk management function in accordance with paragraph 1 shall be ensured throughout the whole hierarchical structure of the AIFM, up to its governing body. It shall be reviewed by the governing body and, where it exists, the supervisory function of the AIFM.

3. The competent authorities of the home Member State of the AIFM shall review the way in which the AIFM has applied paragraphs 1 and 2 on the basis of the criteria laid down in the second sub-paragraph of Article 15(1) of Directive 2011/61/EU.

**Article 43 Safeguards against conflicts of interest  
(Level 2 AIFM Regulation)**

1. The safeguards against conflicts of interest referred to in Article 15(1) of Directive 2011/61/EU shall ensure, at least, that:

- (a) decisions taken by the risk management function are based on reliable data, which are subject to an appropriate degree of control by the risk management function;
- (b) the remuneration of those engaged in the performance of the risk management function reflects the achievement of the objectives linked to the risk management function, independently of the performance of the business areas in which they are engaged;
- (c) the risk management function is subject to an appropriate independent review to ensure that decisions are being arrived at independently;
- (d) the risk management function is represented in the governing body or the supervisory function, where it has been established, at least with the same authority as the portfolio management function;
- (e) any conflicting duties are properly segregated.

2. Where proportionate, taking into account the nature, scale and complexity of the AIFM, the safeguards referred to in paragraph 1 shall also ensure that:

- (a) the performance of the risk management function is reviewed regularly by the internal audit function, or, if the latter has not been established, by an external party appointed by the governing body;
- (b) where a risk committee has been established, it is appropriately resourced and its non-independent members do not have undue influence over the performance of the risk management function.

3. The governing body of the AIFM and, where it exists, the supervisory function shall establish the safeguards against conflicts of interest laid down in paragraphs 1 and 2, regularly review their effectiveness and take timely remedial action to address any deficiencies.

#### **Article 44 Risk limits (Level 2 AIFM Regulation)**

1. An AIFM shall establish and implement quantitative or qualitative risk limits, or both, for each AIF it manages, taking into account all relevant risks. Where only qualitative limits are set, the AIFM shall be able to justify this approach to the competent authority.

2. The qualitative and quantitative risk limits for each AIF shall, at least, cover the following risks:

- (a) market risks;
- (b) credit risks;
- (c) liquidity risks;
- (d) counterparty risks;
- (e) operational risks.

3. When setting risk limits, the AIFM shall take into account the strategies and assets employed in respect of each AIF it manages as well as the national rules applicable to each of those AIFs. Those risk limits shall be aligned with the risk profile of the AIF as disclosed to investors in accordance with point (c) of Article 23(4) of Directive 2011/61/EU and approved by the governing body.

#### **Article 45 Risk measurement and management (Level 2 AIFM Regulation)**

1. AIFMs shall adopt adequate and effective arrangements, processes and techniques in order to:

- (a) identify, measure, manage and monitor at any time the risks to which the AIFs under their management are or might be exposed;
- (b) ensure compliance with the limits set in accordance with Article 44.

2. The arrangements, processes and techniques referred to in paragraph 1 shall be proportionate to the nature, scale and complexity of the business of the AIFM and of each AIF it manages and shall be consistent with the AIF's risk profile as disclosed to investors in accordance with point (c) of Article 23(4) of Directive 2011/61/EU.

3. For the purposes of paragraph 1, the AIFM shall take the following actions for each AIF it manages:

- (a) put in place such risk measurement arrangements, processes and techniques as are necessary to ensure that the risks of positions taken and their contribution to the overall risk profile are accurately measured on the basis of sound and reliable data and that the risk measurement arrangements, processes and techniques are adequately documented;
- (b) conduct periodic back-tests in order to review the validity of risk measurement arrangements which include model-based forecasts and estimates;
- (c) conduct, periodic appropriate stress tests and scenario analyses to address risks arising from potential changes in market conditions that might adversely impact the AIF;
- (d) ensure that the current level of risk complies with the risk limits set in accordance with Article 44;
- (e) establish, implement and maintain adequate procedures that, in the event of actual or anticipated breaches of the risk limits of the AIF, result in timely remedial actions in the best interest of investors;
- (f) ensure that there are appropriate liquidity management systems and procedures for each AIF in line with the requirements laid down in Article 46.

3. AIFMs shall at least:

- (a) implement an appropriate, documented and regularly updated due diligence process when investing on behalf of the AIF, according to the investment strategy, the objectives and risk profile of the AIF;
- (b) ensure that the risks associated with each investment position of the AIF and their overall effect on the AIF's portfolio can be properly identified, measured, managed and monitored on an ongoing basis, including through the use of appropriate stress testing procedures;
- (c) ensure that the risk profile of the AIF shall correspond to the size, portfolio structure and investment strategies and objectives of the AIF as laid down in the AIF rules or instruments of incorporation, prospectus and offering documents.

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

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

- (a) the type of the AIF;
- (b) the investment strategy of the AIF;
- (c) the sources of leverage of the AIF;
- (d) any other interlinkage or relevant relationships with other financial services institutions, which could pose systemic risk;
- (e) the need to limit the exposure to any single counterparty;
- (f) the extent to which the leverage is collateralised;

- (g) the asset-liability ratio;
- (h) the scale, nature and extent of the activity of the AIFM on the markets concerned.

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

- (a) the risk management systems to be employed by AIFMs in relation to the risks which they incur on behalf of the AIFs that they manage;
- (b) the appropriate frequency of review of the risk management system;
- (c) how the risk management function is to be functionally and hierarchically separated from the operating units, including the portfolio management function;
- (d) specific safeguards against conflicts of interest referred to in the second subparagraph of paragraph 1;
- (e) the requirements referred to in paragraph 3.

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

## Article 16 AIFMD

### Liquidity management

[Art. 15 AIFM Law]

- **Recital 81 of the Level 1 AIFM Directive**
- **Explanatory Memorandum section 3.2.6 (Appendix I) and Recitals 57 to 64 and 129 of the Level 2 AIFM Regulation (Appendix II)**
- **See definition of "AIFM of closed-ended AIF" (Appendix VIII)**
- **Q&A published by ESMA (Appendix XIV) Section III Reporting Question 55**

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

#### *Article 46 Liquidity management system and procedures (Level 2 AIFM Regulation)*

*AIFMs shall be able to demonstrate to the competent authorities of their home Member State that an appropriate liquidity management system and effective procedures referred to in Article 16(1) of Directive 2011/61/EU are in place taking into account the investment strategy, the liquidity profile and the redemption policy of each AIF.*

#### *Article 47 Monitoring and managing liquidity risk (Level 2 AIFM Regulation)*

1. *The liquidity management system and procedures referred to in Article 46 shall at least, ensure that:*

- (a) the AIFM maintains a level of liquidity in the AIF appropriate to its underlying obligations, based on an assessment of the relative liquidity of the AIF's assets in the market, taking account of the time required for liquidation and the price or value at which those assets can be liquidated, and their sensitivity to other market risks or factors;*
- (b) the AIFM monitors the liquidity profile of the AIF's portfolio of assets, having regard to the marginal contribution of individual assets which may have a material impact on liquidity, and the material liabilities and commitments, contingent or otherwise, which the AIF may have in relation to its underlying obligations. For these purposes the AIFM shall take into account the profile of the investor base of the AIF, including the type of investors, the relative size of investments and the redemption terms to which these investments are subject;*

- (c) the AIFM, where the AIF invests in other collective investment undertakings, monitors the approach adopted by the managers of those other collective investment undertakings to the management of liquidity, including through conducting periodic reviews to monitor changes to the redemption provisions of the underlying collective investment undertakings in which the AIF invests. Subject to Article 16(1) of Directive 2011/61/EU, this obligation shall not apply where the other collective investment undertakings in which the AIF invests are actively traded on a regulated market within the meaning of point (14) of Article 4(1) of Directive 2004/39/EC or an equivalent third country market;
- (d) the AIFM implements and maintains appropriate liquidity measurement arrangements and procedures to assess the quantitative and qualitative risks of positions and of intended investments which have a material impact on the liquidity profile of the portfolio of the AIF's assets to enable their effects on the overall liquidity profile to be appropriately measured. The procedures employed shall ensure that the AIFM has the appropriate knowledge and understanding of the liquidity of the assets in which the AIF has invested or intends to invest including, where applicable, the trading volume and sensitivity of prices and, as the case may be, or spreads of individual assets in normal and exceptional liquidity conditions;
- (e) the AIFM considers and puts into effect the tools and arrangements, including special arrangements, necessary to manage the liquidity risk of each AIF under its management. The AIFM shall identify the types of circumstances where these tools and arrangements may be used in both normal and exceptional circumstances, taking into account the fair treatment of all AIF investors in relation to each AIF under management. The AIFM may use such tools and arrangements only in these circumstances and if appropriate disclosures have been made in accordance with Article 108.

2. AIFMs shall document their liquidity management policies and procedures, as referred to in paragraph 1, review them on at least an annual basis and update them for any changes or new arrangements.

3. AIFMs shall include appropriate escalation measures in their liquidity management system and procedures, as referred to in paragraph 1, to address anticipated or actual liquidity shortages or other distressed situations of the AIF.

4. Where the AIFM manages an AIF which is a leveraged closed-ended AIF, point (e) of paragraph 1 shall not apply.

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

#### **Article 48 Liquidity management limits and stress tests (Level 2 AIFM Regulation)**

1. AIFMs shall, where appropriate, considering the nature, scale and complexity of each AIF they manage, implement and maintain adequate limits for the liquidity or illiquidity of the AIF consistent with its underlying obligations and redemption policy and in accordance with the requirements laid down in Article 44 relating to quantitative and qualitative risk limits.

AIFMs shall monitor compliance with those limits and where limits are exceeded or likely to be exceeded, they shall determine the required (or necessary) course of action. In determining appropriate action, AIFMs shall consider the adequacy of the liquidity management policies and procedures, the appropriateness of the liquidity profile of the AIF's assets and the effect of atypical levels of redemption requests.

2. AIFMs shall regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable them to assess the liquidity risk of each AIF under their management. The stress tests shall:

- (a) *be conducted on the basis of reliable and up-to-date information in quantitative terms or, where this is not appropriate, in qualitative terms;*
- (b) *where appropriate, simulate a shortage of liquidity of the assets in the AIF and atypical redemption requests;*
- (c) *cover market risks and any resulting impact, including on margin calls, collateral requirements or credit lines;*
- (d) *account for valuation sensitivities under stressed conditions;*
- (e) *be conducted at a frequency which is appropriate to the nature of the AIF, taking in to account the investment strategy, liquidity profile, type of investor and redemption policy of the AIF, and at least once a year.*

3. *AIFMs shall act in the best interest of investors in relation to the outcome of any stress tests.*

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

*Article 49 Alignment of investment strategy, liquidity profile and redemption policy  
(Level 2 AIFM Regulation)*

1. *For the purposes of Article 16(2) of Directive 2011/61/EU, the investment strategy, liquidity profile and redemption policy of each AIF managed by an AIFM shall be considered to be aligned when investors have the ability to redeem their investments in a manner consistent with the fair treatment of all AIF investors and in accordance with the AIF's redemption policy and its obligations.*

2. *In assessing the alignment of the investment strategy, liquidity profile and redemption policy the AIFM shall also have regard to the impact that redemptions may have on the underlying prices or spreads of the individual assets of the AIF.*

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

- (a) the liquidity management systems and procedures; and
- (b) the alignment of the investment strategy, liquidity profile and redemption policy set out in paragraph 2.

## Article 17 AIFMD

### Investment in securitisation positions

- ***[Regulation \(EU\) 2017/2402](#) of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation.***

Where AIFMs are exposed to a securitisation that no longer meets the requirements provided for in [Regulation \(EU\) 2017/2402](#) of the European Parliament and of the Council<sup>55</sup>, they shall, in the best interest of the investors in the relevant AIFs, act and take corrective action, if appropriate.

**Note:**

In respect of certain securitisations the securities of which were issued before 1 January 2019, the due-diligence requirements as provided for in [Delegated Regulation \(EU\) 231/2013](#) may continue to apply (see Article 43 of [Regulation \(EU\) 2017/2402](#) (transitional provisions)).

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<sup>55</sup> Regulation (EU) 2017/2402 of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation.

## SECTION 2

### Organisational requirements

#### Article 18 AIFMD

#### General principles

[Art. 16 AIFM Law]

- **Recitals 22 and 82 of the Level 1 AIFM Directive**
- **Explanatory Memorandum section 3.2.8 (Appendix I) and Recitals 70 to 74 and 89 of the Level 2 AIFM Regulation (Appendix II)**

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

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

#### *Article 57 General requirements (Level 2 AIFM Regulation)*

1. *AIFMs shall:*

- (a) establish, implement and maintain decision-making procedures and an organisational structure which specifies reporting lines and allocates functions and responsibilities clearly and in a documented manner;*
- (b) ensure that their relevant persons are aware of the procedures to be followed for the proper discharge of their responsibilities;*
- (c) establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the AIFM;*
- (d) establish, implement and maintain effective internal reporting and communication of information at all relevant levels of the AIFM and effective information flows with any third party involved;*
- (e) maintain adequate and orderly records of their business and internal organisation.*

*AIFMs shall take into account the nature, scale and complexity of their business and the nature and range of services and activities undertaken in the course of that business.*

*AIFMs shall take into account sustainability risks when complying with the requirements laid down in the first subparagraph.*

2. *AIFMs shall establish, implement and maintain systems and procedures that are adequate to safeguard the security, integrity and confidentiality of information, taking into account the nature of the information in question.*

3. AIFMs shall establish, implement and maintain an adequate business continuity policy aimed at ensuring, in the event of an interruption to their systems and procedures, the preservation of essential data and functions, and the maintenance of services and activities, or, where that is not possible, the timely recovery of such data and functions and the timely resumption of their services and activities.

4. AIFMs shall establish, implement and maintain accounting policies and procedures and valuation rules that enable them, at the request of the competent authority, to deliver in a timely manner to the competent authority financial reports which reflect a true and fair view of their financial position and which comply with all applicable accounting standards and rules.

5. AIFMs shall implement appropriate policies and procedures to ensure that the redemption policies of the AIF are disclosed to investors, in sufficient detail, before they invest in the AIF and in the event of material changes.

6. AIFMs shall monitor and, on a regular basis, evaluate the adequacy and effectiveness of their systems, internal control mechanisms and arrangements established in accordance with paragraphs 1 to 5, and take appropriate measures to address any deficiencies.

#### *Article 58 Electronic data processing (Level 2 AIFM Regulation)*

1. AIFMs shall make appropriate and sufficient arrangements for suitable electronic systems so as to permit the timely and proper recording of each portfolio transaction or subscription or, where relevant, redemption order.

2. AIFMs shall ensure a high standard of security during the electronic data processing and integrity and confidentiality of the recorded information, as appropriate.

#### *Article 59 Accounting procedures (Level 2 AIFM Regulation)*

1. AIFMs shall employ accounting policies and procedures as referred to in Article 57(4) so as to ensure the protection of investors. The accounting records shall be kept in such a way that all assets and liabilities of the AIF can be directly identified at all times. If an AIF has different investment compartments, separate accounts shall be maintained for those compartments.

2. AIFMs shall establish, implement and maintain accounting and valuation policies and procedures so as to ensure that the net asset value of each AIF is accurately calculated on the basis of the applicable accounting rules and standards.

#### *Article 60 Control by the governing body, senior management and supervisory function (Level 2 AIFM Regulation)*

1. When allocating functions internally, AIFMs shall ensure that the governing body, the senior management and, where it exists, the supervisory function are responsible for the AIFM's compliance with its obligations under Directive 2011/61/EU.

2. An AIFM shall ensure that its senior management:

- (a) is responsible for the implementation of the general investment policy for each managed AIF, as defined, where relevant, in the fund rules, the instruments of incorporation, the prospectus or the offering documents;

- (b) oversees the approval of the investment strategies for each managed AIF;
- (c) is responsible for ensuring that valuation policies and procedures in accordance with Article 19 of Directive 2011/61/EU are established and implemented;
- (d) is responsible for ensuring that the AIFM has a permanent and effective compliance function, even if this function is performed by a third party;
  - ensures and verifies on a periodic basis that the general investment policy, the investment strategies and the risk limits of each managed AIF are properly and effectively implemented and complied with, even if the risk management function is performed by third parties;
- (f) approves and reviews on a periodic basis the adequacy of the internal procedures for undertaking investment decisions for each managed AIF, so as to ensure that such decisions are consistent with the approved investment strategies;
- (g) approves and reviews on a periodic basis the risk management policy and the arrangements, processes and techniques for implementing that policy, including the risk limit system for each AIF it manages;
- (h) is responsible for establishing and applying a remuneration policy in line with Annex II of Directive 2011/61/EU;
- (i) is responsible for the integration of sustainability risks in activities referred to in points (a) to (h).

3. An AIFM shall also ensure that its senior management and, where appropriate, its governing body or supervisory function:

- (a) assess and periodically review the effectiveness of the policies, arrangements and procedures put in place to comply with the obligations laid down in Directive 2011/61/EU;
- (b) take appropriate measures to address any deficiencies.

4. An AIFM shall ensure that its senior management receives on a frequent basis, and at least annually, written reports on matters of compliance, internal audit and risk management indicating in particular whether appropriate remedial measures have been taken in the event of any deficiencies.

5. An AIFM shall ensure that its senior management receives on a regular basis reports on the implementation of investment strategies and of the internal procedures for taking investment decisions referred to in points (b) to (e) of paragraph 2.

6. An AIFM shall ensure that the governing body or the supervisory function, if any, receives on a regular basis written reports on the matters referred to in paragraph 4.

### **Article 61 Permanent compliance function (Level 2 AIFM Regulation)**

1. AIFMs shall establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the AIFM to comply with its obligations under Directive 2011/61/EU, and the associated risks, and put in place adequate measures and procedures designed to minimise such risk and to enable the competent authorities to exercise their powers effectively under that Directive.

The AIFM shall take into account the nature, scale and complexity of its business, and the nature and range of services and activities undertaken in the course of that business.

2. An AIFM shall establish and maintain a permanent and effective compliance function which operates independently and has the following responsibilities:

- (a) monitoring and, on a regular basis, evaluating the adequacy and effectiveness of the measures, policies and procedures put in place in accordance with paragraph 1 and the actions taken to address any deficiencies in the AIFM's compliance with its obligations;
- (b) advising the relevant persons responsible for carrying out services and activities and assisting them in complying with the AIFM's obligations under Directive 2011/61/EU.

3. In order to enable the compliance function referred to in paragraph 2 to perform its responsibilities properly and independently, the AIFM shall ensure that:

- (a) the compliance function has the necessary authority, resources, expertise and access to all relevant information;
- (b) a compliance officer is appointed and is responsible for the compliance function and for reporting on a frequent basis, and at least annually, to the senior management on matters of compliance, indicating in particular whether appropriate remedial measures have been taken in the event of any deficiencies;
- (c) persons in the compliance function are not involved in the performance of services or activities they monitor;
- (d) the method of determining the remuneration of a compliance officer and other persons in the compliance function do not affect their objectivity and are not likely to do so.

However, the AIFM shall not be required to comply with points (c) or (d) of the first subparagraph where it is able to demonstrate that in view of the nature, scale and complexity of its business, and the nature and range of its services and activities, that the requirement is not proportionate and that its compliance function continues to be effective.

### **Article 62 Permanent internal audit function (Level 2 AIFM Regulation)**

1. AIFMs shall, where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of collective portfolio management activities undertaken in the course of that business, establish and maintain an internal audit function which is separate and independent from the other functions and activities of the AIFM.

2. The internal audit function referred to in paragraph 1 shall:

- (a) establish, implement and maintain an audit plan to examine and evaluate the adequacy and effectiveness of the AIFM's systems, internal control mechanisms and arrangements;
- (b) issue recommendations based on the results of work carried out in accordance with point (a);
- (c) verify compliance with the recommendations referred to in point (b);
- (d) report internal audit matters.

**Article 63 Personal transactions**  
**(Level 2 AIFM Regulation)**

1. For any relevant person who is involved in activities that may give rise to a conflict of interest, or who has access to inside information within the meaning of Article 1(1) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)<sup>56</sup> or to other confidential information relating to an AIF or transactions with or for an AIF, an AIFM shall establish, implement and maintain adequate arrangements aimed at preventing such relevant persons from:

- (a) entering into a personal transaction in financial instruments or other assets which fulfils one of the following criteria:
  - (i) the transaction is subject to Article 2(1) of Directive 2003/6/EC;
  - (ii) the transaction involves the misuse or improper disclosure of confidential information;
  - (iii) the transaction conflicts or is likely to conflict with an obligation of the AIFM under Directive 2011/61/EU;
- (b) advising or inducing, other than in the proper course of his employment or contract for services, any other person to enter into a personal transaction referred to in point (a)(i) and (ii), or that would otherwise constitute a misuse of information relating to pending orders;
- (c) disclosing, other than in the normal course of his employment or contract for services and without prejudice to Article 3(a) of Directive 2003/6/EC, any information or opinion to any other person if the relevant person knows, or reasonably ought to know, that as a result of that disclosure that other person would or would be likely to take either of the following steps:
  - (i) entering into a personal transaction referred to in point (a)(i) and (ii) in financial instruments or other assets or that would otherwise constitute a misuse of information relating to pending orders;
  - (ii) advising or inducing another person to enter into such a personal transaction.

2. The arrangements referred to in paragraph 1 shall in particular be designed to ensure that:

- (a) each relevant person is aware of the restrictions on personal transactions referred to in paragraph 1, and of the measures established by the AIFM in connection with personal transactions and disclosure, pursuant to paragraph 1;
- (b) the AIFM is informed promptly of any personal transaction entered into by a relevant person covered by paragraph 1, either by notification of that transaction or by other procedures enabling the AIFM to identify such transactions;
- (c) a record is kept of the personal transaction notified to the AIFM or identified by it, including any authorisation or prohibition in connection with such a transaction.

For the purposes of point (b) of the first subparagraph, where certain activities of the AIFM are performed by third parties, the AIFM shall ensure that the entity performing the activity maintains a record of personal transactions entered into by any relevant person covered by paragraph 1 and provides that information to the AIFM promptly on request.

3. Paragraphs 1 and 2 shall not apply to personal transactions:

<sup>56</sup> OJ L96, 12.4.2003, p. 16.

- (a) *effected under a discretionary portfolio management service where there is no prior communication in connection with the transaction between the portfolio manager and the relevant person or other person for whose account the transaction is executed;*
- (b) *in UCITS or AIFs that are subject to supervision under the law of a Member State which requires an equivalent level of risk spreading in their assets, where the relevant person and any other person for whose account the transactions are effected are not involved in the management of that undertaking.*

4. *For the purpose of paragraph 1, a personal transaction shall also include a transaction in a financial instrument or other asset effected on behalf or for the account of:*

- (a) *a relevant person;*
- (b) *any person with whom the relevant person has a family relationship or with whom the relevant person has close links;*
- (c) *a person whose relationship with the relevant person is such that the relevant person has a direct or indirect material interest in the outcome of the trade, other than a fee or commission for the execution of the trade.*

#### *Article 64 Recording of portfolio transactions (Level 2 AIFM Regulation)*

1. *AIFMs shall make without delay for each portfolio transaction relating to AIFs it manages a record of information which is sufficient to reconstruct the details of the order and the executed transaction or of the agreement.*

2. *With regard to portfolio transactions on an execution venue, the record referred to in paragraph 1 shall include the following information:*

- (a) *the name or other designation of the AIF and of the person acting for the account of the AIF;*
- (b) *the asset;*
- (c) *where relevant, the quantity;*
- (d) *the type of the order or transaction;*
- (e) *the price;*
- (f) *for orders, the date and exact time of the transmission of the order and the name or other designation of the person to whom the order was transmitted, or for transactions, the date and exact time of the decision to deal and the execution of the transaction;*
- (g) *where applicable, the name of the person transmitting the order or executing the transaction;*
- (h) *where applicable, the reasons for the revocation of an order;*
- (i) *for executed transactions the counterparty and execution venue identification.*

3. *With regard to portfolio transactions by the AIF outside an execution venue, the record referred to in paragraph 1 shall include the following information:*

- (a) *the name or other designation of the AIF;*

(b) *the legal and other documentation that forms the basis of the portfolio transaction, including in particular the agreement as executed;*

(c) *the price.*

4. *For the purposes of paragraphs 2 and 3, an execution venue shall include a systematic internaliser as referred to in point (7) of Article 4(1) of Directive 2004/39/EC, a regulated market as referred to in point (14) of Article 4(1) of that Directive, a multilateral trading facility as referred to in point (15) of Article 4(1) of that Directive, a market maker as referred to in point (8) of Article 4(1) of that Directive or other liquidity provider or an entity that performs a similar function in a third country to the functions performed by any of the foregoing.*

### *Article 65 Recording of subscription and redemption orders (Level 2 AIFM Regulation)*

1. *AIFMs shall take all reasonable steps to ensure that received AIF subscriptions and, where relevant, redemption orders are recorded without undue delay after receipt of any such order.*

2. *That record shall include information on the following:*

(a) *the relevant AIF;*

(b) *the person giving or transmitting the order;*

(c) *the person receiving the order;*

(d) *the date and time of the order;*

(e) *the terms and means of payment;*

(f) *the type of the order;*

(g) *the date of execution of the order;*

(h) *the number of units or shares or equivalent amounts subscribed or redeemed;*

(i) *the subscription or, where relevant, redemption price for each unit or share or, where relevant, the amount of capital committed and paid;*

(j) *the total subscription or redemption value of the units or shares;*

(k) *the gross value of the order including charges for subscription, or the net amount after charges for redemption.*

*Information under points (i), (j) and (k) shall be recorded as soon as available.*

*Article 66 Recordkeeping requirements  
(Level 2 AIFM Regulation)*

*1. AIFMs shall ensure that all required records referred to in Articles 64 and 65 are retained for a period of at least five years.*

*However, competent authorities may require AIFMs to ensure that any or all of those records are retained for a longer period, taking into account the nature of the asset or portfolio transaction, where it is necessary to enable the authority to exercise its supervisory functions under Directive 2011/61/EU.*

*2. Following the termination of the authorisation of an AIFM, the records are to be retained at least for the outstanding term of the five years period referred to in paragraph 1. Competent authorities may require retention for a longer period.*

*Where the AIFM transfers its responsibilities in relation to the AIF to another AIFM, it shall ensure that the records referred to in paragraph 1 are accessible to that AIFM.*

*3. The records shall be retained on a medium that allows the storage of information in a way accessible for future reference by the competent authorities, and in such a form and manner that:*

- (a) the competent authorities are able to access them readily and to reconstitute each key stage of the processing of each portfolio transaction;*
- (b) corrections or other amendments, and the contents of the records prior to such corrections or amendments, may be easily ascertained;*
- (c) no other manipulation or alteration is possible.*

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

## Article 19 AIFMD

### Valuation

[Art. 17 AIFM Law]

- **Recitals 29 and 82 of the Level 1 AIFM Directive**
- **Explanatory Memorandum section 3.2.9 (Appendix I) and Recitals 75 to 81 of the Level 2 AIFM Regulation (Appendix II)**
- **Q&A published by EU Commission (Appendix X) ID 1156 Valuation**

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

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

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

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

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

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

- **See definition of "AIFM of closed-ended AIF" and of "AIFM of open-ended AIF" (Appendix VIII)**

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

#### **Article 67 Policies and procedures for the valuation of the assets of the AIF (Level 2 AIFM Regulation)**

*1. AIFMs shall establish, maintain, implement and review, for each AIF they manage, written policies and procedures that ensure a sound, transparent, comprehensive and appropriately documented valuation process. The valuation policy and procedures shall cover all material aspects of the valuation process and valuation procedures and controls in respect of the relevant AIF.*

*Without prejudice to requirements under national law and the AIF rules and instruments of incorporation, the AIFM shall ensure that fair, appropriate and transparent valuation methodologies are applied for the AIFs it manages. The valuation policies shall identify and the procedures shall implement the valuation methodologies used for each type of asset in which the AIF may invest in accordance with applicable national law, the AIF rules and the instruments of incorporation. The AIFM shall not invest in a particular type of asset for the first time unless an appropriate valuation methodology or methodologies have been identified for that specific type of asset.*

*The policies and procedures setting out valuation methodologies shall include inputs, models and the selection criteria for pricing and market data sources. They shall provide that prices shall be obtained from independent sources whenever possible and appropriate. The selection process of a particular methodology shall include an*

*assessment of the available relevant methodologies, taking into account their sensitivity to changes in variables and how specific strategies determine the relative value of the assets in the portfolio.*

*2. The valuation policies shall set out the obligations, roles and responsibilities of all parties involved in the valuation process, including the senior management of the AIFM. The procedures shall reflect the organisational structure as set out in the valuation policies.*

*The valuation policies and procedures shall address at least the following:*

- (a) the competence and independence of personnel who are effectively carrying out the valuation of assets;*
- (b) the specific investment strategies of the AIF and the assets the AIF might invest in;*
- (c) the controls over the selection of valuation inputs, sources and methodologies;*
- (d) the escalation channels for resolving differences in values for assets;*
- (e) the valuation of any adjustments related to the size and liquidity of positions, or to changes in the market conditions, as appropriate;*
- (f) the appropriate time for closing the books for valuation purposes;*
- (g) the appropriate frequency for valuing assets.*

*3. Where an external valuer is appointed, the valuation policies and procedures shall set out a process for the exchange of information between the AIFM and the external valuer to ensure that all necessary information required for the purpose of performing the valuation task is provided.*

*The valuation policies and procedures shall ensure that the AIFM conducts initial and periodic due diligence on third parties that are appointed to perform valuation services.*

*4. Where the valuation is performed by the AIFM itself, the policies shall include a description of the safeguards for the functionally independent performance of the valuation task in accordance with point (b) of Article 19(4) of Directive 2011/61/EU. Such safeguards shall include measures to prevent or restrain any person from exercising inappropriate influence over the way in which a person carries out valuation activities.*

### **Article 68 Use of models to value assets (Level 2 AIFM Regulation)**

*1. If a model is used to value the assets of an AIF, the model and its main features shall be explained and justified in the valuation policies and procedures. The reason for the choice of the model, the underlying data, the assumptions used in the model and the rationale for using them, and the limitations of the model-based valuation shall be appropriately documented.*

*2. The valuation policies and procedures shall ensure that before being used a model is validated by a person with sufficient expertise who has not been involved in the process of building that model. The validation process shall be appropriately documented.*

*3. The model shall be subject to prior approval by the senior management of the AIFM.*

*Where the model is used by an AIFM that performs the valuation function itself, the approval by the senior management shall be without prejudice to the competent authority's right to require under Article 19(9) of Directive 2011/61/EU that the model be verified by an external valuer or an auditor.*

**Article 69 Consistent application of valuation policies and procedures  
(Level 2 AIFM Regulation)**

1. An AIFM shall ensure that the valuation policies and procedures and the designated valuation methodologies are applied consistently.
2. The valuation policies and procedures and the designated methodologies shall be applied to all assets within an AIF taking into account the investment strategy, the type of asset and, if applicable, the existence of different external valuers.
3. Where no update is required, the policies and procedures shall be applied consistently over time and valuation sources and rules shall remain consistent over time.
4. The valuation procedures and the designated valuation methodologies shall be applied consistently across all AIFs managed by the same AIFM, taking into account the investment strategies and the types of asset held by the AIFs, and, if applicable, the existence of different external valuers.

**Article 70 Periodic review of valuation policies and procedures  
(Level 2 AIFM Regulation)**

1. Valuation policies shall provide for a periodic review of the policies and procedures, including of the valuation methodologies. The review shall be carried out at least annually and before the AIF engages with a new investment strategy or a new type of asset that is not covered by the actual valuation policy.
2. The valuation policies and procedures shall outline how a change to the valuation policy, including a methodology, may be affected and in what circumstances this would be appropriate. Recommendations for changes to the policies and procedures shall be made to the senior management, which shall review and approve any changes.
3. The risk management function referred to in Article 38 shall review and, if needed, provide appropriate support concerning the policies and procedures adopted for the valuation of assets.

**Article 71 Review of individual values of assets  
(Level 2 AIFM Regulation)**

1. An AIFM shall ensure that all assets held by the AIF are fairly and appropriately valued. The AIFM shall document by type of asset the way the appropriateness and fairness of the individual values is assessed. The AIFM shall at all times be able to demonstrate that the portfolios of AIFs it manages are properly valued.
2. The valuation policies and procedures shall set out a review process for the individual values of assets, where a material risk of an inappropriate valuation exists, such as in the following cases:
  - (a) the valuation is based on prices only available from a single counterparty or broker source;
  - (b) the valuation is based on illiquid exchange prices;
  - (c) the valuation is influenced by parties related to the AIFM;
  - (d) the valuation is influenced by other entities that may have a financial interest in the AIF's performance;

- (e) the valuation is based on prices supplied by the counterparty who originated an instrument, in particular where the originator is also financing the AIF's position in the instrument;*
- (f) the valuation is influenced by one or more individuals within the AIFM.*

*3. The valuation policies and procedures shall describe the review process including sufficient and appropriate checks and controls on the reasonableness of individual values. Reasonableness shall be assessed in terms of the existence of an appropriate degree of objectivity. Such checks and controls shall include at least:*

- (a) verifying values by a comparison amongst counterparty-sourced pricings and over time;*
- (b) validating values by comparison of realised prices with recent carrying values;*
- (c) considering the reputation, consistency and quality of the valuation source;*
- (d) a comparison with values generated by a third party;*
- (e) an examination and documentation of exemptions;*
- (f) highlighting and researching any differences that appear unusual or vary by valuation benchmark established for the type of asset;*
- (g) testing for stale prices and implied parameters;*
- (h) a comparison with the prices of any related assets or their hedges;*
- (i) a review of the inputs used in model-based pricing, in particular of those to which the model's price exhibits significant sensitivity.*

*4. The valuation policies and procedures shall include appropriate escalation measures to address differences or other problems in the valuation of assets.*

### *Article 72 Calculation of the net asset value per unit or share (Level 2 AIFM Regulation)*

- 1. An AIFM shall ensure that for each AIF it manages the net asset value per unit or share is calculated on the occasion of each issue or subscription or redemption or cancellation of units or shares, but at least once a year.*
- 2. An AIFM shall ensure that the procedures and the methodology for calculating the net asset value per unit or share are fully documented. The calculation procedures and methodologies and their application shall be subject to regular verification by the AIFM, and the documentation shall be amended accordingly.*
- 3. An AIFM shall ensure that remedial procedures are in place in the event of an incorrect calculation of the net asset value.*
- 4. An AIFM shall ensure that the number of units or shares in issue is subject to regular verification, at least as often as the unit or share price is calculated.*

### *Article 74 Frequency of valuation of assets held by open-ended AIFs (Level 2 AIFM Regulation)*

- 1. The valuation of financial instruments held by open-ended AIFs shall take place every time the net asset value per unit or share is calculated pursuant to Article 72(1).*

*2. The valuation of other assets held by open-ended AIFs shall take place at least once a year, and every time there is evidence that the last determined value is no longer fair or proper.*

4. AIFMs shall ensure that the valuation function is either performed by:
- (a) an external valuer, being a legal or natural person independent from the AIF, the AIFM and any other persons with close links to the AIF or the AIFM; or
  - (b) the AIFM itself, provided that the valuation task is functionally independent from the portfolio management and the remuneration policy and other measures ensure that conflicts of interest are mitigated and that undue influence upon the employees is prevented.

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

5. Where an external valuer performs the valuation function, the AIFM shall demonstrate that:
- (a) the external valuer is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct;
  - (b) the external valuer can provide sufficient professional guarantees to be able to perform effectively the relevant valuation function in accordance with paragraphs 1, 2 and 3; and
  - (c) the appointment of the external valuer complies with the requirements of Article 20(1) and (2) and the delegated acts adopted pursuant to Article 20(7).

**Article 73 Professional guarantees  
(Level 2 AIFM Regulation)**

*1. External valuers shall provide upon request professional guarantees to demonstrate their ability to perform the valuation function. Professional guarantees to be furnished by external valuers shall be in written form.*

*2. The professional guarantees shall contain evidence of the external valuer's qualification and capability to perform proper and independent valuation, including, at least, evidence of:*

- (a) sufficient personnel and technical resources;*
- (b) adequate procedures safeguarding proper and independent valuation;*
- (c) adequate knowledge and understanding of the investment strategy of the AIF  
and of the assets the external valuer is appointed to value;*
- (d) a sufficiently good reputation and sufficient experience with valuation.*

*3. Where the external valuer is subject to mandatory professional registration with the competent authority or another entity of the state where it is established, the professional guarantee shall contain the name of this authority or entity, including the relevant contact information. The professional guarantee shall indicate clearly the legal or regulatory provisions or rules of professional conduct to which the external valuer is subject.*

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

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

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

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

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

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

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

- (a) the criteria concerning the procedures for the proper valuation of the assets and the calculation of the net asset value per unit or share;
- (b) the professional guarantees the external valuer must be able to provide to effectively perform the valuation function;
- (c) the frequency of valuation carried out by open-ended AIFs which is both appropriate to the assets held by the AIF and its issuance and redemption policy.

## SECTION 3

### Delegation of AIFM functions

#### Article 20 AIFMD

##### Delegation

[Art. 18 AIFM Law]

- **Recitals 12, 30, 31 and 83 of the Level 1 AIFM Directive**
- **Explanatory Memorandum section 3.2.10 (Appendix I) and Recitals 82 to 93 of the Level 2 AIFM Regulation (Appendix II)**
- **Q&A published by EU Commission (Appendix X) ID 1158, 1159 and 1161 Delegation**
- **Q&A published by ESMA (Appendix XIV) Section VI Depositaries Answer 16 and Section VIII Delegation Question 1, Question 2, Question 3, Question 4**

1. AIFMs which intend to delegate to third parties the task of carrying out functions on their behalf shall notify the competent authorities of their home Member State before the delegation arrangements become effective. The following conditions shall be met:

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

#### *Article 76 Objective reasons for delegation (Level 2 AIFM Regulation)*

1. The AIFM shall provide the competent authorities with a detailed description, explanation and evidence of the objective reasons for delegation. When assessing whether the entire delegation structure is based on objective reasons within the meaning of Article 20(1) (a) of Directive 2011/61/EU the following criteria shall be considered:

- (a) *optimising of business functions and processes;*
- (b) *cost saving;*
- (c) *expertise of the delegate in administration or in specific markets or investments;*
- (d) *access of the delegate to global trading capabilities.*

2. Upon request by the competent authorities, an AIFM shall provide further explanations and provide documents proving that the entire delegation structure is based on objective reasons.

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

#### *Article 77 Features of the delegate (Level 2 AIFM Regulation)*

1. A delegate shall have sufficient resources and shall employ sufficient personnel with the skills, knowledge and expertise necessary for the proper discharge of the tasks delegated to it and have an appropriate organizational structure supporting the performance of the delegated tasks.

*2. Persons who effectively conduct the activities delegated by the AIFM shall have sufficient experience, appropriate theoretical knowledge and appropriate practical experience in the relevant functions. Their professional training and the nature of the functions they have performed in the past shall be appropriate for the conduct of the business.*

*3. Persons who effectively conduct the business of the delegate shall not be deemed of sufficiently good repute if they have any negative records relevant both for the assessment of good repute and for the proper performance of the delegated tasks or if there is other relevant information which affects their good reputation. Such negative records shall include but shall not be limited to criminal offences, judicial proceedings or administrative sanctions relevant for the performance of the delegated tasks. Special attention shall be given to any offences related to financial activities, including but not limited to obligations relating to the prevention of money laundering, dishonesty, fraud or financial crime, bankruptcy or insolvency. Other relevant information shall include information such as that indicating that the person is not trustworthy or honest.*

*Where the delegate is regulated in respect of its professional services within the Union, factors referred to in the first subparagraph shall be deemed to be satisfied when the relevant supervisory authority has reviewed the criterion of "good repute" within the authorization procedure unless there is evidence to the contrary.*

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

#### **Article 78 Delegation of portfolio or risk management (Level 2 AIFM Regulation)**

*1. This Article shall apply where the delegation of portfolio management or risk management is concerned.*

*2. The following entities shall be deemed to be authorised or registered for the purpose of asset management and subject to supervision in accordance with point (c) of Article 20(1) of Directive 2011/61/EU:*

- (a) management companies authorised under Directive 2009/65/EC;*
- (b) investment firms authorized under Directive 2004/39/EC to perform portfolio management;*
- (c) credit institutions authorised under Directive 2006/48/EC having the authorisation to perform portfolio management under Directive 2004/39/EC;*
- (d) external AIFMs authorised under Directive 2011/61/EU;*
- (e) third country entities authorised or registered for the purpose of asset management and effectively supervised by a competent authority in those countries.*

*(...)*

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

*Article 78 Delegation of portfolio or risk management  
(Level 2 AIFM Regulation)*

(...)

3. Where the delegation is conferred on a third-country undertaking the following conditions shall be fulfilled in accordance with point (d) of Article 20(1) of Directive 2011/61/EU:

- (a) a written arrangement shall exist between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the undertaking to which delegation is conferred;
- (b) with respect to the undertaking to which delegation is conferred, the arrangement referred to in point (a) allows the competent authorities to:
  - (i) obtain on request the relevant information necessary to carry out their supervisory tasks as provided for in Directive 2011/61/EU;
  - (ii) obtain access to the documents relevant for the performance of their supervisory duties maintained in the third country;
  - (iii) carry out on-site inspections on the premises of the undertaking to which functions were delegated. The practical procedures for on-site inspections shall be detailed in the written arrangement;
  - (iv) receive as soon as possible information from the supervisory authority in the third country for the purpose of investigating apparent breaches of the requirements of Directive 2011/61/EU and its implementing measures;
  - (v) cooperate in enforcement in accordance with the national and international law applicable to the supervisory authority of the third country and the EU competent authorities in cases of breach of the requirements of Directive 2011/61/EU and its implementing measures and relevant national law.

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

*Article 79 Effective supervision  
(Level 2 AIFM Regulation)*

A delegation shall be deemed to prevent the effective supervision of the AIFM where:

- (a) the AIFM, its auditors and the competent authorities do not have effective access to data related to the delegated functions and to the business premises of the delegate, or the competent authorities are not able to exercise those rights of access;
- (b) the delegate does not cooperate with the competent authorities of the AIFM in connection with the delegated functions;
- (c) the AIFM does not make available on request to the competent authorities all information necessary to enable authorities to supervise the compliance of the performance of the delegated functions with the requirements of Directive 2011/61/EU and its implementing measures.

- (f) the AIFM must be able to demonstrate that the delegate 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 delegate and to withdraw the delegation with immediate effect when this is in the interest of investors.

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

*Article 75 General principles  
(Level 2 AIFM Regulation)*

*When delegating the task of carrying out one or more functions on their behalf, AIFMs shall comply, in particular, with the following general principles:*

- (a) the delegation structure does not allow for the circumvention of the AIFM's responsibilities or liability;*
- (b) the obligations of the AIFM towards the AIF and its investors are not altered as a result of the delegation;*
- (c) the conditions with which the AIFM must comply in order to be authorised and carry out activities in accordance with Directive 2011/61/EU are not undermined;*
- (d) the delegation arrangement takes the form of a written agreement concluded between the AIFM and the delegate;*
- (e) the AIFM ensures that the delegate carries out the delegated functions effectively and in compliance with applicable law and regulatory requirements and must establish methods and procedures for reviewing on an ongoing basis the services provided by the delegate. The AIFM shall take appropriate action if it appears that the delegate cannot carry out the functions effectively or in compliance with applicable laws and regulatory requirements;*
- (f) the AIFM supervises effectively the delegated functions and manages the risks associated with the delegation. For this purpose the AIFM shall have at all times the necessary expertise and resources to supervise the delegated functions. The AIFM shall set out in the agreement its right of information, inspection, admittance and access, and its instruction and monitoring rights against the delegate. The AIFM shall also ensure that the delegate properly supervises the performance of the delegated functions, and adequately manages the risks associated with the delegation;*
- (g) the AIFM ensures that the continuity and quality of the delegated functions or of the delegated task of carrying out functions are maintained also in the event of termination of the delegation either by transferring the delegated functions or the delegated task of carrying out functions to another third party or by performing them itself;*
- (h) the respective rights and obligations of the AIFM and the delegate are clearly allocated and set out in the agreement. In particular, the AIFM shall contractually ensure its instruction and termination rights, its rights of information, and its right to inspections and access to books and premises. The agreement shall make sure that sub-delegation can take place only with the consent of the AIFM;*
- (i) where it concerns portfolio management, the delegation is in accordance with the investment policy of the AIF. The delegate shall be instructed by the AIFM how to implement the investment policy and the AIFM shall monitor whether the delegate complies with it on an ongoing basis;*
- (j) the AIFM ensures that the delegate discloses to the AIFM any development that may have a material impact on the delegate's ability to carry out the delegated functions effectively and in compliance with applicable laws and regulatory requirements;*

- (k) *the AIFM ensures that the delegate protects any confidential information relating to the AIFM, the AIF affected by the delegation and the investors in that AIF;*
- (l) *the AIFM ensures that the delegate establishes, implements and maintains a contingency plan for disaster recovery and periodic testing of backup facilities while taking into account the types of delegated functions.*

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

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

### *Article 80 Conflicts of interest (Level 2 AIFM Regulation)*

1. *In accordance with point (b) of Article 20(2) of Directive 2011/61/EU, the criteria to assess whether a delegation conflicts with the interests of the AIFM or the investor in the AIF shall at least include:*

- (a) *where the AIFM and the delegate are members of the same group or have any other contractual relationship, the extent to which the delegate controls the AIFM or has the ability to influence its actions;*
- (b) *where the delegate and an investor in the relevant AIF are members of the same group or have any other contractual relationship, the extent to which this investor controls the delegate or has the ability to influence its actions;*
- (c) *the likelihood that the delegate makes a financial gain, or avoids a financial loss, at the expense of the AIF or the investors in the AIF;*
- (d) *the likelihood that the delegate has an interest in the outcome of a service or an activity provided to the AIFM or the AIF;*
- (e) *the likelihood that the delegate has a financial or other incentive to favour the interest of another client over the interests of the AIF or the investors in the AIF;*
- (f) *the likelihood that the delegate receives or will receive from a person other than the AIFM an inducement in relation to the collective portfolio management activities provided to the AIFM and the AIFs it manages in the form of monies, goods or services other than the standard commission or fee for that service.*

2. *The portfolio or risk management function may be considered to be functionally and hierarchically separated from other potentially conflicting tasks only where the following conditions are satisfied:*

- (a) *persons engaged in portfolio management tasks are not engaged in the performance of potentially conflicting tasks such as controlling tasks;*
- (b) *persons engaged in risk management tasks are not engaged in the performance of potentially conflicting tasks such as operating tasks;*
- (c) *persons engaged in risk management functions are not supervised by those responsible for the performance of operating tasks;*

- (d) *the separation is ensured throughout the whole hierarchical structure of the delegate up to its governing body and is reviewed by the governing body and, where it exists, the supervisory function of the delegate.*

3. *Potential conflicts of interest shall be deemed properly identified, managed, monitored and disclosed to the investors of the AIF only if:*

- (a) *the AIFM ensures that the delegate takes all reasonable steps to identify, manage and monitor potential conflicts of interest that may arise between itself and the AIFM, the AIF or the investors in the AIF. The AIFM shall ensure that the delegate has procedures in place corresponding to those required under Articles 31 to 34.*
- (b) *the AIFM ensures that the delegate discloses potential conflicts of interest as well as the procedures and measures to be adopted by it in order to manage such conflicts of interest to the AIFM which shall disclose them to the AIF and the investors in the AIF in accordance with Article 36.*

3. The AIFM's liability towards the AIF and its investors shall not 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.

- **Q&A published by EU Commission (Appendix X) [ID 1159 Delegation](#), [ID 1163 Delegation](#)**

### **Article 82 Letter-box entity and AIFM no longer considered to be managing an AIF (Level 2 AIFM Regulation)**

1. *An AIFM shall be deemed a letter-box entity and shall no longer be considered to be the manager of the AIF at least in any of the following situations:*

- (a) *the AIFM no longer retains the necessary expertise and resources to supervise the delegated tasks effectively and manage the risks associated with the delegation;*
- (b) *the AIFM no longer has the power to take decisions in key areas which fall under the responsibility of the senior management or no longer has the power to perform senior management functions in particular in relation to the implementation of the general investment policy and investment strategies;*
- (c) *the AIFM loses its contractual rights to inquire, inspect, have access or give instructions to its delegates or the exercise of such rights becomes impossible in practice;*
- (d) *the AIFM delegates the performance of investment management functions to an extent that exceeds by a substantial margin the investment management functions performed by the AIFM itself. When assessing the extent of delegation, competent authorities shall assess the entire delegation structure taking into account not only the assets managed under delegation but also the following qualitative criteria:*
  - (i) *the types of assets the AIF or the AIFM acting on behalf of the AIF is invested in, and the importance of the assets managed under delegation for the risk and return profile of the AIF;*
  - (ii) *the importance of the assets under delegation for the achievement of the investment goals of the AIF;*

- (iii) *the geographical and sectoral spread of the AIF's investments,*
- (iv) *the risk profile of the AIF;*
- (v) *the type of investment strategies pursued by the AIF or the AIFM acting on behalf of the AIF;*
- (vi) *the types of tasks delegated in relation to those retained; and*
- (vii) *the configuration of delegates and their sub-delegates, their geographical sphere of operation and their corporate structure, including whether the delegation is conferred on an entity belonging to the same corporate group as the AIFM.*

2. *The Commission shall monitor, in the light of market developments, the application of this Article. The Commission shall review the situation after two years and shall, if necessary, take appropriate measures to further specify the conditions under which the AIFM shall be deemed to have delegated his functions to the extent that it becomes a letter box entity and can no longer be considered to be manager of the AIF.*

3. *ESMA may issue guidelines to ensure a consistent assessment of delegation structures across the Union.*

- **FAQ AIFM published by CSSF (Appendix XV) Section 7 Delegation [Question 7.a\)](#), [Question 7.b\)](#)**
- **Q&A published by ESMA (Appendix XIV) Section VIII Delegation [Question 1](#)**

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

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

#### **Article 81 Consent and notification of sub-delegation (Level 2 AIFM Regulation)**

1. *A subdelegation shall become effective where the AIFM demonstrates its consent to it in writing.*

*A general consent given in advance by the AIFM shall not be deemed consent in accordance with point (a) of Article 20(4) of Directive 2011/61/EU.*

(...)

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

#### **Article 81 Consent and notification of sub-delegation (Level 2 AIFM Regulation)**

(...)

2. *Pursuant to point (b) of Article 20(4) of Directive 2011/61/EU, the notification shall contain details of the delegate, the name of the competent authority where the sub- delegate is authorised or registered, the delegated functions, the AIFs affected by the sub-delegation, a copy of the written consent by the AIFM and the intended effective date of the sub-delegation.*

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

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

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

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

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

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

- (a) the conditions for fulfilling the requirements set out in paragraphs 1, 2, 4 and 5;
- (b) the conditions under which the AIFM shall be deemed to have delegated its functions to the extent that it becomes a letter-box entity and can no longer be considered to be the manager of the AIF as set out in paragraph 3.

## SECTION 4

### Depositary

#### Article 21 AIFMD

### Depositary

[Art. 19 AIFM Law]

- **Q&A published by EU Commission (Appendix X) ID 1173 Depositary**

#### [Appointment of the depositary]

1. For each AIF it manages, the AIFM shall ensure that a single depositary is appointed in accordance with this Article.
2. The appointment of the depositary shall be evidenced by written contract. The contract shall, inter alia, regulate the flow of information deemed necessary to allow the depositary to perform its functions for the AIF for which it has been appointed as depositary, as set out in this Directive and in other relevant laws, regulations or administrative provisions.

- **Explanatory Memorandum section 3.2.11 (Appendix I) and Recital 94 of the Level 2 AIFM Regulation (Appendix II)**
- **Q&A published by ESMA (Appendix XIV) Section VI Depositaries Question 4**

#### *Article 83 Contractual particulars (Level 2 AIFM Regulation)*

1. A contract by which the depositary is appointed in accordance with Article 21(2) of Directive 2011/61/EU shall be drawn up between the depositary on the one hand and the AIFM and, as the case may be, or the AIF on the other hand and shall include at least the following elements:

- (a) a description of the services to be provided by the depositary and the procedures to be adopted for each type of asset in which the AIF may invest and which shall then be entrusted to the depositary;
- (b) a description of the way in which the safe-keeping and oversight function is to be performed depending on the types of assets and the geographical regions in which the AIF plans to invest. With respect to the custody duties this description shall include country lists and procedures for adding and, as the case may be, or withdrawing countries from that list. This shall be consistent with the information provided in the AIF rules, instruments of incorporation and offering documents regarding the assets in which the AIF may invest;
- (c) a statement that the depositary's liability shall not be affected by any delegation of its custody functions unless it has discharged itself of its liability in accordance with Article 21(13) or (14) of Directive 2011/61/EU;
- (d) the period of validity and the conditions for amendment and termination of the contract including the situations which could lead to the termination of the contract and details regarding the termination procedure and, if applicable, the procedures by which the depositary should send all relevant information to its successor;

- (e) the confidentiality obligations applicable to the parties in accordance with relevant laws and regulations. These obligations shall not impair the ability of competent authorities to have access to the relevant documents and information;*
- (f) the means and procedures by which the depositary transmits to the AIFM or the AIF all relevant information that it needs to perform its duties including the exercise of any rights attached to assets, and in order to allow the AIFM and the AIF to have a timely and accurate overview of the accounts of the AIF;*
- (g) the means and procedures by which the AIFM or the AIF transmits all relevant information or ensures the depositary has access to all the information it needs to fulfil its duties, including the procedures ensuring that the depositary will receive information from other parties appointed by the AIF or the AIFM;*
- (h) information on whether or not the depositary, or a third party to whom safe-keeping functions are delegated in accordance with Article 21(11) of Directive 2011/61/EU may re-use the assets it has been entrusted with and, if any, the conditions attached to any such re-use;*
- (i) the procedures to be followed when an amendment to the AIF rules, instruments of incorporation or offering documents is being considered, detailing the situations in which the depositary is to be informed, or where the prior agreement of the depositary is needed to proceed with the amendment;*
- (j) all necessary information that needs to be exchanged between the AIF, the AIFM, a third party acting on behalf of the AIF or the AIFM, on the one hand, and the depositary, on the other hand, related to the sale, subscription, redemption, issue, cancellation and re-purchase of units or shares of the AIF;*
- (k) all necessary information that needs to be exchanged between the AIF, the AIFM, a third party acting on behalf of the AIF or the AIFM and the depositary related to the performance of the depositary's oversight and control function;*
- (l) where the parties to the contract envisage appointing third parties to carry out parts of their respective duties, a commitment to provide, on a regular basis, details of any third party appointed and, upon request, information on the criteria used to select the third party and the steps envisaged to monitor the activities carried out by the selected third party;*
- (m) information on the tasks and responsibilities of the parties to the contract in respect of obligations relating to the prevention of money laundering and the financing of terrorism;*
- (n) information on all cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF and the procedures ensuring that the depositary will be informed when any new account is opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF;*
- (o) details regarding the depositary's escalation procedures, including the identification of the persons to be contacted within the AIF and, as the case may be, or the AIFM by the depositary when it launches such a procedure;*
- (p) a commitment by the depositary to notify the AIFM when it becomes aware that the segregation of assets is not, or is no longer sufficient to ensure protection from insolvency of a third party, to whom safe-keeping functions are delegated in accordance with Article 21(11) of Directive 2011/61/EU in a specific jurisdiction;*
- (q) the procedures ensuring that the depositary, in respect of its duties, has the ability to enquire into the conduct of the AIFM and, as the case may be, or the AIF and to assess the quality of information transmitted including by way of having access to the books of the AIF and, as the case may be, or AIFM or by way of on-site visits;*

*(r) the procedures ensuring that the AIFM and, as the case may be, or the AIF can review the performance of the depositary in respect of the depositary's contractual obligations.*

*2. The details of the means and procedures set out in points (a) to (r) shall be described in the contract appointing the depositary or any subsequent amendment to the contract.*

*3. The contract appointing the depositary or the subsequent amendment to the contract referred to in paragraph 2 shall be done in writing.*

*4. The parties may agree to transmit all or part of the information that flows between them electronically provided that proper recording of such information is ensured.*

*5. Unless otherwise provided by national law, there shall be no obligation to enter into a specific written agreement for each AIF; it shall be possible for the AIFM and the depositary to enter into a framework agreement listing the AIFs managed by that AIFM to which the agreement applies.*

*6. The national law applicable to the contract appointing the depositary and any subsequent agreement shall be specified.*

- **FAQ AIFM published by CSSF (Appendix XV) Section 10 Depositary Question 10.a)**

3. The depositary shall be:

- (a) a credit institution having its registered office in the Union and authorised in accordance with Directive 2006/48/EC;
- (b) an investment firm having its registered office in the Union, subject to capital adequacy requirements in accordance with Article 20(1) of Directive 2006/49/EC including capital requirements for operational risks and authorised in accordance with Directive 2004/39/EC and which also provides the ancillary service of safe-keeping and administration of financial instruments for the account of clients in accordance with point (1) of Section B of Annex I to Directive 2004/39/EC; such investment firms shall in any case have own funds not less than the amount of initial capital referred to in Article 9 of Directive 2006/49/EC; or
- (c) another category of institution that is subject to prudential regulation and ongoing supervision and which, on 21 July 2011, falls within the categories of institution determined by Member States to be eligible to be a depositary under Article 23(3) of Directive 2009/65/EC.

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

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

- **Recitals 33 and 34 of the Level 1 AIFM Directive**

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

- (a) an AIFM shall not act as depositary;

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

- **Recitals 32 and 43 of the Level 1 AIFM Directive**

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

- **Q&A published by EU Commission (Appendix X) ID 1174 Depositary**
- **Q&A published by ESMA (Appendix XIV) Section VI Depositaries Question 12, Question 13**

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

- **Recitals 35 and 36 of the Level 1 AIFM Directive**

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

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

- (a) the competent authorities of the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, in so far as different, of the home Member State of the AIFM, have signed cooperation and exchange of information arrangements with the competent authorities of the depositary;
- (b) the depositary is subject to effective prudential regulation, including minimum capital requirements, and supervision which have the same effect as Union law and are effectively enforced;

- **Recitals 95 and 96 of the Level 2 AIFM Regulation (Appendix II)**

**Article 84 Criteria for assessing prudential regulation and supervision applicable to a depositary in a third country (Level 2 AIFM Regulation)**

*For the purposes of point (b) of Article 21(6) of Directive 2011/61/EU, the effectiveness of prudential regulation and supervision applicable to a depositary in a third country whether it has the same effect as that provided for under Union law and its effective enforcement shall be assessed against the following criteria:*

- (a) *the depositary is subject to authorisation and ongoing supervision by a public competent authority with adequate resources to fulfil its tasks;*
- (b) *the law of the third country lay down criteria for authorisation as a depositary that have the same effect as those laid down for access to the business of credit institutions or investment firms within the Union;*
- (c) *the capital requirements imposed on the depositary in the third country have the same effect as those applicable in the Union depending on whether the depositary is of the same nature as an Union credit institution or investment firm;*

- (d) *the operating conditions applicable to a depositary in the third country have the same effect as those laid down for credit institutions or investment firms within the Union depending on the nature of the depositary;*
- (e) *the requirements regarding the performance of the specific duties as AIF depositary established in the law of the third country have the same effect as those provided for in Article 21(7) to (15) of Directive 2011/61/EU and its implementing measures and the relevant national law;*
- (f) *the law of the third country provides for the application of sufficiently dissuasive enforcement actions in the event of breach by the depositary of the requirements and conditions referred to points (a) to (e).*

- (c) the third country where the depositary is established is not listed as a Non-Cooperative Country and Territory by FATF;
- (d) the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, in so far as different, the home Member State of the AIFM, have signed an agreement with the third country where the depositary is established which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements;
- (e) the depositary shall by contract be liable to the AIF or to the investors of the AIF, consistently with paragraphs 12 and 13, and shall expressly agree to comply with paragraph 11. Where a competent authority of another Member State disagrees with the assessment made on the application of points (a), (c) or (e) of the first sub-paragraph by the competent authorities of the home Member State of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

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

### [Depositary functions]

7. The depositary shall in general ensure that the AIF's cash flows are properly monitored, and shall in particular ensure that all payments made by or on behalf of investors upon the subscription of units or shares of an AIF have been received and that all cash of the AIF has been booked in cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the depositary acting on behalf of the AIF at an entity referred to in points (a), (b) and (c) of Article 18(1) of Directive 2006/73/EC, or another entity of the same nature, in the relevant market where cash accounts are required provided that such entity is subject to effective prudential regulation and supervision which have the same effect as Union law and are effectively enforced and in accordance with the principles set out in Article 16 of Directive 2006/73/EC.

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

- **Recital 37 of the Level 1 AIFM Directive**
- **Recitals 97 to 99 of the Level 2 AIFM Regulation (Appendix II)**
- **Q&A published by ESMA (Appendix XIV) Section VI Depositaries [Question 1](#), [Question 3](#), [Question 7](#), [Question 10](#)**
- **FAQ AIFM published by CSSF (Appendix XV) Section 19 Marketing (non EU AIFs) [Question 19.f](#)), [Question 19.g](#)), [Question 19.h](#)), [Question 19.i](#))**

**Article 85 Cash monitoring - general requirements  
(Level 2 AIFM Regulation)**

1. Where a cash account is maintained or opened at an entity referred to in Article 21(7) of Directive 2011/61/EU in the name of the AIF, 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, an AIFM shall ensure that the depositary is provided, upon commencement of its duties and on an ongoing basis, with all relevant information it needs to comply with its obligations.

2. In order to have access to all information regarding the AIF's cash accounts and have a clear overview of all the AIF's cash flows, a depositary shall at least:

- (a) be informed, upon its appointment, of all existing cash accounts opened in the name of the AIF, or in the name of the AIFM acting on behalf of the AIF;
- (b) be informed at the opening of any new cash account by the AIF or by the AIFM acting on behalf of the AIF;
- (c) be provided with all information related to the cash accounts opened at a third party entity, directly by those third parties.

**Article 86 Monitoring of the AIF's cash flows  
(Level 2 AIFM Regulation)**

A depositary shall ensure effective and proper monitoring of the AIF's cash flows and in particular it shall at least:

- (a) ensure that all cash of the AIF is booked in accounts opened with entities referred to in points (a), (b) and (c) of Article 18(1) of Directive 2006/73/EC in the relevant markets where cash accounts are required for the purposes of the AIF's operations and which are subject to prudential regulation and supervision that has the same effect as Union law, is effectively enforced and is in accordance with the principles laid down in Article 16 of Directive 2006/73/EC;
- (b) implement effective and proper procedures to reconcile all cash flow movements and perform such reconciliations on a daily basis or, in case of infrequent cash movements, when such cash flow movements occur;
- (c) implement appropriate procedures to identify at the close of business day significant cash flows and in particular those which could be inconsistent with the AIF's operations;
- (d) review periodically the adequacy of those procedures including through a full review of the reconciliation process at least once a year and ensuring that the cash accounts opened in the name of the AIF, 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 are included in the reconciliation process;
- (e) monitor on an ongoing basis the outcomes of the reconciliations and actions taken as a result of any discrepancies identified by the reconciliation procedures and notify the AIFM if an irregularity has not been rectified without undue delay and also the competent authorities if the situation cannot be clarified and, as the case may be, or corrected;
- (f) check the consistency of its own records of cash positions with those of the AIFM. The AIFM shall ensure that all instructions and information related to a cash account opened with a third party are sent to the depositary, so that the depositary is able to perform its own reconciliation procedure.

- **FAQ AIFM published by CSSF (Appendix XV) Section 10 Depository Question 10.c)**

**Article 87 Duties regarding subscriptions  
(Level 2 AIFM Regulation)**

*An AIFM shall ensure that the depositary is provided with information about payments made by or on behalf of investors upon the subscription of units or shares of an AIF at the close of each business day when the AIFM, the AIF or a party acting on behalf of it, such as a transfer agent receives such payments or an order from the investor. The AIFM shall ensure that the depositary receives all other relevant information it needs to make sure that the payments are then booked in cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the depositary in accordance with the provisions of Article 21(7) of Directive 2011/61/EU.*

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

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

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

- **Recitals 100 to 102 of the Level 2 AIFM Regulation (Appendix II)**
- **Q&A published by ESMA (Appendix XIV) Section VI Depositaries Question 8**
- **FAQ AIFM published by CSSF (Appendix XV) Section 19 Marketing (non EU AIFs) Question 19.f), Question 19.g), Question 19.h), Question 19.i)**

**Article 88 Financial instruments to be held in custody  
(Level 2 AIFM Regulation)**

1. Financial instruments belonging to the AIF or to the AIFM acting on behalf of the AIF which are not able to be physically delivered to the depositary shall be included in the scope of the custody duties of the depositary where all of the following requirements are met:

- (a) they are transferable securities including those which embed derivatives as referred to in the last sub-paragraph of Article 51(3) of Directive 2009/65/EC and Article 10 of Directive 2007/16/EC, money market instruments or units of collective investment undertakings.
- (b) they are capable of being registered or held in an account directly or indirectly in the name of the depositary.

2. Financial instruments which, in accordance with applicable national law, are only directly registered in the name of the AIF with the issuer itself or its agent, such as a registrar or a transfer agent, shall not be held in custody.

3. Financial instruments belonging to the AIF or the AIFM acting on behalf of the AIF which are able to be physically delivered to the depositary shall always be included in the scope of the custody duties of the depositary.

- **FAQ AIFM published by CSSF (Appendix XV) Section 10 Depositary Question 10.e), Question 10.h)**

**Article 89 Safekeeping duties with regard to assets held in custody  
(Level 2 AIFM Regulation)**

1. In order to comply with the obligations laid down in point (a) of Article 21(8) of Directive 2011/61/EU with respect to financial instruments to be held in custody, a depositary shall ensure at least that:

- (a) the financial instruments are properly registered in accordance with Article 21(8) (a)(ii) of Directive 2011/61/EU;
- (b) records and segregated accounts are maintained in a way that ensures their accuracy, and in particular record the correspondence with the financial instruments and cash held for AIFs;
- (c) reconciliations are conducted as often as necessary between the depositary's internal accounts and records and those of any third party to whom custody functions are delegated in accordance with Article 21(11) of Directive 2011/61/EU;
- (d) due care is exercised in relation to the financial instruments held in custody in order to ensure a high standard of investor protection;
- (e) all relevant custody risks throughout the custody chain are assessed and monitored and the AIFM is informed of any material risk identified;
- (f) adequate organisational arrangements are introduced to minimise the risk of loss or diminution of the financial instruments, or of rights in connection with those financial instruments as a result of fraud, poor administration, inadequate registering or negligence;
- (g) the AIF's ownership right or the ownership right of the AIFM acting on behalf of the AIF over the assets is verified.

*In relation to point (c) of the first subparagraph, the frequency of the reconciliations shall be determined on the basis of the following:*

- (a) the normal trading activity of the AIF;*
- (b) any trade occurring outside the normal trading activity;*
- (c) any trade occurring on behalf of any other client whose assets are held by the third party in the same financial instruments account as the assets of the AIF.*

*2. Where a depositary has delegated its custody functions to a third party in accordance with Article 21(11) of Directive 2011/61/EU, it shall remain subject to the requirements of points (a) to (e) of paragraph 1 of this Article. It shall also ensure that the third party complies with the requirements of points (b) to (g) of paragraph 1 and segregation obligations laid down in Article 99.*

*3. A depositary's safe-keeping duties as referred to in paragraphs 1 and 2 shall apply on a look-through basis to underlying assets held by financial and, as the case may be, or legal structures controlled directly or indirectly by the AIF or the AIFM acting on behalf of the AIF.*

*The requirement referred to in the first sub-paragraph shall not apply to fund of funds structures or master-feeder structures where the underlying funds have a depositary which keeps in custody the assets of these funds.*

- **Q&A published by ESMA (Appendix XIV) Section VI Depositaries Question 9, Question 15 and Question 16**

(b) for other assets:

- (i) the depositary shall verify the ownership of the AIF or the AIFM acting on behalf of the AIF of such assets and shall maintain a record of those assets for which it is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership of such assets;
- (ii) the assessment whether the AIF or the AIFM acting on behalf of the AIF holds the ownership shall be based on information or documents provided by the AIF or the AIFM and, where available, on external evidence;
- (iii) the depositary shall keep its record up-to-date.

- **Recitals 102 to 105 of the Level 2 AIFM Regulation (Appendix II)**
- **Q&A published by ESMA (Appendix XIV) Section VI Depositaries Question 5**
- **FAQ AIFM published by CSSF (Appendix XV) Section 10 Depositary Question 10.c), Question 10.e), Question 10.g)**

### *Article 90 Safekeeping duties regarding ownership verification and record keeping (Level 2 AIFM Regulation)*

*1. An AIFM shall provide the depositary, upon commencement of its duties and on an ongoing basis, with all relevant information the depositary needs in order to comply with its obligations pursuant to point (b) of Article 21(8) of Directive 2011/61/EU, and ensure that the depositary is provided with all relevant information by third parties.*

*2. In order to comply with the obligations referred to in point (b) of Article 21(8) of Directive 2011/61/EU, a depositary shall at least:*

- (a) *have access without undue delay to all relevant information it needs in order to perform its ownership verification and record-keeping duties, including relevant information to be provided to the depositary by third parties;*
- (b) *possess sufficient and reliable information for it to be satisfied of the AIF's ownership right or of the ownership right of the AIFM acting on behalf of the AIF over the assets;*
- (c) *maintain a record of those assets for which it is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership. In order to comply with this obligation, the depositary shall:*
  - (i) *register in its record, in the name of the AIF, assets, including their respective notional amounts, for which it is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership;*
  - (ii) *be able to provide at any time a comprehensive and up-to-date inventory of the AIF's assets, including their respective notional amounts.*

*For the purpose of point (c) (ii) of paragraph 2, the depositary shall ensure that there are procedures in place so that registered assets cannot be assigned, transferred, exchanged or delivered without the depositary or its delegate having been informed of such transactions and the depositary shall have access without undue delay to documentary evidence of each transaction and position from the relevant third party. The AIFM shall ensure that the relevant third party provides the depositary without undue delay with certificates or other documentary evidence every time there is a sale or acquisition of assets or a corporate action resulting in the issue of financial instruments and at least once a year.*

*3. In any event, a depositary shall ensure that the AIFM has and implements appropriate procedures to verify that the assets acquired by the AIF it manages are appropriately registered in the name of the AIF or in the name of the AIFM acting on behalf of the AIF, and to check the consistency between the positions in the AIFM's records and the assets for which the depositary is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership. The AIFM shall ensure that all instructions and relevant information related to the AIF's assets are sent to the depositary, so that the depositary is able to perform its own verification or reconciliation procedure.*

*4. A depositary shall set up and implement an escalation procedure for situations where an anomaly is detected including notification of the AIFM and of the competent authorities if the situation cannot be clarified and, as the case may be, or corrected.*

*5. A depositary's safe-keeping duties referred to in paragraphs 1 to 4 shall apply on a look-through basis to underlying assets held by financial and, as the case may be, or legal structures established by the AIF or by the AIFM acting on behalf of the AIF for the purposes of investing in the underlying assets and which are controlled directly or indirectly by the AIF or by the AIFM acting on behalf of the AIF.*

*The requirement referred to in the first sub-paragraph shall not apply to fund of funds structures and master-feeder structures where the underlying funds have a depositary which provides ownership verification and record-keeping functions for this fund's assets.*

- **Recital 43 of the Level 1 AIFM Directive**
- **Q&A published by ESMA (Appendix XIV) Section VI Depositaries [Question 9](#)**
- **FAQ AIFM published by CSSF (Appendix XV) Section 10 Depositary [Question 10.c](#), [Question 10.g](#), [Question 10.h](#)**

**Article 91 Reporting obligations for prime brokers  
(Level 2 AIFM Regulation)**

1. Where a prime broker has been appointed, the AIFM shall ensure that from the date of that appointment an agreement is in place pursuant to which the prime broker is required to make available to the depositary in particular a statement in a durable medium which contains the following information:

- (a) the values of the items listed in paragraph 3 at the close of each business day ;
- (b) details of any other matters necessary to ensure that the depositary of the AIF has up-to-date and accurate information about the value of assets the safekeeping of which has been delegated in accordance with Article 21(11) of Directive 2011/61.

2. The statement referred to in paragraph 1 shall be made available to the depositary of the AIF no later than the close of the next business day to which it relates.

3. The items referred to in point (a) of paragraph 1 shall include:

- (a) the total value of assets held by the prime broker for the AIF, where safe-keeping functions are delegated in accordance with Article 21(11) of Directive 2011/61/EU. The value of each of the following:
  - (i) cash loans made to the AIF and accrued interest;
  - (ii) securities to be redelivered by the AIF under open short positions entered into on behalf of the AIF;
  - (iii) current settlement amounts to be paid by the AIF under any futures contracts;
  - (iv) short sale cash proceeds held by the prime broker in respect of short positions entered into on behalf of the AIF;
  - (v) cash margins held by the prime broker in respect of open futures contracts entered into on behalf of the AIF. This obligation is in addition to the obligations under Articles 87 and 88;
  - (vi) mark-to-market close-out exposures of any OTC transaction entered into on behalf of the AIF;
  - (vii) total secured obligations of the AIF against the prime broker; and
  - (viii) all other assets relating to the AIF;
- (b) the value of other assets referred to in point (b) of Article 21(8) of Directive 2011/61/EU held as collateral by the prime broker in respect of secured transactions entered into under a prime brokerage agreement;
- (c) the value of the assets where the prime broker has exercised a right of use in respect of the AIF's assets;
- (d) a list of all the institutions at which the prime broker holds or may hold cash of the AIF in an account opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF in accordance with Article 21(7) of Directive 2011/61/EU.

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

- **Recital 106 of the Level 2 AIFM Regulation (Appendix II)**
- **FAQ AIFM published by CSSF (Appendix XV) Section 19 Marketing (non EU AIFs) Question 19.f), Question 19.g), Question 19.h), Question 19.i)**
- **Q&A published by ESMA (Appendix XIV) Section VI Depositaries Question 10**

### Article 92 Oversight duties - general requirements (Level 2 AIFM Regulation)

1. At the time of its appointment, the depositary shall assess the risks associated with the nature, scale and complexity of the AIF's strategy and the AIFM's organisation in order to devise oversight procedures which are appropriate to the AIF and the assets in which it invests and which are then implemented and applied. Such procedures shall be regularly updated.

2. In performing its oversight duties under Article 21(9) of Directive 2011/61/EU, a depositary shall perform ex-post controls and verifications of processes and procedures that are under the responsibility of the AIFM, the AIF or an appointed third party. The depositary shall in all circumstances ensure that an appropriate verification and reconciliation procedure exists which is implemented and applied and frequently reviewed. The AIFM shall ensure that all instructions related to the AIF's assets and operations are sent to the depositary, so that the depositary is able to perform its own verification or reconciliation procedure.

3. A depositary shall establish a clear and comprehensive escalation procedure to deal with situations where potential irregularities are detected in the course of its oversight duties, the details of which shall be made available to the competent authorities of the AIFM upon request.

4. An AIFM shall provide the depositary, upon commencement of its duties and on an ongoing basis, with all relevant information it needs in order to comply with its obligations pursuant to Article 21(9) of Directive 2011/61/EU including information to be provided to the depositary by third parties. The AIFM shall particularly ensure that the depositary is able to have access to the books and perform on-site visits on premises of the AIFM and of those of any service provider appointed by the AIF or the AIFM, such as administrators or external valuers and, as the case may be, or to review reports and statements of recognised external certifications by qualified independent auditors or other experts in order to ensure the adequacy and relevance of the procedures in place.

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

#### ▪ **Recital 107 of the Level 2 AIFM Regulation (Appendix II)**

### Article 93 Duties regarding subscription and redemptions (Level 2 AIFM Regulation)

In order to comply with point (a) of Article 21(9) of Directive 2011/61/EU the depositary shall meet the following requirements:

(1) The depositary shall ensure that the AIF, the AIFM or the designated entity has established, implements and applies an appropriate and consistent procedure to:

- (i) reconcile the subscription orders with the subscription proceeds, and the number of units or shares issued with the subscription proceeds received by the AIF;
- (ii) reconcile the redemption orders with the redemptions paid, and the number of units or shares cancelled with the redemptions paid by the AIF;
- (iii) verify on a regular basis that the reconciliation procedure is appropriate.

*For the purpose of points (i), (ii) and (iii), the depositary shall in particular regularly check the consistency between the total number of units or shares in the AIF's accounts and the total number of outstanding shares or units that appear in the AIF's register.*

*(2) A depositary shall ensure and regularly check that the procedures regarding the sale, issue, repurchase, redemption and cancellation of shares or units of the AIF comply with the applicable national law and with the AIF rules or instruments of incorporation and verify that these procedures are effectively implemented.*

*(3) The frequency of the depositary's checks shall be consistent with the frequency of subscriptions and redemptions.*

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

▪ **Recital 108 of the Level 2 AIFM Regulation (Appendix II)**

**Article 94 Duties regarding the valuation of shares/units  
(Level 2 AIFM Regulation)**

*1. In order to comply with point (b) of Article 21(9) of Directive 2011/61/EU the depositary shall:*

- (a) verify on an ongoing basis that appropriate and consistent procedures are established and applied for the valuation of the assets of the AIF in compliance with Article 19 of Directive 2011/61/EU and its implementing measures and with the AIF rules and instruments of incorporation; and*
- (b) ensure that the valuation policies and procedures are effectively implemented and periodically reviewed.*

*2. A depositary's procedures shall be conducted at a frequency consistent with the frequency of the AIF's valuation policy as defined in Article 19 of Directive 2011/61/EU and its implementing measures.*

*3. Where a depositary considers that the calculation of the value of the shares or units of the AIF has not been performed in compliance with applicable law or the AIF rules or with Article 19 of Directive 2011/61/EU, it shall notify the AIFM and, as the case may be, or the AIF and ensure that timely remedial action is taken in the best interest of the investors in the AIF.*

*4. Where an external valuer has been appointed, a depositary shall check that the external valuer's appointment is in accordance with Article 19 of Directive 2011/61/EU and its implementing measures.*

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

- **Recital 109 of the Level 2 AIFM Regulation (Appendix II)**  
 ▪ **Q&A published by ESMA (Appendix XIV) Section VI Depositaries Question 4**

**Article 95 Duties regarding the carrying out of the AIFM's instructions  
(Level 2 AIFM Regulation)**

*In order to comply with point (c) of Article 21(9) of Directive 2011/61/EU the depositary shall at least:*

- (a) set up and implement appropriate procedures to verify that the AIF and AIFM comply with applicable laws and regulations and with the AIF's rules and instruments of incorporation. In*

*particular, the depositary shall monitor the AIF's compliance with investment restrictions and leverage limits set in the AIF's offering documents. Those procedures shall be proportionate to the nature, scale and complexity of the AIF;*

- (b) set up and implement an escalation procedure where the AIF has breached one of the limits or restrictions referred to in point (a).*

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

#### **Article 96 Duties regarding the timely settlement of transactions (Level 2 AIFM Regulation)**

*1. In order to comply with point (d) of Article 21(9) (of Directive 2011/61/EU the depositary shall set up a procedure to detect any situation where a consideration related to the operations involving the assets of the AIF or of the AIFM acting on behalf of the AIF is not remitted to the AIF within the usual time limits, notify the AIFM and, where the situation has not been remedied, request the restitution of the financial instruments from the counterparty where possible.*

*2. Where transactions do not take place on a regulated market, the usual time limits shall be assessed with regard to the conditions attached to the transactions (OTC derivative contracts or investments in real estate assets or in privately held companies).*

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

#### ▪ **Recital 110 of the Level 2 AIFM Regulation (Appendix II)**

#### **Article 97 Duties related to the AIF's income distribution (Level 2 AIFM Regulation)**

*1. In order to comply with point (e) of Article 21(9) (of Directive 2011/61/EU the depositary shall:*

- (a) ensure that the net income calculation, once declared by the AIFM, is applied in accordance with the AIF rules, instruments of incorporation and applicable national law;*
- (b) ensure that appropriate measures are taken where the AIF's auditors have expressed reserves on the annual financial statements. The AIF or the AIFM acting on behalf of the AIF shall provide the depositary with all information on reserves expressed on the financial statements; and*
- (c) check the completeness and accuracy of dividend payments, once they are declared by the AIFM, and, where relevant, of the carried interest.*

*2. Where a depositary considers that the income calculation has not been performed in compliance with applicable law or with the AIF rules or instruments of incorporation, it shall notify the AIFM and, as the case may be, or the AIF and ensure that timely remedial action has been taken in the best interest of the AIF's investors.*

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

#### ▪ **Recital 38 of the Level 1 AIFM Directive**

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

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

### [Delegation of depositary function(s)]

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

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

- (a) the tasks are not delegated with the intention of avoiding the requirements of this Directive;
- (b) the depositary can demonstrate that there is an objective reason for the delegation;
- (c) the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it wants to delegate parts of its tasks, and keeps 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

- **Recital 39 of the Level 1 AIFM Directive**
- **Recitals 111 and 112 of the Level 2 AIFM Regulation (Appendix II)**
- **Q&A published by ESMA (Appendix XIV) Section VI Depositaries [Question 2](#), [Question 8](#), [Question 11](#), [Question 14](#), [Answer 16](#)**

### Article 98 Due diligence (Level 2 AIFM Regulation)

*1. In order to fulfil the obligations laid down in point (c) of Article 21(11) of Directive 2011/61/EU a depositary shall implement and apply an appropriate documented due diligence procedure for the selection and ongoing monitoring of the delegate. That procedure shall be reviewed regularly, at least once a year, and made available upon request to competent authorities.*

*2. When selecting and appointing a third party, to whom safekeeping functions are delegated in accordance with Article 21(11) of Directive 2011/61/EU, a depositary shall exercise all due skill, care and diligence to ensure that entrusting financial instruments to this third party provides an adequate standard of protection. It shall at least:*

- (a) assess the regulatory and legal framework, including country risk, custody risk and the enforceability of the third party's contracts. That assessment shall in particular enable the depositary to determine the potential implication of an insolvency of the third party for the assets and rights of the AIF. If a depositary becomes aware that the segregation of assets is not sufficient to ensure protection from insolvency because of the law of the country where the third party is located, it shall immediately inform the AIFM;*
- (b) assess whether the third party's practice, procedures and internal controls are adequate to ensure that the financial instruments of the AIF or of the AIFM acting on behalf of the AIF are subject to a high standard of care and protection;*

- (c) assess whether the third party's financial strength and reputation are consistent with the tasks delegated. That assessment shall be based on information provided by the potential third party as well as other data and information, where available.*
- (d) ensure that the third party has the operational and technological capabilities to perform the delegated custody tasks with a satisfactory degree of protection and security.*

*2a. A contract, by which the depositary appoints a third party to hold assets of that depositary's AIF clients in custody, shall contain at least the following provisions:*

- (a) a guarantee of the depositary's right to information, inspection, and access to the relevant records and accounts of the third party holding assets in custody to enable the depositary to fulfil its oversight and due diligence obligations and in particular allow the depositary to:*
  - (i) identify all entities within the custody chain;*
  - (ii) verify that the quantity of the identified financial instruments recorded in the financial instruments accounts opened in the depositary's books in the name of the AIF or in the name of the AIFM, acting on behalf of the AIF, matches the quantity of the identified financial instruments held in custody by the third party for that AIF as recorded in the financial instruments account opened in the third party's books;*
  - (iii) verify that the quantity of the identified financial instruments, which are registered and held in a financial instruments account opened at the issuer's Central Securities Depository (CSD) or its agent, in the name of the third party on behalf of its clients, matches the quantity of the identified financial instruments recorded in the financial instruments accounts opened in the depositary's books in the name of each of its AIF clients or in the name of the AIFM acting on behalf of the AIF;*
- (b) details of equivalent rights and obligations agreed between the third party and another third party, in the event of a further delegation of custody functions.*

*3. A depositary shall exercise all due skill, care and diligence in the periodic review and ongoing monitoring to ensure that the third party continues to comply with the criteria provided for in paragraph 1 of this Article and the conditions set out in point (d) of Article 21(11) of Directive 2011/61/EU. To this end the depositary shall at least:*

- (a) monitor the third party's performance and its compliance with the depositary's standards;*
- (b) ensure that the third party exercises a high standard of care, prudence and diligence in the performance of its custody tasks and in particular that it effectively segregates the financial instruments in line with the requirements of Article 99;*
- (c) review the custody risks associated with the decision to entrust the assets to the third party and without undue delay notify the AIF or AIFM of any change in those risks. That assessment shall be based on information provided by the third party and other data and information where available. During market turmoil or when a risk has been identified, the frequency and the scope of the review shall be increased. If the depositary becomes aware that the segregation of assets is no longer sufficient to ensure protection from insolvency because of the law of the country where the third party is located, it shall immediately inform the AIFM.*

*4. Where the third party further delegates any of the functions delegated to it, the conditions and criteria set out in paragraphs 1, 2 and 3 shall apply mutatis mutandis.*

*5. A depositary shall monitor compliance with Article 21(4) of Directive 2011/61/EU.*

*6. A depositary shall devise contingency plans for each market in which it appoints a third party in accordance with Article 21(11) of Directive 2011/61/EU to perform safekeeping duties. Such a contingency plan shall include the identification of an alternative provider, if any.*

*7. A depositary shall take measures, including termination of the contract, which are in the best interest of the AIF and its investors where the delegate no longer complies with the requirements.*

- (d) the depositary ensures that the third party meets the following conditions at all times during the performance of the tasks delegated to it:
- (i) the third party has the structures and the expertise that are adequate and proportionate to the nature and complexity of the assets of the AIF or the AIFM acting on behalf of the AIF which have been entrusted to it;
  - (ii) for custody tasks referred to in point (a) of paragraph 8, the third party is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned and the third party is subject to an external periodic audit to ensure that the financial instruments are in its possession;
  - (iii) the third party segregates the assets of the depositary's clients from its own assets and from the assets of the depositary in such a way that they can at any time be clearly identified as belonging to clients of a particular depositary;

- **Recitals 40 and 42 of the Level 1 AIFM Directive**
- **Recitals 111 and 112 of the Level 2 AIFM Regulation (Appendix II)**

### Article 99 Segregation obligation (Level 2 AIFM Regulation)

*1. Where safekeeping functions have been delegated wholly or partly to a third party, a depositary shall ensure that the third party, to whom safe-keeping functions are delegated pursuant to Article 21(11) of Directive 2011/61/EU, acts in accordance with the segregation obligation laid down in point (iii) of Article 21(11)(d) of that Directive by ensuring and verifying that the third party:*

- (a) *correctly records all identified financial instruments in the financial instruments account, which is opened in the third party's books, in order to hold in custody the financial instruments for the depositary's clients, which excludes proprietary financial instruments of the depositary and of the third party and of the third party's other clients, to enable the depositary to match the quantity of the identified financial instruments recorded in the accounts opened in the depositary's books in the name of each of its AIF clients or in the name of the AIFM acting on behalf of the AIF;*
- (b) *keeps all necessary records and financial instruments accounts to enable the depositary at any time and without delay to distinguish assets of the depositary's clients from the third party own assets, assets of the third party's other clients and assets held for the depositary for its own account;*
- (c) *maintains records and financial instruments accounts in a way that ensures their accuracy, and in particular their correspondence to the assets kept safe for the depositary's AIF clients and on the basis of which the depositary can at any time establish the precise nature, location and ownership status of those assets;*
- (d) *provides the depositary with a statement, on a regular basis and in any case whenever a change in circumstances occurs, detailing the assets of the depositary's AIF clients;*
- (e) *conducts reconciliations, as often as necessary, between its financial instruments accounts and internal records and those of the third party to whom it has delegated safe-keeping functions in accordance with Article 21(11) of Directive 2011/61/EU.*

*The frequency of the reconciliation shall be determined in accordance with Article 89(1);*

- (f) introduces adequate organisational arrangements to minimise the risk of loss or diminution of financial instruments or of rights in connection with those financial instruments as a result of misuse of the financial instruments, fraud poor administration, inadequate record-keeping or negligence;*
- (g) where the third party is an entity referred to in points (a), (b) and (c) of Article 18(1) of Directive 2006/73/EC, which is subject to effective prudential regulation and supervision that has the same effect as Union law and is effectively enforced, the depositary shall take the necessary steps to ensure that the AIF's cash is held in an account or accounts in accordance with Article 21(7) of Directive 2011/61/EU.*

*2. Where a depositary has delegated its custody functions to a third party in accordance with Article 21(11) of Directive 2011/61/EU, the monitoring of the third party's compliance with its segregation obligations shall ensure that the financial instruments belonging to its clients are protected from any insolvency of that third party. If, according to the applicable law, including in particular the law relating to property or insolvency, the requirements laid down in paragraph 1 are not sufficient to achieve that objective, the depositary shall assess what additional arrangements are to be made in order to minimise the risk of loss and maintain an adequate standard of protection.*

*2a. Where a depositary delegates its custody functions to a third party located in a third country in accordance with Article 21(11) of Directive 2011/61/EU, in addition to the requirements of paragraph 1 of this Article, the depositary shall ensure the following:*

- (a) the depositary receives legal advice from an independent natural or legal person confirming that the applicable insolvency law recognises the following:*
  - (i) the segregation of the assets of the depositary's clients from the third party's own assets, from the assets of the third party's other clients and from the assets held by the third party for the depositary's own account;*
  - (ii) the assets of the depositary's AIF clients do not form part of the third party's estate in case of insolvency;*
  - (iii) the assets of the depositary's AIF clients are unavailable for distribution among, or realisation for the benefit of, creditors of the third party to whom custody functions have been delegated in accordance with Article 21(11) of Directive 2011/61/EU;*
- (b) the third party takes the following steps:*
  - (i) it ensures that the conditions laid down in point (a) are met when concluding the delegation agreement with the depositary and on an ongoing basis for the entire duration of the delegation;*
  - (ii) it immediately informs the depositary whenever any of the conditions referred to in point (i) are no longer met;*
  - (iii) it informs the depositary about any changes to applicable insolvency law and its effective application.*

*3. Paragraphs 1, 2 and 2a shall apply mutatis mutandis when the third party, to whom safe-keeping functions are delegated in accordance with Article 21(11) of Directive 2011/61/EU, has decided to delegate all or part of its safe-keeping functions to another third party pursuant to the third subparagraph of Article 21(11) of Directive 2011/61/EU.*

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

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

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

- (a) the investors of the relevant AIF must be duly informed that such delegation is required due to legal constraints in the law of the third country and of the circumstances justifying the delegation, prior to their investment; and
- (b) the AIF, or the AIFM on behalf of the AIF, must instruct the depositary to delegate the custody of such financial instruments to such local entity.

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

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

- **Recitals 41 of the Level 1 AIFM Directive**

### [Liability of the depositary]

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

- **Recitals 44, 45 to 46 of the Level 1 AIFM Directive**

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

- **Recitals 113 to 119 of the Level 2 AIFM Regulation (Appendix II)**
- **Q&A published by ESMA (Appendix XIV) Section VI Depositaries Question 9**

### Article 100 Loss of a financial instrument held in custody (Level 2 AIFM Regulation)

1. A loss of a financial instrument held in custody within the meaning of Article 21(12) of Directive 2011/61/EU shall be deemed to have taken place when, in relation to a financial instrument held in custody by the depositary or by a third party to whom the custody of financial instruments held in custody has been delegated, any of the following conditions is met:

- (a) a stated right of ownership of the AIF is demonstrated not to be valid because it either ceased to exist or never existed;
- (b) the AIF has been definitively deprived of its right of ownership over the financial instrument;

*(c) the AIF is definitively unable to directly or indirectly dispose of the financial instrument.*

*2. The ascertainment by the AIFM of the loss of a financial instrument shall follow a documented process readily available to the competent authorities. Once a loss is ascertained, it shall be notified immediately to investors in a durable medium.*

*3. A financial instrument held in custody shall not be deemed to be lost within the meaning of Article 21(12) of Directive 2011/61/EU where an AIF is definitively deprived of its right of ownership in respect of a particular instrument, but this instrument is substituted by or converted into another financial instrument or instruments.*

*4. In the event of insolvency of the third party to whom the custody of financial instruments held in custody has been delegated, the loss of a financial instrument held in custody shall be ascertained by the AIFM as soon as one of the conditions listed in paragraph 1 is met with certainty.*

*There shall be certainty as to whether any of the conditions set out in paragraph 1 is fulfilled at the latest at the end of the insolvency proceedings. The AIFM and the depositary shall monitor closely the insolvency proceedings to determine whether all or some of the financial instruments entrusted to the third party to whom the custody of financial instruments has been delegated are effectively lost.*

*5. A loss of a financial instrument held in custody shall be ascertained irrespective of whether the conditions listed in paragraph 1 are the result of fraud, negligence or other intentional or non-intentional behaviour.*

#### **Article 101 Liability discharge under Article 21(12) of Directive 2011/61/EU (Level 2 AIFM Regulation)**

*1. A depositary's liability under the second sub-paragraph of Article 21(12) of Directive 2011/61/EU shall not be triggered provided the depositary can prove that all the following conditions are met:*

- (a) the event which led to the loss is not the result of any act or omission of the depositary or of a third party to whom the custody of financial instruments held in custody in accordance with point (a) of Article 21(8) of Directive 2011/61/EU has been delegated;*
- (b) the depositary could not have reasonably prevented the occurrence of the event which led to the loss despite adopting all precautions incumbent on a diligent depositary as reflected in common industry practice;*
- (c) despite rigorous and comprehensive due diligence, the depositary could not have prevented the loss.*

*This condition may be deemed to be fulfilled when the depositary has ensured that the depositary and the third party to whom the custody of financial instruments held in custody in accordance with point (a) of Article 21(8) of Directive 2011/61/EU has been delegated have taken all of the following actions:*

- (i) establishing, implementing, applying and maintaining structures and procedures and insuring expertise that are adequate and proportionate to the nature and complexity of the assets of the AIF in order to identify in a timely manner and monitor on an ongoing basis external events which may result in loss of a financial instrument held in custody;*
- (ii) assessing on an ongoing basis whether any of the events identified under the first indent presents a significant risk of loss of a financial instrument held in custody;*
- (iii) informing the AIFM of the significant risks identified and taking appropriate actions, if any, to prevent or mitigate the loss of financial instruments held in custody, where actual or potential external events have been identified which are believed to present a significant risk of loss of a financial instrument held in custody.*

2. The requirements referred to in points (a) and (b) of paragraph 1 may be deemed to be fulfilled in the following circumstances:

- (a) natural events beyond human control or influence;
- (b) the adoption of any law, decree, regulation, decision or order by any government or governmental body, including any court or tribunal, which impacts the financial instruments held in custody;
- (c) war, riots or other major upheavals.

3. The requirements referred to in points (a) and (b) of paragraph 1 shall not be deemed to be fulfilled in cases such as an accounting error, operational failure, fraud, failure to apply the segregation requirements at the level of the depositary or a third party to whom the custody of financial instruments held in custody in accordance with point (a) of Article 21(8) of Directive 2011/61/EU has been delegated.

4. This Article shall apply *mutatis mutandis* to the delegate when the depositary has contractually transferred its liability in accordance with Article 21(13) and (14) of Directive 2011/61/EU.

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

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

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

- (a) all requirements for the delegation of its custody tasks set out in the second sub-paragraph of paragraph 11 are met;
- (b) a written contract between the depositary and the third party expressly transfers the liability of the depositary to that third party and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against the third party in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf; and
- (c) a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, expressly allows a discharge of the depositary's liability and establishes the objective reason to contract such a discharge.

- **Recital 45 of the Level 1 AIFM Directive**
- **Recitals 120 to 122 of the Level 2 AIFM Regulation (Appendix II)**

#### Article 102 Objective reasons for the depositary to contract a discharge of liability (Level 2 AIFM Regulation)

1. The objective reasons for contracting a discharge pursuant to Article 21(13) of Directive 2011/61/EU shall be:

- (a) limited to precise and concrete circumstances characterising a given activity;
- (b) consistent with the depositary's policies and decisions.

2. The objective reasons shall be established each time the depositary intends to discharge itself of liability.

3. The depositary shall be deemed to have objective reasons for contracting the discharge of its liability in accordance with Article 21(13) of Directive 2011/61/EU when the depositary can demonstrate that it had no other option but to delegate its custody duties to a third party. In particular, this shall be the case where:

- (a) the law of a third country requires that certain financial instruments be held in custody by a local entity and local entities exist that satisfy the delegation criteria laid down in Article 21(11) of Directive 2011/61/EU; or
- (b) the AIFM insists on maintaining an investment in a particular jurisdiction despite warnings by the depositary as to the increased risk this presents.

- **FAQ AIFM published by CSSF (Appendix XV) Section 10 Depositary Question 10.b)**

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

- **Recital 46 of the Level 1 AIFM Directive**

- (a) the rules or instruments of incorporation of the AIF concerned expressly allow for such a discharge under the conditions set out in this paragraph;
- (b) the investors of the relevant AIF have been duly informed of that discharge and of the circumstances justifying the discharge prior to their investment;
- (c) the AIF or the AIFM on behalf of the AIF instructed the depositary to delegate the custody of such financial instruments to a local entity;
- (d) there is a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, which expressly allows such a discharge; and
- (e) there is a written contract between the depositary and the third party that expressly transfers the liability of the depositary to that local entity and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against that local entity in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf.

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

16. The depositary shall make available to its competent authorities, on request, all information which it has obtained while performing 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.

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

- **Recital 83 of the Level 1 AIFM Directive**

- (a) the particulars that need to be included in the written contract referred to in paragraph 2;
- (b) general criteria for assessing whether the prudential regulation and supervision of third countries as referred to in point (b) of paragraph 6 have the same effect as Union law and are effectively enforced;

- (c) the conditions for performing the depositary functions pursuant to paragraphs 7, 8 and 9, including:
  - (i) the type of financial instruments to be included in the scope of the depositary's custody duties in accordance with point (a) of paragraph 8;
  - (ii) the conditions subject to which the depositary is able to exercise its custody duties over financial instruments registered with a central depositary; and
  - (iii) the conditions subject to which the depositary is to safekeep the financial instruments issued in a nominative form and registered with an issuer or a registrar, in accordance with point (b) of paragraph 8;
- (d) the due diligence duties of depositaries pursuant to point (c) of paragraph 11;
- (e) the segregation obligation pursuant to point (d)(iii) of paragraph 11;
- (f) the conditions subject to which and circumstances in which financial instruments held in custody are to be considered as lost;
- (g) what is to be understood by external events beyond reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary pursuant to paragraph 12;
- (h) the conditions subject to which and circumstances in which there is an objective reason to contract a discharge pursuant to paragraph 13.

## CHAPTER IV

### TRANSPARENCY REQUIREMENTS

#### Article 22 AIFMD

##### Annual report

[Art. 20 AIFM Law]

- *Recitals 48 and 83 of the Level I AIFM Directive*
- *Explanatory Memorandum section 3.2.12 (Appendix I) and Recitals 125 to 127 of the Level 2 AIFM Regulation (Appendix II)*
- *Q&A published by EU Commission (Appendix X) ID 1175 and 1176 Reporting requirements*

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

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

#### Article 103 General principles for the annual report (Level 2 AIFM Regulation)

*All information provided in the annual report, including the information specified in this Section, shall be presented in a manner that provides materially relevant, reliable, comparable and clear information. The annual report shall contain the information investors need in relation to particular AIF structures.*

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

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

#### Article 104 Content and format of the balance sheet or statement of assets and liabilities and of the income and expenditure account (Level 2 AIFM Regulation)

1. The balance sheet or statement of assets and liabilities shall contain at least the following elements and underlying line items in accordance with point (a) of Article 22(2) of Directive 2011/61/EU:

- (a) "assets" comprising the resources controlled by the AIF as a result of past events and from which future economic benefits are expected to flow to the AIF. Assets shall be sub-classified according to the following line items
  - (i) "investments", including, but not limited to, debt and equity securities, real estate and property and derivatives;

- (ii) "cash and cash equivalents", including, but not limited to, cash-in-hand, demand deposits and qualifying short-term liquid investments;
  - (iii) "receivables", including, but not limited to, amounts receivable in relation to dividends and interest, investments sold, amounts due from brokers and "prepayments", including, but not limited to, amounts paid in advance in relation to expenses of the AIF,
- (b) "liabilities", comprising present obligations of the AIF arising from past events, the settlement of which is expected to result in an outflow from the AIF of resources embodying economic benefits. Liabilities shall be sub-classified according to the following line items:
- (i) "payables", including, but not limited to, amounts payable in relation to the purchase of investments or redemption of units or shares in the AIF and amounts due to brokers and "accrued expenses", including, but not limited to, liabilities for management fees, advisory fees, performance fees, interest and other expenses incurred in the course of operations of the AIF;
  - (ii) "borrowings", including, but not limited to, amounts payable to banks and other counterparties;
  - (iii) "other liabilities", including, but not limited to, amounts due to counterparties for collateral on return of securities loaned, deferred income and dividends and distributions payable;
- (c) "net assets", representing the residual interest in the assets of the AIF after deducting all its liabilities.

2. The income and expenditure account shall contain at least the following elements and underlying line items:

- (a) "income", representing any increases in economic benefits during the accounting period in the form of inflows or enhancements of assets or decreases of liabilities that result in increases in net assets other than those relating to contributions from investors. Income shall be sub-classified according to the following line items:
- (i) "investment income", which can be further sub-classified as follows:
    - "dividend income", relating to dividends on equity investments to which the AIF is entitled;
    - "interest income", relating to interest on debt investments and on cash to which the AIF is entitled;
    - "rental income", relating to rental income from property investments to which the AIF is entitled;
  - (ii) "realised gains on investments", representing gains on the disposal of investments;
  - (iii) "unrealised gains on investments", representing gains on the revaluation of investments; and
  - (iv) "other income" including, but not limited to, fee income from securities loaned and from miscellaneous sources.
- (b) "expenses", representing decreases in economic benefits during the accounting period in the form of outflows or depletions of assets or incurrences of liabilities that result in decreases in net assets, other than those relating to distributions to investors. Expenses shall, be sub-classified according to the following line items:
- "investment advisory or management fees", representing contractual fees due to the advisor or AIFM;

*"other expenses", including, but not limited to, administration fees, professional fees, custodian fees and interest. Individual items, if material in nature, should be disclosed separately;*

*"realised loss on investments", representing loss on the disposal of investments;*

*"unrealised loss on investments", representing loss on the revaluation of investments;*

- (c) *"net income or expenditure", representing the excess of income over expenditure or expenditure over income, as applicable.*

*3. The layout, nomenclature and terminology of line items shall be consistent with the accounting standards applicable to or the rules adopted by the AIF, and shall comply with legislation applicable where the AIF is established. Such line items may be amended or extended to ensure compliance with the above.*

*4. Additional line items, headings and subtotals shall be presented when such presentation is relevant to the understanding of an AIF's financial position in the balance sheet or statement of assets and liabilities or an AIF's financial performance in the content and format of the income and expenditure account. Where relevant additional information shall be presented in the notes to the financial statements. The purpose of the notes shall be to provide narrative descriptions or disaggregation of items presented in the primary statements and information about items that do not qualify for recognition in these statements.*

*5. Each material class of similar items shall be presented separately. Individual items, if material, shall be disclosed. Materiality shall be assessed under the requirements of the accounting framework adopted.*

*6. The presentation and classification of items in the balance sheet or statement of assets and liabilities shall be retained from one reporting or accounting period to the next unless it is apparent that another presentation or classification would be more appropriate, as when a shift in the investment strategy leads to different trading patterns, or because an accounting standard has required a change in presentation.*

*7. With respect to the content and format of the income and expenditure account set out to in Annex IV, all items of income and expense shall be recognised in a given period in the income and expenditure account unless an accounting standard adopted by the AIF requires otherwise.*

▪ **FAQ AIFM published by CSSF (Appendix XV) Section 14 Reporting Question 14.I)**

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

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

**Article 105 Report on the activities of the financial year  
(Level 2 AIFM Regulation)**

*1. The report on activities of the financial year shall include at least:*

- (a) an overview of investment activities during the year or period, and an overview of the AIF's portfolio at year-end or period end;*
- (b) an overview of AIF performance over the year or period;*
- (c) material changes as defined below in the information listed in Article 23 of Directive 2011/61/EU not already present in the financial statements.*

2. The report shall include a fair and balanced review of the activities and performance of the AIF, containing also a description of the principal risks and investment or economic uncertainties that the AIF might face.

3. To the extent necessary for an understanding of the AIF's investment activities or its performance, the analysis shall include both financial and non-financial key performance indicators relevant to that AIF. The information provided in the report shall be consistent with national rules where the AIF is established.

4. The information in the report on the activities of the financial year shall form part of the directors or investment managers report insofar as this is usually presented alongside the financial statements of the AIF

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

### Article 106 Material changes (Level 2 AIFM Regulation)

1. Any changes in information shall be deemed material within the meaning of point (d) of Article 22(2) of Directive 2011/61/EU if there is a substantial likelihood that a reasonable investor, becoming aware of such information, would reconsider its investment in the AIF, including because such information could impact an investor's ability to exercise its rights in relation to its investment, or otherwise prejudice the interests of one or more investors in the AIF.

2. In order to comply with point (d) of Article 22(2) of Directive 2011/61/EU, AIFMs shall assess changes in the information referred to in Article 23 of Directive 2011/61/EU during the financial year in accordance with paragraph 1 of this Article.

3. Information shall be disclosed in line with the requirements of the accounting standards and accounting rules adopted by the AIF together with a description of any potential or anticipated impact on the AIF and, as the case may be, or investors in the AIF. Additional disclosures shall be made when compliance with specific requirements of the accounting standards and accounting rules may be insufficient to enable investors to understand the impact of the change.

4. Where the information required to be disclosed in accordance with paragraph 1 is not covered by the accounting standards applicable to an AIF, or its accounting rules, a description of the material change shall be provided together with any potential or anticipated impact on the AIF and, as the case may be, or investors in the AIF.

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

- **Q&A published by ESMA (Appendix XIV) Section I Remuneration: Question 6, Question 7**
- **Article 13 of the Level 1 AIFM Directive**

### Article 107 Remuneration disclosure (Level 2 AIFM Regulation)

1. When information required by point (e) of Article 22(2) of Directive 2011/61/EU is given, it shall be specified whether or not the total remuneration relates to any of the following:

- (a) the total remuneration of the entire staff of the AIFM, indicating the number of beneficiaries;
- (b) the total remuneration of those staff of the AIFM who are fully or partly involved in the activities of the AIF, indicating the number of beneficiaries;

(c) *the proportion of the total remuneration of the staff of the AIFM attributable to the AIF, indicating the number of beneficiaries.*

2. *Where relevant, the total remuneration for the financial year shall also mention the carried interest paid by the AIF.*

3. *Where information is disclosed at the level of the AIFM, an allocation or breakdown shall be provided in relation to each AIF, insofar as this information exists or is readily available. As part of this disclosure, a description of how the allocation or breakdown has been provided shall be included.*

4. *AIFMs shall provide general information relating to the financial and non-financial criteria of the remuneration policies and practices for relevant categories of staff to enable investors to assess the incentives created. In accordance with the principles set out in Annex II of Directive 2011/61/EU, AIFMs shall disclose at least the information necessary to provide an understanding of the risk profile of the AIF and the measures it adopts to avoid or manage conflicts of interest.*

(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.

- **Q&A published by ESMA (Appendix XIV) Section I Remuneration: Question 7**
- **Article 13 of the Level 1 AIFM Directive**

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

The accounting information given in the annual report shall be audited by one or more persons empowered by law to audit accounts in accordance with Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts<sup>57</sup>. The auditor's report, including any qualifications, shall be reproduced in full in the annual report.

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

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

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<sup>57</sup> OJ L 157, 9.6.2006, p. 87.

## Article 23 AIFMD

### Disclosure to investors

[Art. 21 AIFM Law]

- **Recital 83 of the Level 1 AIFM Directive**
- **Explanatory Memorandum section 3.2.12 (Appendix I) and Recitals 71, 124 and 128 to 130 of the Level 2 AIFM Regulation (Appendix II)**
- **See definition of "AIFM of closed-ended AIF" (Appendix VIII)**
- **Q&A published by EU Commission (Appendix X) ID 1175 and 1176 Reporting requirements**

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

- (a) a description of the investment strategy and objectives of the AIF, information on where any master AIF is established and where the underlying funds are established if the AIF is a fund of funds, a description of the types of assets in which the AIF may invest, the techniques it may employ and all associated risks, any applicable investment restrictions, the circumstances in which the AIF may use leverage, the types and sources of leverage permitted and the associated risks, any restrictions on the use of leverage and any collateral and asset reuse arrangements, and the maximum level of leverage which the AIFM are entitled to employ on behalf of the AIF;
- (b) a description of the procedures by which the AIF may change its investment strategy or investment policy, or both;
- (c) a description of the main legal implications of the contractual relationship entered into for the purpose of investment, including information on jurisdiction, on the applicable law and on the existence or not of any legal instruments providing for the recognition and enforcement of judgments in the territory where the AIF is established;
- (d) the identity of the AIFM, the AIF's depository, 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);
- (f) a description of any delegated management function as referred to in Annex I by the AIFM and of any safe-keeping function delegated by the depository, the identification of the delegate and any conflicts of interest that may arise from such delegations;
- (g) a description of the AIF's valuation procedure and of the pricing methodology for valuing assets, including the methods used in valuing hard-to-value assets in accordance with Article 19;
- (h) a description of the AIF's liquidity risk management, including the redemption rights both in normal and in exceptional circumstances, and the 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) a description of how the AIFM ensures a fair treatment of investors and, whenever an investor obtains preferential treatment or the right to obtain preferential treatment, a description of that preferential treatment, the type of investors who obtain such preferential treatment and, where relevant, their legal or economic links with the AIF or AIFM;
- (k) the latest annual report referred to in Article 22;
- (l) the procedure and conditions for the issue and sale of units or shares;

- (m) the latest net asset value of the AIF or the latest market price of the unit or share of the AIF, in accordance with Article 19;
- (n) where available, the historical performance of the AIF;
- (o) the identity of the prime broker and a description of any material arrangements of the AIF with its prime brokers and the way the conflicts of interest in relation thereto are managed and the provision in the contract with the depositary on the possibility of transfer and reuse of AIF assets, and information about any transfer of liability to the prime broker that may exist;
- (p) a description of how and when the information required under paragraphs 4 and 5 will be disclosed.

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

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

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

- (a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
- (b) any new arrangements for managing the liquidity of the AIF;
- (c) the current risk profile of the AIF and the risk management systems employed by the AIFM to manage those risks.

▪ See definition of "AIFM of closed-ended AIF" (Appendix VIII)

#### Article 108 Periodic disclosure to investors (Level 2 AIFM Regulation)

1. The information referred to in Article 23(4) of Directive 2011/61/EU shall be presented in a clear and understandable way.

2. When disclosing the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature in accordance with Article 23(4)(a) of Directive 2011/61/EU the AIFM shall:

- (a) provide an overview of any special arrangements in place including whether they relate to side pockets, gates or other similar arrangements, the valuation methodology applied to assets which are subject to such arrangements and how management and performance fees apply to these assets;
- (b) disclose this information as part of the AIF's periodic reporting to investors, as required by the AIF's rules or instruments of incorporation, or at the same time as the prospectus and offering document and - as a minimum - at the same time as the annual report is made available in accordance with Article 22(1) of Directive 2011/61/EU.

The percentage of the AIF's assets which are subject to special arrangements as defined in Article 1(5) shall be calculated as the net value of those assets subject to special arrangements divided by the net asset value of the AIF concerned.

3. For any new arrangements for managing the liquidity of the AIF in accordance with point (b) of Article 23(4) of Directive 2011/61/EU AIFMs shall:

- (a) for each AIF that they manage which is not an unleveraged closed-ended AIF, notify to investors whenever they make changes to the liquidity management systems and procedures referred to in Article 16(1) of Directive 2011/61/EU which are material in accordance with Article 106(1);
- (b) immediately notify investors where they activate gates, side pockets or similar special arrangements or where they decide to suspend redemptions;
- (c) provide an overview of the changes to arrangements concerning liquidity, whether or not these are special arrangements. Where relevant, the terms under which redemption is permitted and circumstances determining when management discretion applies shall be included. Also any voting or other restrictions exercisable, the length of any lock-up or any provision concerning "first in line" or "pro-rating" on gates and suspensions shall be included.

4. The disclosure of the risk profile of the AIF in accordance with point (c) of Article 23(4) of Directive 2011/61/EU shall outline:

- (a) measures to assess the sensitivity of the AIF's portfolio to the most relevant risks to which the AIF is or could be exposed;
- (b) if risk limits set by the AIFM have been or are likely to be exceeded and where these risk limits have been exceeded a description of the circumstances and, the remedial measures taken;

The information shall be disclosed as part of the AIF's periodic reporting to investors, as required by the AIF's rules or instruments of incorporation or at the same time as the prospectus and offering document and - at a minimum - at the same time as the annual report is made available in accordance with Article 22(1) of Directive 2011/61/EU.

5. The risk management systems employed by the AIFM in accordance with point (c) of Art. 23(4) of Directive 2011/61/EU shall outline the main features of the risk management systems employed by the AIFM to manage the risks to which each AIF it manages is or may be exposed. In the case of a change the disclosure shall include the information relating to the change and its anticipated impact on the AIF and its investors.

The information shall be disclosed as part of the AIF's periodic reporting to investors, as required by the AIF's rules or instruments of incorporation or at the same time as the prospectus and offering document and - as a minimum - at the same time as the annual report is made available or made public in accordance with Article 22(1) of Directive 2011/61/EU.

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

- (a) any changes to the maximum level of leverage which the AIFM may employ on behalf of the AIF as well as any right of the reuse of collateral or any guarantee granted under the leveraging arrangement;
- (b) the total amount of leverage employed by that AIF.

- See the definition of "**leverage**" under article 4 1(v) of the Level 1 AIFM Directive

### Article 109 Regular disclosure to investors (Level 2 AIFM Regulation)

1. The information referred to in Article 23(5) of Directive 2011/61/EU shall be presented in a clear and understandable way.

*2. Information on changes to the maximum level of leverage calculated in accordance with the gross and commitment methods and any right of re-use of collateral or any guarantee under the leveraging arrangements shall be provided without undue delay and shall include:*

- (a) the original and revised maximum level of leverage calculated in accordance with Articles 7 and 8, whereby the level of leverage shall be calculated as the relevant exposure divided by the net asset value of the AIF;*
- (b) the nature of the rights granted for the reuse of collateral;*
- (c) the nature of guarantees granted and*
- (d) details of changes in any service providers which relating to one of the items above.*

*3. Information on the total amount of leverage calculated in accordance with the gross and commitment methods employed by the AIF shall be disclosed as part of the AIF's periodic reporting to investors, as required by the AIF's rules or instruments of incorporation, or at the same time as the prospectus and offering document and at least at the same time as the annual report is made available according to Article 22(1) of Directive 2011/61/EU.*

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

## Article 24 AIFMD

### Reporting obligations to competent authorities

[Art. 22 AIFM Law]

- **Recital 83 of the Level 1 AIFM Directive**
- **See the definition of "leverage" under article 4 1(v) of the Level 1 AIFM Directive**
- **Explanatory Memorandum section 3.2.12 (Appendix I) and Recitals 12, 123, 131 and 132 of the Level 2 AIFM Regulation (Appendix II)**
- **Annex IV of the Level 2 AIFM Regulation: Reporting templates (Appendix VI)**
- **ESMA Guidelines on reporting obligations under Article 3 and 24 of the AIFMD (Appendix XIII)**
- **Q&A published by EU Commission (Appendix X) ID 1175 and 1176 Reporting requirements ID 1204 Responsibility of Member States' competent authorities**
- **Q&A published by ESMA (Appendix XIV) Section III Reporting Question 20, Question 56, Question 58, Question 74, Question 83**
- **FAQ AIFM published by CSSF (Appendix XV) Section 14 Reporting Question 14.n), Question 14.o), Question 14.p), Question 14.q), Question 14.r)**
- **Circular CSSF 15/612 (not included in this compilation): Information to be submitted to the CSSF in relation to unregulated AIFs (established in Luxembourg, in another EU Member State or in a third country) and/or regulated AIFs established in a third country**
- **Circular CSSF 15/633 (not included in this compilation): Financial information to be provided by investment fund managers and their branches on a quarterly basis.**

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

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

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

- (a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
- (b) any new arrangements for managing the liquidity of the AIF;
- (c) the current risk profile of the AIF and the risk management systems employed by the AIFM to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk;
- (d) information on the main categories of assets in which the AIF invested; and
- (e) the results of the stress tests performed in accordance with point (b) of Article 15(3) and the second subparagraph of Article 16(1).

#### Article 110 Reporting to competent authorities (Level 2 AIFM Regulation)

1. In order to comply with the requirements of the second subparagraph of Article 24(1) and of point (d) of Article 3(3) of Directive 2011/61/EU, an AIFM shall provide the following information when reporting to competent authorities:

- (a) *the main instruments in which it is trading, including a break-down of financial instruments and other assets, including the AIF's investment strategies and their geographical and sectoral investment focus;*
- (b) *the markets of which it is a member or where it actively trades;*
- (c) *the diversification of the AIF's portfolio, including, but not limited to, its principal exposures and most important concentrations.*

*The information shall be provided as soon as possible and not later than one month after the end of the period referred to in paragraph 3. Where the AIF is a fund of funds this period may be extended by the AIFM by 15 days.*

*2. For each of the EU AIFs they manage and for each of the AIFs they market in the Union, AIFMs shall provide to the competent authorities of their home Member State the following information in accordance with Article 24(2) of Directive 2011/61/EU:*

- (a) *the percentage of the AIF's assets which are subject to special arrangements as defined in Article 1(5) of this Regulation arising from their illiquid nature as referred to in point (a) of Article 23(4) of Directive 2011/61/EU;*
- (b) *any new arrangements for managing the liquidity of the AIF;*
- (c) *the risk management systems employed by the AIFM to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk;*
- (d) *the current risk profile of the AIF, including:*
  - (i) *the market risk profile of the investments of the AIF, including the expected return and volatility of the AIF in normal market conditions;*
  - (ii) *the liquidity profile of the investments of the AIF, including the liquidity profile of the AIF's assets, the profile of redemption terms and the terms of financing provided by counterparties to the AIF;*
- (e) *information on the main categories of assets in which the AIF invested including the corresponding short market value and long market value, the turnover and performance during the reporting period; and*
- (f) *the results of periodic stress tests, under normal and exceptional circumstances, performed in accordance with point (b) of Article 15(3) and the second subparagraph of Article 16(1) of Directive 2011/61/EU.*

*3. The information referred to in paragraphs 1 and 2 shall be reported as follows:*

- (a) *on a half-yearly basis by AIFMs managing portfolios of AIFs whose assets under management calculated in accordance with Article 2 in total exceed the threshold of either EUR 100 million or EUR 500 million laid down in points (a) and (b) respectively of Article 3(2) of Directive 2011/61/EU but do not exceed EUR 1 billion, for each of the EU AIFs they manage and for each of the AIFs they market in the Union;*
- (b) *on a quarterly basis by AIFMs managing portfolios of AIFs whose assets under management calculated in accordance with Article 2 in total exceed EUR 1 billion, for each of the EU AIFs they manage, and for each of the AIFs they market in the Union;*

- (c) on a quarterly basis by AIFMs which are subject to the requirements referred to in point (a) of this paragraph, for each AIF whose assets under management, including any assets acquired through use of leverage, in total exceed EUR 500 million, in respect of that AIF;
- (d) on an annual basis by AIFMs in respect of each unleveraged AIF under their management which, in accordance with its core investment policy, invests in non-listed companies and issuers in order to acquire control.

4. By way of derogation from paragraph 3, the competent authority of the home Member State of the AIFM may deem it appropriate and necessary for the exercise of its function to require all or part of the information to be reported on a more frequent basis.

5. AIFMs managing one or more AIFs which they have assessed to be employing leverage on a substantial basis in accordance with Article 111 of this Regulation shall provide the information required under Article 24(4) of Directive 2011/61/EU at the same time as that required under paragraph 2 of this Article.

6. AIFMs shall provide the information specified under paragraphs 1, 2 and 5 in accordance with the pro-forma reporting template set out in the Annex IV.

7. In accordance with point (a) of Article 42(1) of Directive 2011/61/EU, for non-EU AIFMs, any reference to the competent authorities of the home Member State shall mean the competent authority of the Member State of reference.

- **Q&A published by ESMA (Appendix XIV) Section III Reporting [Question 37](#), [Question 40](#), [Question 56](#), [Question 58](#), [Question 83](#)**
- **FAQ AIFM published by CSSF (Appendix XV) Section 14 Reporting [Question 14.a](#)), [Question 14.b](#)), [Question 18.e](#))**

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

- (a) an annual report of each EU AIF managed by the AIFM and of each AIF marketed by it in the Union, for each financial year, in accordance with Article 22(1);
- (b) for the end of each quarter a detailed list of all AIFs which the AIFM manages.

4. An AIFM managing AIFs employing leverage on a substantial basis shall make available information about the overall level of leverage employed by each AIF it manages, a break-down between leverage arising from borrowing of cash or securities and leverage embedded in financial derivatives and the extent to which the AIF's assets have been reused under leveraging arrangements to the competent authorities of its home Member State.

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

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

**Article 111 Use of leverage on a "substantial basis"  
(Level 2 AIFM Regulation)**

*1. Leverage shall be considered to be employed on a substantial basis for the purposes of Article 24(4) of Directive 2011/61/EU when the exposure of an AIF as calculated according to the commitment method under Article 8 of this Regulation exceeds three times its net asset value.*

*2. Where the requirements referred to in paragraph 1 of this Article are fulfilled, AIFMs shall provide information in accordance with Article 24(4) of Directive 2011/61/EU to the competent authorities of their home Member States in accordance with the principles laid down in Article 110(3) of this Regulation.*

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.

- **See ESMA Opinion - Collection of information for the effective monitoring of systemic risk under Art. 24 (5), first sub-paragraph of the Level 1 AIFM Directive, ref. [ESMA/2013/1340](#) on ESMA website**

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 56 and subject to the conditions of Articles 57 and 58, measures specifying:

- (a) when leverage is to be considered to be employed on a substantial basis for the purposes of paragraph 4; and
- (b) the obligations to report and provide information provided for in this Article.

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

## CHAPTER V

### AIFMs MANAGING SPECIFIC TYPES OF AIF

#### SECTION 1

##### AIFMs managing leveraged AIFs

#### Article 25 AIFMD

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

[Art. 23 AIFM Law]

- *Recitals 49 to 51, 78 and 84 of the Level 1 AIFM Directive*
- *See the definition of "leverage" under article 4 1(v) of the Level 1 AIFM Directive*
- *Recital 133 of the Level 2 AIFM Regulation (Appendix II)*

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

2. The competent authorities of the home Member State of the AIFM shall ensure that all information gathered under Article 24 in respect of all AIFMs that they supervise and the information gathered under Article 7 is made available to competent authorities of other relevant Member States, ESMA and the ESRB by means of the procedures set out in Article 50 on supervisory cooperation. They shall, without delay, also provide information by means of those procedures, and bilaterally to the competent authorities of other Member States directly concerned, if an AIFM under their responsibility, or AIF managed by that AIFM could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions in other Member States.

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

#### Article 112 Restrictions on the management of AIFs (Level 2 AIFM Regulation)

1. *The principles laid down in this Article shall apply in order to specify the circumstances in which competent authorities exercise their power to impose leverage limits or other restrictions on AIFMs.*

2. *When assessing the information received under Articles 7(3), 15(4), 24(4) or 24(5) of Directive 2011/61/EU, a competent authority shall take into account the extent to which the use of leverage by an AIFM or its*

*interaction with a group of AIFMs or other financial institutions can contribute to the build-up of systemic risk in the financial system or risks creating disorderly markets.*

3. *Competent authorities shall take into account at least the following aspects in their assessment:*

- (a) the circumstances in which the exposure of an AIF or several AIFs including those exposures resulting from financing or investment positions entered into by the AIFM for its own account or on behalf of the AIFs could constitute an important source of market, liquidity or counterparty risk to a financial institution;*
- (b) the circumstances in which the activities of an AIFM or its interaction with, for example, a group of AIFMs or other financial institutions, in particular with respect to the types of assets in which the AIF invests and the techniques employed by the AIFM through the use of leverage, contribute or could contribute to a downward spiral in the prices of financial instruments or other assets in a manner that threatens the viability of such financial instruments or other assets;*
- (c) criteria such as the type of AIF, the investment strategy of the AIFM with respect to the AIFs concerned, the market conditions in which the AIFM and the AIF operate and any likely pro-cyclical effects that could result from the imposition by the competent authorities of limits or other restrictions on the use of leverage by the AIFM concerned;*
- (d) criteria, such as the size of an AIF or several AIFs and any related impact in a particular market sector, concentrations of risks in particular markets in which the AIF or several AIFs are investing, any contagion risk to other markets from a market where risks have been identified, liquidity issues in particular markets at a given time, the scale of asset/liability mismatch in a particular AIFM investment strategy or irregular movements in the prices of assets in which an AIF may invest*

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

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

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

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

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

9. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures setting out principles specifying the circumstances in which competent

authorities apply the provisions set out in paragraph 3, taking into account different strategies of AIFs, different market conditions in which AIFs operate and possible pro-cyclical effects of applying those provisions.

## SECTION 2

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

#### Article 26 AIFMD

##### Scope

[Art. 24 AIFM Law]

▪ **Recital 58 of the Level 1 AIFM Directive**

1. This Section shall apply to the following:
  - (a) AIFMs managing one or more AIFs which either individually or jointly on the basis of an agreement aimed at acquiring control, acquire control of a non-listed company in accordance with paragraph 5;
  - (b) AIFMs cooperating with one or more other AIFMs on the basis of an agreement pursuant to which the AIFs managed by those AIFMs jointly, acquire control of a non-listed company in accordance with paragraph 5.
2. This Section shall not apply where the non-listed companies concerned are:
  - (a) small and medium-sized enterprises within the meaning of Article 2(1) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises<sup>58</sup>; or
  - (b) special purpose vehicles with the purpose of purchasing, holding or administering real estate.
3. Without prejudice to paragraphs 1 and 2 of this Article, Article 27(1) shall also apply to AIFMs managing AIFs that acquire a non-controlling participation in a non-listed company.
4. Article 28(1), (2) and (3) and Article 30 shall apply also to AIFMs managing AIFs that acquire control over issuers. For the purposes of those Articles, paragraphs 1 and 2 of this Article shall apply *mutatis mutandis*.
5. For the purpose of this Section, for non-listed companies, control shall mean more than 50 % of the voting rights of the companies.

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

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

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

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

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

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<sup>58</sup> OJ L 124, 20.5.2003, p. 36.

- ***Q&A published by EU Commission (Appendix X) ID 1194 Issues related to private equity***

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

## Article 27 AIFMD

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

[Art. 25 AIFM Law]

- **Recitals 52 to 54 and 58 of the Level 1 AIFM Directive**
- **Q&A published by EU Commission (Appendix X) ID 1194 Issues related to private equity**

1. Member States shall require that when an AIF acquires, disposes of or holds shares of a non-listed company, the AIFM managing such an AIF notify the competent authorities of its home Member State of the proportion of voting rights of the non-listed company held by the AIF any time when that proportion reaches, exceeds or falls below the thresholds of 10 %, 20 %, 30 %, 50 % and 75 %.
2. Member States shall require that when an AIF acquires, individually or jointly, control over a non-listed company pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF notify the following of the acquisition of control by the AIF:
  - (a) the non-listed company;
  - (b) the shareholders of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access; and
  - (c) the competent authorities of the home Member State of the AIFM.
3. The notification required under paragraph 2 shall contain the following additional information:
  - (a) the resulting situation in terms of voting rights;
  - (b) the conditions subject to which control was acquired, including information about the identity of the different shareholders involved, any natural person or legal entity entitled to exercise voting rights on their behalf and, if applicable, the chain of undertakings through which voting rights are effectively held;
  - (c) the date on which control was acquired.
4. In its notification to the non-listed company, the AIFM shall request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the acquisition of control by the AIF managed by the AIFM and of the information referred to in paragraph 3. The AIFM shall use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this Article.
5. The notifications referred to in paragraphs 1, 2 and 3 shall be made as soon as possible, but no later than 10 working days after the date on which the AIF has reached, exceeded or fallen below the relevant threshold or has acquired control over the non-listed company.

## Article 28 AIFMD

### Disclosure in case of acquisition of control

[Art. 26 AIFM Law]

- *Recitals 52 to 56 and 58 of the Level 1 AIFM Directive*
- *Q&A published by EU Commission (Appendix X) ID 1194 Issues related to private equity*

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

- (a) the company concerned;
- (b) the shareholders of the company of which the identities and addresses are available to the AIFM or can be made available by the company or through a register to which the AIFM has or can obtain access; and
- (c) the competent authorities of the home Member State of the AIFM.

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

2. The AIFM shall make available:

- (a) the identity of the AIFMs which either individually or in agreement with other AIFMs manage the AIFs that have acquired control;
- (b) the policy for preventing and managing conflicts of interest, in particular between the AIFM, the AIF and the company, including information about the specific safeguards established to ensure that any agreement between the AIFM and/or the AIF and the company is concluded at arm's length; and
- (c) the policy for external and internal communication relating to the company in particular as regards employees.

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

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

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

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

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

## Article 29 AIFMD

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

[Art. 27 AIFM Law]

- **Recitals 52 to 55 and 58 of the Level 1 AIFM Directive**
- **Q&A published by EU Commission (Appendix X) ID 1194 Issues related to private equity**

1. Member States shall require that when an AIF acquires, individually or jointly, control of a non-listed company pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF shall either:
  - (a) request and use its best efforts to ensure that the annual report of the non-listed company drawn up in accordance with paragraph 2 is made available by the board of directors of the company to the employees' representatives or, where there are none, to the employees themselves within the period such annual report has to be drawn up in accordance with the national applicable law; or
  - (b) for each such AIF include in the annual report provided for in Article 22 the information referred to in paragraph 2 relating to the relevant non-listed company.
2. The additional information to be included in the annual report of the company or the AIF, in accordance with paragraph 1, shall include at least a fair review of the development of the company's business representing the situation at the end of the period covered by the annual report. The report shall also give an indication of:
  - (a) any important events that have occurred since the end of the financial year;
  - (b) the company's likely future development; and
  - (c) the information concerning acquisitions of own shares prescribed by Article 22(2) of Council Directive 77/91/EEC<sup>59</sup>.
3. The AIFM managing the relevant AIF shall either:
  - (a) request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information referred to in point (b) of paragraph 1 relating to the company concerned to the employees' representatives of the company concerned or, where there are none, to the employees themselves within the period referred to in Article 22(1); or
  - (b) make available the information referred to in point (a) of paragraph 1 to the investors of the AIF, in so far as already available, within the period referred to in Article 22(1) and, in any event, no later than the date on which the annual report of the non-listed company is drawn up in accordance with the national applicable law.

<sup>59</sup> OJ L 26, 31.1.1977, p. 1.

## Article 30 AIFMD

### Asset stripping

[Art. 28 AIFM Law]

- **Recital 57 of the Level 1 AIFM Directive**
- **Q&A published by EU Commission (Appendix X) ID 1195 Issues related to private equity**

1. Member States shall require that when an AIF, individually or jointly, acquires control of a non-listed company or an issuer pursuant to Article 26(1), in conjunction with paragraph 5 of that Article, the AIFM managing such an AIF shall for a period of 24 months following the acquisition of control of the company by the AIF:

- (a) not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in paragraph 2;
- (b) in so far as the AIFM is authorised to vote on behalf of the AIF at the meetings of the governing bodies of the company, not vote in favour of a distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in paragraph 2; and
- (c) in any event use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares by the company as described in paragraph 2.

2. The obligations imposed on AIFMs pursuant to paragraph 1 shall relate to the following:

- (a) any distribution to shareholders made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may be not distributed under the law or the statutes, on the understanding that where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital;
- (b) any distribution to shareholders the amount of which would exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes;
- (c) to the extent that acquisitions of own shares are permitted, the acquisitions by the company, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, that would have the effect of reducing the net assets below the amount mentioned in point (a).

3. For the purposes of paragraph 2:

- (a) the term "distribution" referred to in points (a) and (b) of paragraph 2 shall include, in particular, the payment of dividends and of interest relating to shares;
- (b) the provisions on capital reductions shall not apply on a reduction in the subscribed capital, the purpose of which is to offset losses incurred or to include sums of money in a non-distributable reserve provided that, following that operation, the amount of such reserve is not more than 10 % of the reduced subscribed capital; and
- (c) the restriction set out in point (c) of paragraph 2 shall be subject to points (b) to (h) of Article 20(1) of Directive 77/91/EEC.

## CHAPTER VI

### RIGHTS OF EU AIFMs TO MARKET AND MANAGE EU AIFs IN THE UNION

#### Article 30a AIFMD

##### Conditions for pre-marketing in the Union by an EU AIFM

[Art. 28-1 AIFM Law] [Art. 28-2 AIFM Law] [Art. 29 AIFM Law]

- **Q&A published by ESMA (Appendix XIV) Section II Notifications of AIFs Question 9, Section XVII Marketing Question 1**

1. Member States shall ensure that an authorised EU AIFM may engage in pre-marketing in the Union, except where the information presented to potential professional investors:

- (a) is sufficient to allow investors to commit to acquiring units or shares of a particular AIF;
- (b) amounts to subscription forms or similar documents whether in a draft or a final form; or
- (c) amounts to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.

Where a draft prospectus or offering documents are provided, they shall not contain information sufficient to allow investors to take an investment decision and shall clearly state that:

- (a) they do not constitute an offer or an invitation to subscribe to units or shares of an AIF; and
- (b) the information presented therein should not be relied upon because it is incomplete and may be subject to change.

Member States shall ensure that an EU AIFM is not required to notify the competent authorities of the content or of the addressees of pre-marketing, or to fulfil any conditions or requirements other than those set out in this Article, before it engages in pre-marketing.

2. EU AIFMs shall ensure that investors do not acquire units or shares in an AIF through pre-marketing and that investors contacted as part of pre-marketing may only acquire units or shares in that AIF through marketing permitted under Article 31 or 32.

Any subscription by professional investors, within 18 months of the EU AIFM having begun pre-marketing, to units or shares of an AIF referred to in the information provided in the context of pre-marketing, or of an AIF established as a result of the pre-marketing, shall be considered to be the result of marketing and shall be subject to the applicable notification procedures referred to in Articles 31 and 32.

Member States shall ensure that an EU AIFM sends, within two weeks of it having begun pre-marketing, an informal letter, in paper form or by electronic means, to the competent authorities of its home Member State. That letter shall specify the Member States in which and the periods during which the pre-marketing is taking or has taken place, a brief description of the pre-marketing including information on the investment strategies presented and, where relevant, a list of the AIFs and compartments of AIFs which are or were the subject of pre-marketing. The competent authorities of the home Member State of the EU AIFM shall promptly inform the competent authorities of the Member States in which the EU AIFM is or was engaged in pre-marketing. The competent authorities of the Member State in which pre-marketing is taking or has taken place may request the competent authorities of the home Member State of the EU AIFM to provide further information on the pre-marketing that is taking or has taken place on its territory.

3. A third party shall only engage in pre-marketing on behalf of an authorised EU AIFM where it is authorised as an investment firm in accordance with Directive 2014/65/EU of the European Parliament and of the Council<sup>60</sup>, as a credit institution in accordance with Directive 2013/36/EU of the European Parliament and of the Council<sup>61</sup>, as a UCITS management company in accordance with Directive 2009/65/EC, as an AIFM in accordance with this Directive, or acts as a tied agent in accordance with Directive 2014/65/EU. Such a third party shall be subject to the conditions set out in this Article.
4. An EU AIFM shall ensure that pre-marketing is adequately documented.

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<sup>60</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

<sup>61</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

## Article 31 AIFMD

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

[Art. 29 AIFM Law]

- *Recitals 59, 60 and 70 of the Level 1 AIFM Directive*
- *Q&A published by EU Commission (Appendix X) ID 1187 Passport issues ID 1201 Cooperation between Member States' competent authorities*
- *Q&A published by ESMA (Appendix XIV) Section II Notifications of AIFs Question 4, Question 5*

1. Member States shall ensure that an authorised EU AIFM may market units or shares of any EU AIF that it manages to professional investors in the home Member State of the AIFM as soon as the conditions laid down in this Article are met.

Where the EU AIF is a feeder AIF the right to market referred to in the first subparagraph is subject to the condition that the master AIF is also an EU AIF which is managed by an authorised EU AIFM.

2. The AIFM shall submit a notification to the competent authorities of its home Member State in respect of each EU AIF that it intends to market.

That notification shall comprise the documentation and information set out in [Annex III](#).

3. Within 20 working days following receipt of a complete notification file pursuant to paragraph 2, the competent authorities of the home Member State of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 2. The competent authorities of the home Member State of the AIFM shall prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Directive or the AIFM otherwise does not or will not comply with this Directive. In the case of a positive decision, the AIFM may start marketing the AIF in its home Member State from the date of the notification by the competent authorities to that effect.

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

4. In the event of a material change to any of the particulars communicated in accordance with paragraph 2, the AIFM shall give written notice of that change to the competent authorities of its home Member State at least 1 month before implementing the change as regards any changes planned by the AIFM, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would otherwise no longer comply with this Directive, the relevant competent authorities shall inform the AIFM without undue delay that it is not to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with this Directive or the AIFM otherwise no longer complies with this Directive, the competent authorities of the home Member State of the AIFM shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF.

5. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine:

- (a) the form and content of a model for the notification letter referred to in paragraph 2; and
- (b) the form of the written notice referred to in paragraph 4.

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

6. Without prejudice to Article 43(1), Member States shall require that AIFs managed and marketed by AIFMs be marketed only to professional investors.

## Article 32 AIFMD

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

[Art. 30 AIFM Law] [Art. 31 AIFM Law]

- *Recitals 15, 59, 60 and 70 of the Level 1 AIFM Directive*
- *Q&A published by ESMA (Appendix XIV) Section II Notifications of AIFs Question 6, Question 7, Question 8*

1. Member States shall ensure that an authorised EU AIFM may market units or shares of an EU AIF that it manages to professional investors in another Member State than the home Member State of the AIFM as soon as the conditions laid down in this Article are met.

Where the EU AIF is a feeder AIF the right to market referred to in the first subparagraph is subject to the condition that the master AIF is also an EU AIF and is managed by an authorised EU AIFM.

2. The AIFM shall submit a notification to the competent authorities of its home Member State in respect of each EU AIF that it intends to market.

That notification shall comprise the documentation and information set out in [Annex IV](#).

3. The competent authorities of the home Member State of the AIFM shall, no later than 20 working days after the date of receipt of the complete notification file referred to in paragraph 2, transmit the complete notification file to the competent authorities of the Member States where it is intended that the AIF be marketed. Such transmission shall occur only if the AIFM's management of the AIF complies with and will continue to comply with this Directive and if the AIFM otherwise complies with this Directive.

The competent authorities of the home Member State of the AIFM shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

4. Upon transmission of the notification file, the competent authorities of the home Member State of the AIFM shall, without delay, notify the AIFM about the transmission. The AIFM may start marketing the AIF in the host Member State of the AIFM as of the date of that notification.

In so far as they are different, the competent authorities of the home Member State of the AIFM shall also inform the competent authorities of the AIF that the AIFM may start marketing the units or shares of the AIF in the host Member State of the AIFM.

5. Arrangements referred to in point (h) of Annex IV shall be subject to the laws and supervision of the host Member State of the AIFM.

6. Member States shall ensure that the notification letter by the AIFM referred to in paragraph 2 and the statement referred to in paragraph 3 are provided in a language customary in the sphere of international finance.

Member States shall ensure that electronic transmission and filing of the documents referred to in paragraph 3 are accepted by their competent authorities.

7. In the event of a material change to any of the particulars communicated in accordance with paragraph 2, the AIFM shall give written notice of that change to the competent authorities of its home Member State at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would otherwise no longer comply with this Directive, the relevant competent authorities of the home Member State of the AIFM shall inform the AIFM within 15 working days of receipt of all the information referred to in the first subparagraph that it is not to implement the change. In that case, the competent

authorities of the home Member State of the AIFM shall notify the competent authorities of the host Member State of the AIFM accordingly.

If a planned change is implemented notwithstanding the first and second subparagraphs, or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with this Directive or the AIFM otherwise would no longer comply with this Directive, the competent authorities of the home Member State of the AIFM shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF and shall notify the competent authorities of the host Member State of the AIFM accordingly without undue delay.

If the changes do not affect the compliance of the AIFM's management of the AIF with this Directive, or the compliance by the AIFM with this Directive otherwise, the competent authorities of the home Member State of the AIFM shall within one month inform the competent authorities of the host Member State of the AIFM of those changes.

- ***Q&A published by EU Commission (Appendix X) ID 1203 Cooperation between Member States' competent authorities***

8. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine:

- (a) the form and content of a model for the notification letter referred to in paragraph 2;
- (b) the form and content of a model for the statement referred to in paragraph 3;
- (c) the form of the transmission referred to in paragraph 3; and
- (d) the form of the written notice referred to in paragraph 7.

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

9. Without prejudice to Article 43(1), Member States shall require that the AIFs managed and marketed by the AIFM be marketed only to professional investors.

## Article 32a AIFMD

### De-notification of arrangements made for the marketing of units or shares of some or all EU AIFs in the Member States other than in the home Member State of the AIFM

[Art. 29-1 AIFM Law] [Art. 30-1 AIFM Law] [Art. 31-1 AIFM Law] [Art. 32 AIFM Law] [Art 33 AIFM Law]

▪ **Q&A published by ESMA (Appendix XIV) Section II Notifications of AIFs Question 11**

1. Member States shall ensure that an EU AIFM may de-notify arrangements made for marketing as regards units or shares of some or all of its AIFs in a Member State in respect of which it has made a notification in accordance with Article 32, where all the following conditions are fulfilled:

(a) except in the case of closed-ended AIFs and funds regulated by Regulation (EU) 2015/760 of the European Parliament and of the Council<sup>62</sup>, a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such AIF units or shares held by investors in that Member State, is publicly available for at least 30 working days, and is addressed, directly or through financial intermediaries, individually to all investors in that Member State whose identity is known;

(b) the intention to terminate arrangements made for marketing units or shares of some or all of its AIFs in that Member State is made public by means of a publicly available medium, including by electronic means, which is customary for marketing AIFs and suitable for a typical AIF investor;

(c) any contractual arrangements with financial intermediaries or delegates are modified or terminated with effect from the date of de-notification in order to prevent any new or further, direct or indirect, offering or placement of the units or shares identified in the notification referred to in paragraph 2.

As of the date referred to in point (c) of the first subparagraph, the AIFM shall cease any new or further, direct or indirect, offering or placement of units or shares of the AIF it manages in the Member State in respect of which it has submitted a notification in accordance with paragraph 2.

2. The AIFM shall submit a notification to the competent authorities of its home Member State containing the information referred to in points (a), (b) and (c) of the first subparagraph of paragraph 1.

3. The competent authorities of the home Member State of the AIFM shall verify whether the notification submitted by the AIFM in accordance with paragraph 2 is complete. The competent authorities of the home Member State of the AIFM shall, no later than 15 working days from the receipt of a complete notification, transmit that notification to the competent authorities of the Member State identified in the notification referred to in paragraph 2, and to ESMA.

Upon transmission of the notification pursuant to the first subparagraph, the competent authorities of the home Member State of the AIFM shall promptly notify the AIFM of that transmission.

For a period of 36 months from the date referred to in point (c) of the first subparagraph of paragraph 1, the AIFM shall not engage in pre-marketing of units or shares of the EU AIFs referred to in the notification, or in respect of similar investment strategies or investment ideas, in the Member State identified in the notification referred to in paragraph 2.

4. The AIFM shall provide investors who remain invested in the EU AIF as well as the competent authorities of the home Member State of the AIFM with the information required under Articles 22 and 23.

<sup>62</sup> Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98).

5. The competent authorities of the home Member State of the AIFM shall transmit to the competent authorities of the Member State identified in the notification referred to in paragraph 2, information on any changes to the documentation and information referred to in points (b) to (f) of Annex IV.
6. The competent authorities of the Member State identified in the notification referred to in paragraph 2 of this Article shall have the same rights and obligations as the competent authorities of the host Member State of the AIFM as set out in Article 45.
7. Without prejudice to other supervisory powers referred to in Article 45(3), as from the date of transmission under paragraph 5 of this Article, the competent authorities of the Member State identified in the notification referred to in paragraph 2 of this Article, shall not require the AIFM concerned to demonstrate compliance with national laws, regulations and administrative provisions governing marketing requirements as referred to in Article 5 of Regulation (EU) 2019/1156 of the European Parliament and of the Council<sup>63</sup>.
8. Member States shall allow for the use of any electronic or other distance communication means for the purposes of paragraph 4.

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<sup>63</sup> Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014 (OJ L 188, 12.7.2019, p. 55)

## Article 33 AIFMD

### Conditions for managing EU AIFs established in other Member States and for providing services in other Member States

[Art. 32 AIFM Law] [Art 33 AIFM Law]

- *Q&A published by EU Commission (Appendix X) ID 1205 Responsibility of Member States' competent authorities ID 1211 Passport issues*
- *Q&A published by ESMA (Appendix XIV) Section II Notifications of AIFs Question 7, Section IV Notification of AIFMs Question 1, Question 2, Question 3, Question 4, Question 5, Question 6*

1. Member States shall ensure that an authorised EU AIFM may, directly or by establishing a branch:
  - (a) manage EU AIFs established in another Member State, provided that the AIFM is authorised to manage that type of AIF;
  - (b) provide in another Member State the services referred to in Article 6(4) for which it has been authorised.
  
2. An AIFM intending to provide the activities and services referred to in paragraph 1 for the first time shall communicate the following information to the competent authorities of its home Member State:
  - (a) the Member State in which it intends to manage AIFs directly or to establish a branch, and/or to provide the services referred to in Article 6(4);
  - (b) a programme of operations stating in particular the services which it intends to perform and/or identifying the AIFs that it intends to manage.
  
3. If the AIFM intends to establish a branch, it shall provide the following information in addition to that referred to in paragraph 2:
  - (a) the organisational structure of the branch;
  - (b) the address in the home Member State of the AIF from which documents may be obtained;
  - (c) the names and contact details of the persons responsible for the management of the branch.
  
4. The competent authorities of the home Member State of the AIFM shall, within 1 month of receiving the complete documentation in accordance with paragraph 2 or within 2 months of receiving the complete documentation in accordance with paragraph 3, transmit the complete documentation to the competent authorities of the host Member State of the AIFM. Such transmission shall occur only if the AIFM's management of the AIF complies, and will continue to comply, with this Directive and the AIFM otherwise complies with this Directive.
 

The competent authorities of the home Member State of the AIFM shall enclose a statement to the effect that the AIFM concerned is authorised by them.

The competent authorities of the home Member State of the AIFM shall immediately notify the AIFM about the transmission.

Upon receipt of the transmission notification the AIFM may start to provide its services in its host Member State.
  
5. The host Member State of the AIFM shall not impose any additional requirements on the AIFM concerned in respect of the matters covered by this Directive.
  
6. In the event of a change to any of the information communicated in accordance with paragraph 2, and, where relevant, paragraph 3, an AIFM shall give written notice of that change to the competent authorities of its

home Member State at least 1 month before implementing planned changes, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would otherwise no longer comply with this Directive, the relevant competent authorities of the home Member State of the AIFM shall inform the AIFM within 15 working days of receipt of all the information referred to in the first subparagraph that it is not to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with this Directive or the AIFM otherwise would no longer comply with this Directive, the competent authorities of the home Member State of the AIFM shall take all due measures in accordance with Article 46 and shall notify accordingly the competent authorities of the host Member State of the AIFM without undue delay.

If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with this Directive, or the compliance by the AIFM with this Directive otherwise, the competent authorities of the home Member State of the AIFM shall, without undue delay, inform the competent authorities of the host Member States of the AIFM of those changes.

7. In order to ensure consistent harmonisation of this Article, ESMA may develop draft regulatory technical standards to specify the information to be notified in accordance with paragraphs 2 and 3.

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

8. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to establish standard forms, templates and procedures for the transmission of information in accordance with paragraphs 2 and 3.

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

## CHAPTER VII

### SPECIFIC RULES IN RELATION TO THIRD COUNTRIES

- *Recital 70 of the Level 1 AIFM Directive*

#### Article 34 AIFMD

#### Conditions for EU AIFMs which manage non-EU AIFs which are not marketed in Member States

[Art. 34 AIFM Law]

- *Recitals 61, 74 and 84 of the Level 1 AIFM Directive*

1. Member States shall ensure that an authorised EU AIFM may manage non-EU AIFs which are not marketed in the Union provided that:
  - (a) the AIFM complies with all the requirements established in this Directive except for Article 21 and 22 in respect of those AIFs; and
  - (b) appropriate cooperation arrangements are in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows competent authorities of the home Member State of the AIFM to carry out their duties in accordance with this Directive.

- *Explanatory Memorandum section 3.2.13 (Appendix I) and Recitals 134 and 135 of the Level 2 AIFM Regulation (Appendix II)*

#### Article 113 General requirements (Level 2 AIFM Regulation)

1. Cooperation arrangements shall cover all possible situations and actors envisaged in Chapter VII of Directive 2011/61/EU taking into account the location of the AIFM, the location of the AIF and the activity of the AIFM.
2. Cooperation arrangements shall take a written form.
3. Cooperation arrangements shall establish the specific framework for consultation, cooperation and exchange of information for supervisory and enforcement purposes between EU competent authorities and third country supervisory authorities.
4. Cooperation arrangements shall include a specific clause providing for the transfer of information received by a Union competent authority from a supervisory authority in a third country to other Union competent authorities, to ESMA or to the ESRB as required under Directive 2011/61/EU.

**Article 114 Mechanisms, instruments and procedures**  
*(Level 2 AIFM Regulation)*

*1. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for enabling Union competent authorities to have access to all information necessary for the performance of their duties under Directive 2011/61/EU.*

*2. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for enabling on-site inspections to be carried out where required for the exercise of the Union competent authority's duties under Directive 2011/61/EU. On-site inspections shall be carried out directly by the Union competent authority or by the third country competent authority with the assistance of the Union competent authority.*

*3. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for the third country competent authority to assist the Union competent authorities where it is necessary to enforce Union legislation and national implementing legislation breached by an entity established in the third country, in accordance with the national and international law applicable to that authority.*

2. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

3. In order to ensure uniform application of this Article, ESMA shall develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1.

## Article 35 AIFMD

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

[Art. 35 AIFM Law] [Art. 36 AIFM Law]

- **Recitals 62, 74 and 84 of the Level 1 AIFM Directive**
- **Q&A published by EU Commission (Appendix X) ID 1200 Issues related to master AIFs and feeder AIFs**

1. Member States shall ensure that an authorised EU AIFM may market to professional investors in the Union units or shares of non-EU AIFs it manages and of EU feeder AIFs that do not fulfil the requirements referred to in the second subparagraph of Article 31(1) as soon as the conditions laid down in this Article are met.
2. AIFMs shall comply with all the requirements established in this Directive, with the exception of Chapter VI. In addition the following conditions shall be met:
  - (a) appropriate cooperation arrangements must be in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information, taking into account Article 50(4), that allows the competent authorities to carry out their duties in accordance with this Directive;
  - (b) the third country where the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF;
  - (c) the third country where the non-EU AIF is established has signed an agreement with the home Member State of the authorised AIFM and with each other Member State in which the units or shares of the non-EU AIF are intended to be marketed, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements.

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

- **Explanatory Memorandum section 3.2.13 (Appendix I) and Recitals 134 and 135 of the Level 2 AIFM Regulation (Appendix II)**

#### Article 113 General requirements (Level 2 AIFM Regulation)

1. Cooperation arrangements shall cover all possible situations and actors envisaged in Chapter VII of Directive 2011/61/EU taking into account the location of the AIFM, the location of the AIF and the activity of the AIFM.
2. Cooperation arrangements shall take a written form.
3. Cooperation arrangements shall establish the specific framework for consultation, cooperation and exchange of information for supervisory and enforcement purposes between EU competent authorities and third country supervisory authorities.

*4. Cooperation arrangements shall include a specific clause providing for the transfer of information received by a Union competent authority from a supervisory authority in a third country to other Union competent authorities, to ESMA or to the ESRB as required under Directive 2011/61/EU.*

**Article 114 Mechanisms, instruments and procedures  
(Level 2 AIFM Regulation)**

*1. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for enabling Union competent authorities to have access to all information necessary for the performance of their duties under Directive 2011/61/EU.*

*2. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for enabling on-site inspections to be carried out where required for the exercise of the Union competent authority's duties under Directive 2011/61/EU. On-site inspections shall be carried out directly by the Union competent authority or by the third country competent authority with the assistance of the Union competent authority.*

*3. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for the third country competent authority to assist the Union competent authorities where it is necessary to enforce Union legislation and national implementing legislation breached by an entity established in the third country, in accordance with the national and international law applicable to that authority.*

3. If an AIFM intends to market units or shares of non-EU AIFs in its home Member State, the AIFM shall submit a notification to the competent authorities of its home Member State in respect of each non-EU AIF that it intends to market.

That notification shall comprise the documentation and information set out in Annex III.

4. No later than 20 working days after receipt of a complete notification pursuant to paragraph 3, the competent authorities of the home Member State of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 3 in its territory. The competent authorities of the home Member State of the AIFM shall prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Directive or the AIFM otherwise does not or will not comply with this Directive. In the case of a positive decision, the AIFM may start marketing the AIF in its home Member State as of the date of the notification by the competent authorities to that effect.

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

5. If an AIFM intends to market units or shares of non-EU AIFs in a Member State other than its home Member State, the AIFM shall submit a notification to the competent authorities of its home Member State in respect of each non-EU AIF that it intends to market.

That notification shall comprise the documentation and information set out in Annex IV.

6. The competent authorities of the home Member State of the AIFM shall, no later than 20 working days after the date of receipt of the complete notification file referred to in paragraph 5, transmit that complete notification file to the competent authorities of the Member State where the AIF is intended to be marketed. Such transmission will occur only if the AIFM's management of the AIF complies and will continue to comply with this Directive and that the AIFM otherwise complies with this Directive.

The competent authorities of the home Member State of the AIFM shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

7. Upon transmission of the notification file, the competent authorities of the home Member State of the AIFM shall, without delay, notify the AIFM about the transmission. The AIFM may start marketing the AIF in the relevant host Member States of the AIFM as of the date of that notification by the competent authorities.

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

8. Arrangements referred to in point (h) of Annex IV shall be subject to the laws and supervision of the host Member States of the AIFM.

9. Member States shall ensure that the notification letter of the AIFM referred to in paragraph 5 and the statement referred to in paragraph 6 are provided in a language customary in the sphere of international finance.

Member States shall ensure that electronic transmission and filing of the documents referred to in paragraph 6 are accepted by their competent authorities.

10. In the event of a material change to any of the particulars communicated in accordance with paragraph 3 or 5, the AIFM shall give written notice of that change to the competent authorities of its home Member State, at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

If pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would no longer comply with this Directive, the competent authorities of the home Member State of the AIFM shall inform the AIFM without undue delay that it is not to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs, or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with this Directive or the AIFM otherwise would no longer comply with this Directive, the competent authorities of the home Member State of the AIFM shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF.

If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with this Directive, or the compliance by the AIFM with this Directive otherwise, the competent authorities of the home Member State of the AIFM shall, without delay, inform ESMA in so far as the changes concern the termination of the marketing of certain AIFs or additional AIFs marketed and, if applicable, the competent authorities of the host Member States of the AIFM of those changes.

- ***Q&A published by EU Commission (Appendix X) ID 1203 Cooperation between Member States' competent authorities***

11. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in point (a) of paragraph 2 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

12. In order to ensure uniform application of this Article, ESMA may develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in point (a) of paragraph 2.

13. ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in point (a) of paragraph 2 so as to ensure that both the competent authorities of the home and the host Member States receive sufficient information in order to be able to exercise their supervisory and investigatory powers under this Directive.

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

14. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to specify the procedures for coordination and exchange of information between the competent authority of the home Member State and the competent authorities of the host Member States of the AIFM.

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

15. In case a competent authority rejects a request to exchange information in accordance with the regulatory technical standards referred to in paragraph 14, the competent authorities concerned may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

16. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine:

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

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

17. Without prejudice to Article 43(1), Member States shall require that the AIFs managed and marketed by the AIFM be marketed only to professional investors.

## Article 36 AIFMD

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

[Art. 37 AIFM Law]

- **Recitals 15, 19, 63, 74 and 84 of the Level 1 AIFM Directive**
- **Q&A published by EU Commission (Appendix X) ID 1199 Issues related to master AIFs and feeder AIFs ID 1206 Passport issues**
- **Q&A published by ESMA (Appendix XIV) Section XI Scope Question 1**

1. Without prejudice to Article 35, Member States may allow an authorised EU AIFM to market to professional investors, in their territory only, units or shares of non-EU AIFs it manages and of EU feeder AIFs that do not fulfil the requirements referred to in the second subparagraph of Article 31(1), provided that:

- (a) the AIFM complies with all the requirements established in this Directive with the exception of Article 21. That AIFM shall however ensure that one or more entities are appointed to carry out the duties referred to in Article 21(7), (8) and (9). The AIFM shall not perform those functions. The AIFM shall provide its supervisory authorities with information about the identity of those entities responsible for carrying out the duties referred to in Article 21(7), (8) and (9);
- (b) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows the competent authorities of the home Member State of the AIFM to carry out their duties in accordance with this Directive;

- **Explanatory Memorandum section 3.2.13 (Appendix I) and Recitals 134 and 135 of the Level 2 AIFM Regulation (Appendix II)**

#### Article 113 General requirements (Level 2 AIFM Regulation)

1. Cooperation arrangements shall cover all possible situations and actors envisaged in Chapter VII of Directive 2011/61/EU taking into account the location of the AIFM, the location of the AIF and the activity of the AIFM.

2. Cooperation arrangements shall take a written form.

3. Cooperation arrangements shall establish the specific framework for consultation, cooperation and exchange of information for supervisory and enforcement purposes between EU competent authorities and third country supervisory authorities.

4. Cooperation arrangements shall include a specific clause providing for the transfer of information received by a Union competent authority from a supervisory authority in a third country to other Union competent authorities, to ESMA or to the ESRB as required under Directive 2011/61/EU.

**Article 114 Mechanisms, instruments and procedures**  
*(Level 2 AIFM Regulation)*

*1. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for enabling Union competent authorities to have access to all information necessary for the performance of their duties under Directive 2011/61/EU.*

*2. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for enabling on-site inspections to be carried out where required for the exercise of the Union competent authority's duties under Directive 2011/61/EU. On-site inspections shall be carried out directly by the Union competent authority or by the third country competent authority with the assistance of the Union competent authority.*

*3. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for the third country competent authority to assist the Union competent authorities where it is necessary to enforce Union legislation and national implementing legislation breached by an entity established in the third country, in accordance with the national and international law applicable to that authority.*

(c) the third country where the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF

2. Member States may impose stricter rules on the AIFM in respect of the marketing of units or shares of non-EU AIFs to investors in their territory for the purpose of this Article.

3. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

4. In order to ensure uniform application of this Article, ESMA shall develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1.

## Article 37 AIFMD

### Authorisation of non-EU AIFMs intending to manage EU AIFs and/or market AIFs managed by them in the Union in accordance with Article 39 or 40

[Art. 38 AIFM Law]

- **Recitals 15, 19, 64 to 67, 74 and 84 of the Level 1 AIFM Directive**
- **Q&A published by EU Commission (Appendix X) ID 1197 Issues related to Article 37 AIFMD**
- **FAQ AIFM published by CSSF (Appendix XV) Section 18 Marketing (non-EU AIFM) Question 18.h)**

1. Member States shall require that non-EU AIFMs intending to manage EU AIFs and/or to market AIFs managed by them in the Union in accordance with Article 39 or 40 acquire prior authorisation by the competent authorities of their Member State of reference in accordance with this Article.

2. A non-EU AIFM intending to obtain prior authorisation as referred to in paragraph 1 shall comply with this Directive, with the exception of Chapter VI. If and to the extent that compliance with a provision of this Directive is incompatible with compliance with the law to which the non-EU AIFM and/or the non-EU AIF marketed in the Union is subject, there shall be no obligation on the AIFM to comply with that provision of this Directive if it can demonstrate that:

- (a) it is impossible to combine such compliance with compliance with a mandatory provision in the law to which the non-EU AIFM and/or the non-EU AIF marketed in the Union is subject;
- (b) the law to which the non-EU AIFM and/or the non-EU AIF is subject provides for an equivalent rule having the same regulatory purpose and offering the same level of protection to the investors of the relevant AIF; and
- (c) the non-EU AIFM and/or the non-EU AIF complies with the equivalent rule referred to in point (b).

3. A non-EU AIFM intending to obtain prior authorisation as referred to in paragraph 1 shall have a legal representative established in its Member State of reference. The legal representative shall be the contact point of the AIFM in the Union and any official correspondence between the competent authorities and the AIFM and between the EU investors of the relevant AIF and the AIFM as set out in this Directive shall take place through that legal representative. The legal representative shall perform the compliance function relating to the management and marketing activities performed by the AIFM under this Directive together with the AIFM.

4. The Member State of reference of a non-EU AIFM shall be determined as follows:

- (a) if the non-EU AIFM intends to manage only one EU AIF, or several EU AIFs established in the same Member State, and does not intend to market any AIF in accordance with Article 39 or 40 in the Union, the home Member State of that or those AIFs is deemed to be the Member State of reference and the competent authorities of this Member State will be competent for the authorisation procedure and for the supervision of the AIFM;
- (b) if the non-EU AIFM intends to manage several EU AIFs established in different Member States and does not intend to market any AIF in accordance with Article 39 or 40 in the Union, the Member State of reference is either:
  - (i) the Member State where most of the AIFs are established; or
  - (ii) the Member State where the largest amount of assets is being managed;
- (c) if the non-EU AIFM intends to market only one EU AIF in only one Member State, the Member State of reference is determined as follows:

- (i) if the AIF is authorised or registered in a Member State, the home Member State of the AIF or the Member State where the AIFM intends to market the AIF;
  - (ii) if the AIF is not authorised or registered in a Member State, the Member State where the AIFM intends to market the AIF;
- (d) if the non-EU AIFM intends to market only one non-EU AIF in only one Member State, the Member State of reference is that Member State;
- (e) if the non-EU AIFM intends to market only one EU AIF, but in different Member States, the Member State of reference is determined as follows:
- (i) if the AIF is authorised or registered in a Member State, the home Member State of the AIF or one of the Member States where the AIFM intends to develop effective marketing; or
  - (ii) if the AIF is not authorised or registered in a Member State, one of the Member States where the AIFM intends to develop effective marketing;
- (f) if the non-EU AIFM intends to market only one non-EU AIF, but in different Member States, the Member State of reference is one of those Member States;
- (g) if the non-EU AIFM intends to market several EU AIFs in the Union, the Member State of reference is determined as follows:
- (i) in so far as those AIFs are all registered or authorised in the same Member State, the home Member State of those AIFs or the Member State where the AIFM intends to develop effective marketing for most of those AIFs;
  - (ii) in so far as those AIFs are not all registered or authorised in the same Member State, the Member State where the AIFM intends to develop effective marketing for most of those AIFs;
- (h) if the non-EU AIFM intends to market several EU and non-EU AIFs, or several non-EU AIFs in the Union, the Member State of reference is the Member State where it intends to develop effective marketing for most of those AIFs.

In accordance with the criteria set out in points (b), (c)(i), (e), (f), and (g)(i) of the first subparagraph, more than one Member State of reference is possible. In such cases, Member States shall require that the non-EU AIFM intending to manage EU AIFs without marketing them and/or market AIFs managed by it in the Union in accordance with Article 39 or 40 submit a request to the competent authorities of all of the Member States that are possible Member States of reference in accordance with the criteria set out in those points, to determine its Member State of reference from among them. Those competent authorities shall jointly decide the Member State of reference for the non-EU AIFM, within 1 month of receipt of such request. The competent authorities of the Member State that is appointed as Member State of reference shall, without undue delay, inform the non-EU AIFM of that appointment. If the non-EU AIFM is not duly informed of the decision made by the relevant competent authorities within 7 days of the decision or if the relevant competent authorities have not made a decision within the 1-month period, the non-EU AIFM may itself choose its Member State of reference based on the criteria set out in this paragraph.

The AIFM shall be able to prove its intention to develop effective marketing in a particular Member State by disclosure of its marketing strategy to the competent authorities of the Member State indicated by it.

- ***Commission Implementing Regulation (EU) 448/2013 establishing a procedure for determining the Member State of reference of a non-EU AIFM (Appendix XII).***

5. Member States shall require that a non-EU AIFM intending to manage EU AIFs without marketing them and/or to market AIFs managed by it in the Union in accordance with Article 39 or 40 submit a request for authorisation to its Member State of reference.

After receiving the application for authorisation, the competent authorities shall assess whether the determination by the AIFM as regards its Member State of reference complies with the criteria laid down in paragraph 4. If the competent authorities consider that this is not the case, they shall refuse the authorisation request of the non-EU AIFM explaining the reasons for their refusal. If the competent authorities consider that the criteria of paragraph 4 have been complied with, they shall notify ESMA, requesting advice on their assessment. In their notification to ESMA, the competent authorities shall provide ESMA with the justification by the AIFM of its assessment regarding the Member State of reference and with information on the marketing strategy of the AIFM.

Within 1 month of having received the notification referred to in the second subparagraph, ESMA shall issue advice to the relevant competent authorities about their assessment on the Member State of reference in accordance with the criteria set out in paragraph 4. ESMA shall issue a negative advice only if it considers that the criteria set out in paragraph 4 have not been complied with.

The term referred to in Article 8(5) shall be suspended during ESMA's deliberation in accordance with this paragraph.

▪ **Q&A published by EU Commission (Appendix X) ID 1198 Issues related to Article 37 AIFMD**

If the competent authorities propose to grant authorisation contrary to ESMA's advice referred to in the third subparagraph they shall inform ESMA, stating their reasons. ESMA shall publish the fact that the competent authorities do not comply or intend to comply with its advice. ESMA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authorities for not complying with that advice. The competent authorities shall receive advance notice about such a publication.

If the competent authorities propose to grant authorisation contrary to ESMA's advice referred to in the third subparagraph and the AIFM intends to market units or shares of AIFs managed by it in Member States other than the Member State of reference, the competent authorities of the Member State of reference shall also inform the competent authorities of those Member States thereof, stating their reasons. In so far as applicable, the competent authorities of the Member State of reference shall also inform the competent authorities of the home Member States of the AIFs managed by the AIFM thereof, stating their reasons.

6. Where a competent authority of a Member State disagrees with the determination of the Member State of reference by the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

7. Without prejudice to paragraph 8, no authorisation shall be granted unless the following additional conditions are met:

- (a) the Member State of reference is indicated by the AIFM in accordance with the criteria set out in paragraph 4 and supported by the disclosure of the marketing strategy, and the procedure set out in paragraph 5 has been followed by the relevant competent authorities;
- (b) the AIFM has appointed a legal representative established in the Member State of reference;
- (c) the legal representative shall, together with the AIFM, be the contact person of the non-EU AIFM for the investors of the relevant AIFs, for ESMA and for the competent authorities as regards the activities for which the AIFM is authorised in the Union and shall at least be sufficiently equipped to perform the compliance function pursuant to this Directive;
- (d) appropriate cooperation arrangements are in place between the competent authorities of the Member State of reference, the competent authorities of the home Member State of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties in accordance with this Directive;

- **Explanatory Memorandum section 3.2.13 (Appendix I) and Recitals 134 and 135 of the Level 2 AIFM Regulation (Appendix II)**

#### Article 113 General requirements (Level 2 AIFM Regulation)

1. Cooperation arrangements shall cover all possible situations and actors envisaged in Chapter VII of Directive 2011/61/EU taking into account the location of the AIFM, the location of the AIF and the activity of the AIFM.
2. Cooperation arrangements shall take a written form.
3. Cooperation arrangements shall establish the specific framework for consultation, cooperation and exchange of information for supervisory and enforcement purposes between EU competent authorities and third country supervisory authorities.
4. Cooperation arrangements shall include a specific clause providing for the transfer of information received by a Union competent authority from a supervisory authority in a third country to other Union competent authorities, to ESMA or to the ESRB as required under Directive 2011/61/EU.

#### Article 114 Mechanisms, instruments and procedures (Level 2 AIFM Regulation)

1. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for enabling Union competent authorities to have access to all information necessary for the performance of their duties under Directive 2011/61/EU.
2. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for enabling on-site inspections to be carried out where required for the exercise of the Union competent authority's duties under Directive 2011/61/EU. On-site inspections shall be carried out directly by the Union competent authority or by the third country competent authority with the assistance of the Union competent authority.
3. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for the third country competent authority to assist the Union competent authorities where it is necessary to enforce Union legislation and national implementing legislation breached by an entity established in the third country, in accordance with the national and international law applicable to that authority.

- (e) the third country where the non-EU AIFM is established is not listed as a Non-Cooperative Country and Territory by FATF;
- (f) the third country where the non-EU AIFM is established has signed an agreement with the Member State of reference, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements;
- (g) the effective exercise by the competent authorities of their supervisory functions under this Directive is neither prevented by the laws, regulations or administrative provisions of a third country governing the AIFM, nor by limitations in the supervisory and investigatory powers of that third country's supervisory authorities.

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

Where a competent authority of an EU AIF does not enter into the required cooperation arrangements as set out in point (d) of the first subparagraph within a reasonable period of time, the competent authorities of the Member State of reference may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

8. The authorisation shall be given in accordance with Chapter II which shall apply *mutatis mutandis* subject to the following criteria:

- (a) the information referred to in Article 7(2) shall be supplemented by:
  - (i) a justification by the AIFM of its assessment regarding the Member State of reference in accordance with the criteria set out in paragraph 4 with information on the marketing strategy;
  - (ii) a list of the provisions of this Directive for which compliance by the AIFM is impossible as compliance by the AIFM with those provisions is, in accordance with paragraph 2, incompatible with compliance with a mandatory provision in the law to which the non-EU AIFM or the non-EU AIF marketed in the Union is subject;
  - (iii) written evidence based on the regulatory technical standards developed by ESMA that the relevant third country law provides for a rule equivalent to the provisions for which compliance is impossible, which has the same regulatory purpose and offers the same level of protection to the investors of the relevant AIFs and that the AIFM complies with that equivalent rule; such written evidence being supported by a legal opinion on the existence of the relevant incompatible mandatory provision in the law of the third country and including a description of the regulatory purpose and the nature of the investor protection pursued by it; and
  - (iv) the name of the legal representative of the AIFM and the place where it is established;
- (b) the information referred to in Article 7(3) may be limited to the EU AIFs the AIFM intends to manage and to those AIFs managed by the AIFM that it intends to market in the Union with a passport;
- (c) point (a) of Article 8(1) shall be without prejudice to paragraph 2 of this Article;
- (d) point (e) of Article 8(1) shall not apply;
- (e) the second subparagraph of Article 8(5) shall be read as including a reference to 'the information referred to in point (a) of Article 37(8)'.

Where a competent authority of another Member State disagrees with the authorisation granted by the competent authorities of the Member State of reference of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

9. In case the competent authorities of the Member State of reference consider that the AIFM may rely on paragraph 2 to be exempted from compliance with certain provisions of this Directive, they shall, without undue delay, notify ESMA thereof. They shall support this assessment by the information provided by the AIFM in accordance with points (a)(ii) and (iii) of paragraph 8.

Within 1 month of receipt of the notification referred to in the first subparagraph, ESMA shall issue advice to the competent authorities about the application of the exemption for compliance with this Directive caused by the incompatibility in accordance with paragraph 2. The advice may, in particular, address whether the conditions for such exemption appear to be met based on the information provided by the AIFM in accordance with points (a)(ii) and (iii) of paragraph 8 and on the regulatory technical standards on equivalence. ESMA shall seek to build a common European supervisory culture and consistent supervisory practices and ensure consistent approaches among competent authorities in relation to the application of this paragraph.

The term referred to in Article 8(5) shall be suspended during the ESMA review in accordance with this paragraph.

▪ **Q&A published by EU Commission (Appendix X) ID 1198 Issues related to Article 37 AIFMD**

If the competent authorities of the Member State of reference propose to grant authorisation contrary to ESMA's advice referred to in the second subparagraph they shall inform ESMA, stating their reasons. ESMA shall publish the fact that the competent authorities do not comply or intend to comply with that advice. ESMA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authorities for not complying with that advice. The competent authorities concerned shall receive advance notice of such publication.

If the competent authorities propose to grant authorisation contrary to the ESMA advice referred to in the second subparagraph and the AIFM intends to market units or shares of AIFs managed by it in Member States other than the Member State of reference, the competent authorities of the Member State of reference shall also inform the competent authorities of those Member States thereof, stating their reasons.

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

10. The competent authorities of the Member State of reference shall, without undue delay, inform ESMA of the outcome of the initial authorisation process, about any changes in the authorisation of the AIFM and any withdrawal of authorisation.

The competent authorities shall inform ESMA about the applications for authorisation that they have rejected, providing data about the AIFM having asked for authorisation and the reasons for the rejection. ESMA shall keep a central register of those data, which shall be at the disposal of competent authorities, on request. Competent authorities shall treat this information as confidential.

11. The determination of the Member State of reference shall not be affected by the further business development of the AIFM in the Union. However, where the AIFM changes its marketing strategy within 2 years of its initial authorisation, and that change would have affected the determination of the Member State of reference if the modified marketing strategy had been the initial marketing strategy, the AIFM shall notify the competent authorities of the original Member State of reference of the change before implementing it and indicate its Member State of reference in accordance with the criteria set out in paragraph 4 and based on the new strategy. The AIFM shall justify its assessment by disclosing its new marketing strategy to its original Member State of reference. At the same time the AIFM shall provide information on its legal representative, including its name and the place where it is established. The legal representative shall be established in the new Member State of reference.

The original Member State of reference shall assess whether the determination of the AIFM in accordance with the first subparagraph is correct and shall notify ESMA thereof. ESMA shall issue advice on the assessment made by the competent authorities. In their notification to ESMA, the competent authorities shall provide the AIFM's justification of its assessment regarding the Member State of reference and information on the AIFM's new marketing strategy.

Within 1 month of receipt of the notification referred to in the second subparagraph, ESMA shall issue advice to the relevant competent authorities about their assessment. ESMA shall issue a negative advice only where it considers that the criteria set out in paragraph 4 have not been complied with.

After receipt of ESMA's advice in accordance with the third subparagraph, the competent authorities of the original Member State of reference shall inform the non-EU AIFM, its original legal representative and ESMA of their decision.

Where the competent authorities of the original Member State of reference agree with the assessment made by the AIFM, they shall also inform the competent authorities of the new Member State of reference of the change. The original Member State of reference shall, without undue delay, transfer a copy of the authorisation and the supervision file relating to the AIFM to the new Member State of reference. From the date of transmission of the authorisation and supervision file, the competent authorities of the new Member State of reference shall be competent for authorising and supervising the AIFM.

Where the competent authorities' final assessment is contrary to ESMA's advice referred to in the third subparagraph:

- (a) the competent authorities shall inform ESMA thereof, stating reasons. ESMA shall publish the fact that the competent authorities do not comply, or intend not to comply, with its advice. ESMA may also decide, on a case-by-case basis, to publish the reasons for non-compliance provided by the competent authorities. The competent authorities concerned shall receive advance notice of such publication;
- (b) where the AIFM markets units or shares of AIFs managed by it in Member States other than the original Member State of reference, the competent authorities of the original Member State of reference shall inform the competent authorities of those other Member States thereof, stating reasons. Where applicable, the competent authorities of the Member State of reference shall also inform the competent authorities of the home Member States of the AIFs managed by the AIFM thereof, stating reasons.

12. Where it appears from the actual course of the business development of the AIFM in the Union within 2 years after its authorisation that the marketing strategy as presented by the AIFM at the time of its authorisation was not followed, the AIFM made false statements in relation thereto or the AIFM has failed to comply with paragraph 11 when changing its marketing strategy, the competent authorities of the original Member State of reference shall request that the AIFM indicate the Member State of reference based on its actual marketing strategy. The procedure set out in paragraph 11 shall apply *mutatis mutandis*. If the AIFM does not comply with the competent authorities' request, they shall withdraw its authorisation.

Where the AIFM changes its marketing strategy after the period referred to in paragraph 11 and intends to change its Member State of reference on the basis of its new marketing strategy, it may submit a request to change its Member State of reference to the competent authorities of the original Member State of reference. The procedure referred to in paragraph 11 shall apply *mutatis mutandis*.

Where a competent authority of a Member State disagrees with the assessment made on the determination of the Member State of reference under paragraph 11 or under this paragraph, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

13. Any disputes arising between the competent authorities of the Member State of reference of the AIFM and the AIFM shall be settled in accordance with the law of and subject to the jurisdiction of the Member State of reference.

Any disputes between the AIFM or the AIF and EU investors of the relevant AIF shall be settled in accordance with the law of and subject to the jurisdiction of a Member State.

▪ **Q&A published by EU Commission (Appendix X) ID 1196 Issues related to Article 37 AIFMD**

14. The Commission shall adopt implementing acts with a view to specifying the procedure to be followed by the possible Member States of reference when determining the Member State of reference from among those Member States in accordance with the second subparagraph of paragraph 4. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 59(2).

15. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in point (d) of paragraph 7 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

16. In order to ensure uniform application of this Article, ESMA may develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in point (d) of paragraph 7.

17. ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in point (d) of paragraph 7 so as to ensure that the competent authorities

of the Member State of reference and the competent authorities of the host Member States receive sufficient information in order to be able to exercise their supervisory and investigatory powers under this Directive.

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

18. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to specify the procedures for coordination and exchange of information between the competent authority of the Member State of reference and the competent authorities of the host Member States of the AIFM.

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

19. In case a competent authority rejects a request to exchange information in accordance with the regulatory technical standards referred to in paragraph 17, the competent authorities concerned may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

20. In accordance with Article 29 of Regulation (EU) No 1095/2010, ESMA shall promote an effective bilateral and multilateral exchange of information between the competent authorities of the Member State of reference of the non-EU AIFM and the competent authorities of the host Member States of the AIFM concerned, with full respect for the applicable confidentiality and data protection provisions provided for in the relevant Union legislation.

21. In accordance with Article 31 of Regulation (EU) No 1095/2010, ESMA shall fulfil a general coordination role between the competent authority of the Member State of reference of the non-EU AIFM and the competent authorities of the host Member States of the AIFM concerned. In particular, ESMA may:

- (a) facilitate the exchange of information between the competent authorities concerned;
- (b) determine the scope of the information that the competent authority of the Member State of reference must provide to the competent authorities of the host Member States concerned;
- (c) take all appropriate measures in case of developments which may jeopardise the functioning of the financial markets with a view to facilitating the coordination of actions undertaken by the competent authority of the Member State of reference and the competent authorities of the host Member States in relation to non-EU AIFMs.

22. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine the form and content of the request referred to in the second subparagraph of paragraph 12.

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

23. In order to ensure the uniform application of this Article, ESMA shall develop draft regulatory technical standards on the following:

- (a) the manner in which an AIFM must comply with the requirements laid down in this Directive, taking into account that the AIFM is established in a third country and, in particular, the presentation of the information required in Articles 22 to 24;
- (b) the conditions under which the law to which a non-EU AIFM or a non-EU AIF is subject is considered to provide for an equivalent rule having the same regulatory purpose and offering the same level of protection to the relevant investors.

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

## Article 38 AIFMD

### Peer review of authorisation and supervision of non-EU AIFMs

▪ **Recital 68 of the Level 1 AIFM Directive**

1. ESMA shall, on an annual basis, conduct a peer review analysis of the supervisory activities of the competent authorities in relation to the authorisation and the supervision of non-EU AIFMs under Articles 37, 39, 40 and 41, to further enhance consistency in supervisory outcomes, in accordance with Article 30 of Regulation (EU) No 1095/2010.
2. By 22 July 2013, ESMA shall develop methods to allow for objective assessment and comparison between the authorities reviewed.
3. In particular, the peer review analysis shall include an assessment of:
  - (a) the degree of convergence in supervisory practices achieved in the authorisation and supervision of non-EU AIFMs;
  - (b) the extent to which the supervisory practice achieves the objectives set out in this Directive;
  - (c) the effectiveness and the degree of convergence achieved with regard to the enforcement of this Directive and its implementing measures and the regulatory and implementing technical standards developed by ESMA pursuant to this Directive, including administrative measures and penalties imposed against non-EU AIFMs where this Directive has not been complied with.
4. On the basis of the conclusions of the peer review, ESMA may issue guidelines and recommendations pursuant to Article 16 of Regulation (EU) No 1095/2010, with a view to establishing consistent, efficient and effective supervisory practices of non-EU AIFMs.
5. The competent authorities shall make every effort to comply with those guidelines and recommendations.
6. Within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or intend to comply, it shall inform ESMA, stating its reasons.
7. ESMA shall publish the fact that a competent authority does not comply or intend to comply with that guideline or recommendation. ESMA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with that guideline or recommendation. The competent authority shall receive advance notice of such a publication.
8. In the report referred to in Article 43(5) of Regulation (EU) No 1095/2010, ESMA shall inform the European Parliament, the Council and the Commission of the guidelines and recommendations issued pursuant to this Article, stating which competent authorities have not complied with them, and outlining how ESMA intends to ensure that those competent authorities comply with its recommendations and guidelines in the future.
9. The Commission shall duly take those reports into account in its review of this Directive in accordance with Article 69 and in any subsequent evaluation that it conducts.
10. ESMA shall make the best practices that can be identified from peer reviews publicly available. In addition, all other results of peer reviews may be made public, subject to the agreement of the competent authority being the subject of the peer review.

## Article 39 AIFMD

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

[Art. 39 AIFM Law] [Art. 40 AIFM Law]

- **Q&A published by EU Commission (Appendix X) ID 1201 Cooperation between Member States' competent authorities**
- **FAQ AIFM published by CSSF (Appendix XV) Section 18 Marketing (non-EU AIFM) Question 18.h)**

1. Member States shall ensure that a duly authorised non-EU AIFM may market the units or shares of an EU AIF it manages to professional investors in the Union with a passport as soon as the conditions laid down in this Article are met.

2. In case the AIFM intends to market units or shares of the EU AIF in its Member State of reference, the AIFM shall submit a notification to the competent authorities of its Member State of reference in respect of each EU AIF that it intends to market.

That notification shall comprise the documentation and information set out in Annex III.

3. No later than 20 working days after receipt of a complete notification pursuant to paragraph 2, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 2 in its territory. The competent authorities of the Member State of reference of the AIFM may prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Directive or if the AIFM otherwise does not or will not comply with this Directive. In the case of a positive decision, the AIFM may start marketing the AIF in its Member State of reference as of the date of the notification by the competent authorities to that effect.

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

4. In case the AIFM intends to market units or shares of the EU AIF in Member States other than its Member State of reference, the AIFM shall submit a notification to the competent authorities of its Member State of reference in respect of each EU AIF that it intends to market.

That notification shall comprise the documentation and information set out in Annex IV.

5. The competent authorities of the Member State of reference shall, no later than 20 working days after the date of receipt of the complete notification file referred to in paragraph 4, transmit the complete notification file to the competent authorities of the Member States where the units or shares of the AIF are intended to be marketed. Such transmission shall be effected only if the AIFM's management of the AIF complies and will continue to comply with this Directive and if the AIFM otherwise complies with this Directive.

The competent authorities of the Member State of reference of the AIFM shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

6. Upon transmission of the notification file, the competent authorities of the Member State of reference of the AIFM shall, without delay, notify the AIFM about the transmission. The AIFM may start marketing the AIF in the relevant host Member States as of the date of that notification.

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

7. The arrangements referred to in point (h) of Annex IV shall be subject to the laws and supervision of the host Member States of the AIFM.

8. Member States shall ensure that the notification letter by the AIFM referred to in paragraph 4 and the statement referred to in paragraph 5 are provided in a language customary in the sphere of international finance.

Member States shall ensure that electronic transmission and filing of the documents referred to in paragraph 6 are accepted by their competent authorities.

9. In the event of a material change to any of the particulars communicated in accordance with paragraph 2 and/or 4, the AIFM shall give written notice of that change to the competent authorities of its Member State of reference at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would otherwise no longer comply with this Directive, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM, without undue delay, that it is not to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with this Directive or the AIFM otherwise no longer complies with this Directive, the competent authorities of the Member State reference of the AIFM shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF.

If the changes are acceptable because they do not affect compliance of the AIFM's management of the AIF with this Directive, or compliance by the AIFM with this Directive otherwise, the competent authorities of the Member State of reference shall, without delay, inform ESMA in so far as the changes concern the termination of the marketing of certain AIFs or additional AIFs being marketed and, in so far as applicable, the competent authorities of the host Member States of those changes.

- ***Q&A published by EU Commission (Appendix X) ID 1203 Cooperation between Member States' competent authorities***

10. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine:

- (a) the form and content of a model for the notification letter referred to in paragraphs 2 and 4;
- (b) the form and content of a model for the statement referred to in paragraph 5;
- (c) the form of the transmission referred to in paragraph 5; and
- (d) the form of the written notice referred to in paragraph 9.

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

11. Without prejudice to Article 43(1), Member States shall require that the AIFs managed and marketed by the AIFM be marketed only to professional investors.

## Article 40 AIFMD

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

[Art. 41 AIFM Law] [Art. 42 AIFM Law]

- **Recitals 15, 19, 74 and 84 of the Level 1 AIFM Directive**
- **Q&A published by EU Commission (Appendix X) ID 1201 Cooperation between Member States' competent authorities**
- **FAQ AIFM published by CSSF (Appendix XV) Section 18 Marketing (non-EU AIFM) Question 18.h)**

1. Member States shall ensure that a duly authorised non-EU AIFM may market units or shares of a non-EU AIF it manages to professional investors in the Union with a passport as soon as the conditions laid down in this Article are met.

2. In addition to the requirements in this Directive in relation to EU-AIFMs, for non-EU AIFMs the following conditions shall be met:

(a) appropriate cooperation arrangements are in place between the competent authorities of the Member State of reference and the supervisory authority of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties in accordance with this Directive;

- **Explanatory Memorandum section 3.2.13 (Appendix I) and Recitals 134 and 135 of the Level 2 AIFM Regulation (Appendix II)**

#### Article 113 General requirements (Level 2 AIFM Regulation)

1. Cooperation arrangements shall cover all possible situations and actors envisaged in Chapter VII of Directive 2011/61/EU taking into account the location of the AIFM, the location of the AIF and the activity of the AIFM.

2. Cooperation arrangements shall take a written form.

3. Cooperation arrangements shall establish the specific framework for consultation, cooperation and exchange of information for supervisory and enforcement purposes between EU competent authorities and third country supervisory authorities.

4. Cooperation arrangements shall include a specific clause providing for the transfer of information received by a Union competent authority from a supervisory authority in a third country to other Union competent authorities, to ESMA or to the ESRB as required under Directive 2011/61/EU.

#### Article 114 Mechanisms, instruments and procedures (Level 2 AIFM Regulation)

1. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for enabling Union competent authorities to have access to all information necessary for the performance of their duties under Directive 2011/61/EU.

*2. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for enabling on-site inspections to be carried out where required for the exercise of the Union competent authority's duties under Directive 2011/61/EU. On-site inspections shall be carried out directly by the Union competent authority or by the third country competent authority with the assistance of the Union competent authority.*

*3. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for the third country competent authority to assist the Union competent authorities where it is necessary to enforce Union legislation and national implementing legislation breached by an entity established in the third country, in accordance with the national and international law applicable to that authority.*

(b) the third country where the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF;

(c) the third country where the non-EU AIF is established has signed an agreement with the Member State of reference and with each other Member State in which the units or shares of the non-EU AIF are intended to be marketed which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements.

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

3. The AIFM shall submit a notification to the competent authorities of its Member State of reference in respect of each non-EU AIF that it intends to market in its Member State of reference.

That notification shall comprise the documentation and information set out in Annex III.

4. No later than 20 working days after receipt of a complete notification pursuant to paragraph 3, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 3 in its territory. The competent authorities of the Member State of reference of the AIFM may prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Directive or the AIFM otherwise does not or will not comply with this Directive. In the case of a positive decision, the AIFM may start marketing the AIF in its Member State of reference from the date of the notification by the competent authorities to that effect.

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

5. If the AIFM intends to market the units or shares of a non-EU AIF also in Member States other than its Member State of reference, the AIFM shall submit a notification to the competent authorities of its Member State of reference in respect of each non-EU AIF that it intends to market.

That notification shall comprise the documentation and information set out in Annex IV.

6. The competent authorities of the Member State of reference shall, no later than 20 working days after the date of receipt of the complete notification file referred to in paragraph 5, transmit the complete notification file to the competent authorities of the Member States where the units or shares of the AIF are intended to be marketed. Such transmission shall occur only if the AIFM's management of the AIF complies and will continue to comply with this Directive and that in general the AIFM complies with this Directive.

The competent authorities of the Member State of reference of the AIFM shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

7. Upon transmission of the notification file, the competent authorities of the Member State of reference of the AIFM shall, without delay, notify the AIFM of the transmission. The AIFM may start marketing the AIF in the relevant host Member States of the AIFM as of the date of that notification.

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

8. Arrangements referred to in point (h) of Annex IV shall be subject to the laws and supervision of the host Member States of the AIFM, in so far as those Member States are different than the Member State of reference.

9. Member States shall ensure that the notification letter by the AIFM referred to in paragraph 5 and the statement referred to in paragraph 6 are provided in a language customary in the sphere of international finance.

Member States shall ensure that electronic transmission and filing of the documents referred to in paragraph 6 are accepted by their competent authorities.

10. In the event of a material change to any of the particulars communicated in accordance with paragraph 3 or 5, the AIFM shall give written notice of that change to the competent authorities of the Member State of reference at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive, or the AIFM would otherwise no longer comply with this Directive, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM, without undue delay, that it is not to implement the change.

If the planned change is implemented notwithstanding the first and second subparagraphs, or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with this Directive or the AIFM otherwise no longer complies with this Directive, the competent authorities of the Member State of reference of the AIFM shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF.

If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with this Directive or the compliance by the AIFM with this Directive otherwise, the competent authorities of the Member State of reference shall, without delay, inform ESMA in so far as the changes concern the termination of the marketing of certain AIFs or additional AIFs being marketed and, in so far as applicable, the competent authorities of the host Member States of the AIFM of those changes.

▪ ***Q&A published by EU Commission (Appendix X) ID 1203 Cooperation between Member States' competent authorities***

11. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in point (a) of paragraph 2 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

12. In order to ensure uniform application of this Article, ESMA may develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in point (a) of paragraph 2.

13. ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in point (a) of paragraph 2 so as to ensure that the competent authorities of the Member State of reference and the competent authorities of the host Member States receive sufficient information in order to be able to exercise their supervisory and investigatory powers under this Directive.

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

14. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to specify the procedures for coordination and exchange of information between the competent authority of the Member State of reference and the competent authorities of the host Member States of the AIFM.

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

15. In case a competent authority rejects a request to exchange information in accordance with the regulatory technical standards referred to in paragraph 14, the competent authorities concerned may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

16. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine:

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

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

17. Without prejudice to Article 43(1), Member States shall require that the AIFs managed and marketed by the AIFM be marketed only to professional investors.

## Article 41 AIFMD

### Conditions for managing AIFs established in Member States other than the Member State of reference by non-EU AIFMs

[Art. 43 AIFM Law] [Art. 44 AIFM Law]

- **Q&A published by EU Commission (Appendix X) ID 1205 Responsibility of Member States' competent authorities**

1. Member States shall ensure that an authorised non-EU AIFM may manage EU AIFs established in a Member State other than its Member State of reference either directly or via the establishment of a branch, provided that the AIFM is authorised to manage that type of AIF.

2. Any non-EU AIFM intending to manage EU AIFs established in another Member State than its Member State of reference for the first time shall communicate the following information to the competent authorities of its Member State of reference:

- (a) the Member State in which it intends to manage AIFs directly or establish a branch;
- (b) a programme of operations stating in particular the services which it intends to perform and identifying the AIFs it intends to manage.

3. If the non-EU AIFM intends to establish a branch, it shall provide, in addition to the information requested in paragraph 2, the following information:

- (a) the organisational structure of the branch;
- (b) the address in the home Member State of the AIF from which documents may be obtained;
- (c) the names and contact details of persons responsible for the management of the branch.

4. The competent authorities of the Member State of reference shall, within 1 month of receiving the complete documentation in accordance with paragraph 2 or within 2 months of receiving the complete documentation in accordance with paragraph 3, transmit that documentation to the competent authorities of the host Member States of the AIFM. Such transmission shall occur only if the AIFM's management of the AIF complies and will continue to comply with this Directive and the AIFM otherwise complies with this Directive.

The competent authorities of the Member State of reference shall enclose a statement to the effect that the AIFM concerned is authorised by them.

The competent authorities of the Member State of reference shall immediately notify the AIFM about the transmission. Upon receipt of the transmission notification the AIFM may start to provide its services in the host Member States of the AIFM.

The competent authorities of the Member State of reference shall also inform ESMA that the AIFM may start managing the AIF in the host Member States of the AIFM.

5. The host Member States of the AIFM shall not impose any additional requirements on the AIFM concerned in respect of the matters covered by this Directive.

6. In the event of a change to any of the information communicated in accordance with paragraph 2 and, if relevant, paragraph 3, an AIFM shall give written notice of that change to the competent authorities of its Member State of reference at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would otherwise no longer comply with this Directive, the competent authorities of the Member State of reference shall inform the AIFM without undue delay that it is not to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with this Directive or the AIFM otherwise no longer complies with this Directive, the competent authorities of the Member State of reference shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF.

If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with this Directive or the compliance by the AIFM with this Directive otherwise, the competent authorities of the Member State of reference shall without undue delay inform the competent authorities of the host Member States of the AIFM of those changes.

7. In order to ensure consistent harmonisation of this Article, ESMA may develop draft regulatory technical standards to specify the information to be notified in accordance with paragraphs 2 and 3.

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

8. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to establish standard forms, templates and procedures for the transmission of information in accordance with paragraphs 2 and 3.

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

## Article 42 AIFMD

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

[Art. 45 AIFM Law]

- **Recitals 15, 19, 69, 74 and 84 of the Level 1 AIFM Directive**
- **Q&A published by EU Commission (Appendix X) ID 1185 Scope and exemptions ID 1204 Responsibility of Member States' competent authorities ID 1206 Passport issues**
- **Q&A published by ESMA (Appendix XIV) Section III Reporting Question 1, Question 36, Question 37, Question 55**

1. Without prejudice to Articles 37, 39 and 40, Member States may allow non-EU AIFMs to market to professional investors, in their territory only, units or shares of AIFs they manage subject at least to the following conditions:

- (a) the non-EU AIFM complies with Articles 22, 23 and 24 in respect of each AIF marketed by it pursuant to this Article and with Articles 26 to 30 where an AIF marketed by it pursuant to this Article falls within the scope of Article 26(1). Competent authorities and AIF investors referred to in those Articles shall be deemed those of the Member States where the AIFs are marketed;
- (b) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the Member States where the AIFs are marketed, in so far as applicable, the competent authorities of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows competent authorities of the relevant Member States to carry out their duties in accordance with this Directive;

- **Explanatory Memorandum section 3.2.13 (Appendix I) and Recitals 134 and 135 of the Level 2 AIFM Regulation (Appendix II)**

#### Article 113 General requirements (Level 2 AIFM Regulation)

1. Cooperation arrangements shall cover all possible situations and actors envisaged in Chapter VII of Directive 2011/61/EU taking into account the location of the AIFM, the location of the AIF and the activity of the AIFM.
2. Cooperation arrangements shall take a written form.
3. Cooperation arrangements shall establish the specific framework for consultation, cooperation and exchange of information for supervisory and enforcement purposes between EU competent authorities and third country supervisory authorities.
4. Cooperation arrangements shall include a specific clause providing for the transfer of information received by a Union competent authority from a supervisory authority in a third country to other Union competent authorities, to ESMA or to the ESRB as required under Directive 2011/61/EU.

### Article 114 Mechanisms, instruments and procedures (Level 2 AIFM Regulation)

1. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for enabling Union competent authorities to have access to all information necessary for the performance of their duties under Directive 2011/61/EU.
2. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for enabling on-site inspections to be carried out where required for the exercise of the Union competent authority's duties under Directive 2011/61/EU. On-site inspections shall be carried out directly by the Union competent authority or by the third country competent authority with the assistance of the Union competent authority.
3. Cooperation arrangements shall establish the mechanisms, instruments and procedures required for the third country competent authority to assist the Union competent authorities where it is necessary to enforce Union legislation and national implementing legislation breached by an entity established in the third country, in accordance with the national and international law applicable to that authority.

### Article 115 Data protection (Level 2 AIFM Regulation)

Cooperation arrangements shall ensure that the transfer to third countries of data and the analysis of data takes place only in accordance with Article 52 of Directive 2011/61/EU.

- (c) the third country where the non-EU AIFM or the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF.

Where a competent authority of an EU AIF does not enter into the required cooperation arrangements as set out in point (b) of the first subparagraph within a reasonable period of time, the competent authorities of the Member State where the AIF is intended to be marketed may refer the matter to ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

2. Member States may impose stricter rules on the non-EU AIFM in respect of the marketing of units or shares of AIFs to investors in their territory for the purpose of this Article.
3. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.
4. In order to ensure uniform application of this Article, ESMA shall develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1.

## CHAPTER VIII

### MARKETING TO RETAIL INVESTORS

#### Article 43 AIFMD

#### Marketing of AIFs by AIFMs to retail investors

[Art. 46 AIFM Law]

- *Recital 71 of the Level 1 AIFM Directive*
- *Q&A published by EU Commission (Appendix X) ID 1177, 1178, 1181 and 1193 Marketing to retail investors ID 1210 and 1211 Passport issues*

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

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

2. Member States that permit the marketing of AIFs to retail investors in their territory shall, by 22 July 2014, inform the Commission and ESMA of:

- (a) the types of AIF which AIFMs may market to retail investors in their territory;
- (b) any additional requirements that the Member State imposes for the marketing of AIFs to retail investors.

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

## Article 43a AIFMD

### Facilities available to retail investors

[Art. 46-1 AIFM Law]

1. Without prejudice to Article 26 of Regulation (EU) 2015/760, Member States shall ensure that an AIFM makes available, in each Member State where it intends to market units or shares of an AIF to retail investors, facilities to perform the following tasks:
  - (a) process investors' subscription, payment, repurchase and redemption orders relating to the units or shares of the AIF, in accordance with the conditions set out in the AIF's documents;
  - (b) provide investors with information on how orders referred to in point (a) can be made and how repurchase and redemption proceeds are paid;
  - (c) facilitate the handling of information relating to the exercise of investors' rights arising from their investment in the AIF in the Member State where the AIF is marketed;
  - (d) make the information and documents required pursuant to Articles 22 and 23 available to investors for the purposes of inspection and obtaining copies thereof;
  - (e) provide investors with information relevant to the tasks that the facilities perform in a durable medium as defined in point (m) of Article 2(1) of Directive 2009/65/EC; and
  - (f) act as a contact point for communicating with the competent authorities.
2. Member States shall not require an AIFM to have a physical presence in the host Member State or to appoint a third party for the purposes of paragraph 1.
3. The AIFM shall ensure that the facilities to perform the tasks referred to in paragraph 1, including electronically, are provided:
  - (a) in the official language or one of the official languages of the Member State where the AIF is marketed or in a language approved by the competent authorities of that Member State;
  - (b) by the AIFM itself, by a third party which is subject to regulation and supervision governing the tasks to be performed, or by both.

For the purposes of point (b), where the tasks are to be performed by a third party, the appointment of that third party shall be evidenced by a written contract, which specifies which of the tasks referred to in paragraph 1 are not to be performed by the AIFM and that the third party will receive all the relevant information and documents from the AIFM.

**CHAPTER IX**  
**COMPETENT AUTHORITIES**

**SECTION 1**  
Designation, powers and redress procedures

**Article 44 AIFMD**  
Designation of competent authorities

[Art. 47 AIFM Law]

Member States shall designate the competent authorities which are to carry out the duties provided for in this Directive.

They shall inform ESMA and the Commission thereof, indicating any division of duties.

The competent authorities shall be public authorities.

Member States shall require that their competent authorities establish the appropriate methods to monitor that AIFMs comply with their obligations under this Directive, where relevant on the basis of guidelines developed by ESMA.

## Article 45 AIFMD

### Responsibility of competent authorities in Member States

[Art. 48 AIFM Law] [Art. 49 AIFM Law]

- **Recitals 11 and 72 of the Level 1 AIFM Directive**
- **Q&A published by EU Commission (Appendix X) ID 1202 Cooperation between Member States' competent authorities ID 1207 Responsibility of Member States' competent authorities**
- **Q&A published by ESMA (Appendix XIV) Section XIV Branches: Question 1**

1. The prudential supervision of an AIFM shall be the responsibility of the competent authorities of the home Member State of the AIFM, whether the AIFM manages and/or markets AIFs in another Member State or not, without prejudice to those provisions of this Directive which confer the responsibility for supervision on the competent authorities of the host Member State of the AIFM.

2. The supervision of an AIFM's compliance with Articles 12 and 14 shall be the responsibility of the competent authorities of the host Member State of the AIFM where the AIFM manages and/or markets AIFs through a branch in that Member State.

3. The competent authorities of the host Member State of the AIFM may require an AIFM managing or marketing AIFs in its territory, whether or not through a branch, to provide the information necessary for the supervision of the AIFM's compliance with the applicable rules for which those competent authorities are responsible.

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

4. Where the competent authorities of the host Member State of the AIFM ascertain that an AIFM managing and/or marketing AIFs in its territory, whether or not through a branch, is in breach of one of the rules in relation to which they have responsibility for supervising compliance, those authorities shall require the AIFM concerned to put an end to that breach and inform the competent authorities of the home Member State thereof.

5. If the AIFM concerned refuses to provide the competent authorities of its host Member State with information falling under their responsibility, or fails to take the necessary steps to put an end to the breach referred to in paragraph 4, the competent authorities of its host Member State shall inform the competent authorities of its home Member State thereof. The competent authorities of the home Member State of the AIFM shall, at the earliest opportunity:

(a) take all appropriate measures to ensure that the AIFM concerned provides the information requested by the competent authorities of its host Member State pursuant to paragraph 3, or puts an end to the breach referred to in paragraph 4;

(b) request the necessary information from the relevant supervisory authorities in third countries.

The nature of the measures referred to in point (a) shall be communicated to the competent authorities of the host Member State of the AIFM.

6. If, despite the measures taken by the competent authorities of the home Member State of the AIFM pursuant to paragraph 5 or because such measures prove to be inadequate or are not available in the Member State in question, the AIFM continues to refuse to provide the information requested by the competent authorities of its host Member State pursuant to paragraph 3, or persists in breaching the legal or regulatory provisions, referred to in paragraph 4, in force in its host Member State, the competent authorities of the host Member State of the AIFM may, after informing the competent authorities of the home Member State of the AIFM, take appropriate measures, including those laid down in Articles 46 and 48, to prevent or penalise further irregularities and, in so far as necessary, to prevent that AIFM from initiating any further transactions in its host

Member State. Where the function carried out in the host Member State of the AIFM is the management of AIFs, the host Member State may require the AIFM to cease managing those AIFs.

7. Where the competent authorities of the host Member State of the AIFM have clear and demonstrable grounds for believing that the AIFM is in breach of the obligations arising from rules in relation to which they have no responsibility for supervising compliance, they shall refer those findings to the competent authorities of the home Member State of the AIFM which shall take appropriate measures, including, if necessary, request additional information from the relevant supervisory authorities in third countries.

8. If despite the measures taken by the competent authorities of the home Member State of the AIFM or because such measures prove to be inadequate, or because the home Member State of the AIFM fails to act within a reasonable timeframe, the AIFM persists in acting in a manner that is clearly prejudicial to the interests of the investors of the relevant AIF, the financial stability or the integrity of the market in the host Member State of the AIFM, the competent authorities of the host Member State of the AIFM may, after informing the competent authorities of the home Member State of the AIFM, take all appropriate measures needed in order to protect the investors of the relevant AIF, the financial stability and the integrity of the market in the host Member State, including the possibility of preventing the AIFM concerned to further market the units or shares of the relevant AIF in the host Member State.

9. The procedure laid down in paragraphs 7 and 8 shall also apply in the event that the competent authorities of the host Member State have clear and demonstrable grounds for disagreement with the authorisation of a non-EU AIFM by the Member State of reference.

10. Where the competent authorities concerned disagree on any of the measures taken by a competent authority pursuant to paragraphs 4 to 9, they may bring the matter to the attention of ESMA, which may act in accordance with the powers conferred to it under Article 19 of Regulation (EU) No 1095/2010.

11. Where applicable, ESMA shall facilitate the negotiation and conclusion of the cooperation arrangements required by this Directive between the competent authorities of the Member States and the supervisory authorities of third countries.

## Article 46 AIFMD

### Powers of competent authorities

[Art. 50 AIFM Law]

1. Competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions. Such powers shall be exercised in any of the following ways:

- (a) directly;
- (b) in collaboration with other authorities;
- (c) under their responsibility by delegation to entities to which tasks have been delegated;
- (d) by application to the competent judicial authorities.

2. The competent authorities shall have the power to:

- (a) have access to any document in any form and to receive a copy of it;
- (b) require information from any person related to the activities of the AIFM or the AIF and if necessary to summon and question a person with a view to obtaining information;
- (c) carry out on-site inspections with or without prior announcements;
- (d) require existing telephone and existing data traffic records;
- (e) require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;
- (f) request the freezing or the sequestration of assets;
- (g) request the temporary prohibition of professional activity;
- (h) require authorised AIFM, depositaries or auditors to provide information;
- (i) adopt any type of measure to ensure that AIFMs or depositaries continue to comply with the requirements of this Directive applicable to them;
- (j) require the suspension of the issue, repurchase or redemption of units in the interest of the unit-holders or of the public;
- (k) withdraw the authorisation granted to an AIFM or a depositary;
- (l) refer matters for criminal prosecution;
- (m) request that auditors or experts carry out verifications or investigations.

3. Where the competent authority of the Member State of reference considers that an authorised non-EU AIFM is in breach of its obligations under this Directive, it shall notify ESMA, setting out full reasons as soon as possible.

4. Member States shall ensure that the competent authorities have the powers necessary to take all measures required in order to ensure the orderly functioning of markets in those cases where the activity of one or more AIFs in the market for a financial instrument could jeopardise the orderly functioning of that market.

## Article 47 AIFMD

### Powers and competences of ESMA

▪ **Recital 73 of the Level 1 AIFM Directive**

1. ESMA may develop and regularly review guidelines for the competent authorities of the Member States on the exercise of their authorisation powers and on the reporting obligations by the competent authorities imposed by this Directive.

ESMA shall further have the powers necessary, including those enumerated in Article 48(3), to carry out the tasks attributed to it by this Directive.

2. The obligation of professional secrecy shall apply to all persons who work or who have worked for ESMA, and for the competent authorities or for any other person to whom ESMA has delegated tasks, including auditors and experts contracted by ESMA. Information covered by professional secrecy shall not be disclosed to another person or authority except where such disclosure is necessary for legal proceedings.

3. All the information exchanged under this Directive between ESMA, the competent authorities, EBA, the European Supervisory Authority (European Insurance and Occupational Pensions Authority) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council<sup>64</sup> and the ESRB 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.

4. In accordance with Article 9 of Regulation (EU) No 1095/2010, ESMA may, where all the conditions in paragraph 5 are met, request the competent authority or competent authorities to take any of the following measures, as appropriate:

- (a) prohibit the marketing in the Union of units or shares of AIFs managed by non-EU AIFMs or of non-EU AIFs managed by EU AIFMs without the authorisation required in Article 37 or without the notification required in Articles 35, 39 and 40 or without being allowed to do so by the relevant Member States in accordance with Article 42;
- (b) impose restrictions on non-EU AIFMs relating to the management of an AIF in case of excessive concentration of risk in a specific market on a cross-border basis;
- (c) impose restrictions on non-EU AIFMs relating to the management of an AIF where its activities potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions.

5. ESMA may take a decision under paragraph 4 and subject to the requirements set out in paragraph 6 if both of the following conditions are met:

- (a) a substantial threat exists, originating or aggravated by the activities of AIFMs, to the orderly functioning and integrity of the financial market or to the stability of the whole or a part of the financial system in the Union and there are cross border implications; and
- (b) the relevant competent authority or competent authorities have not taken measures to address the threat or the measures that have been taken do not sufficiently address the threat.

6. The measures taken by the competent authority or competent authorities pursuant to paragraph 4 shall:

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<sup>64</sup> OJ L 331, 15.12.2010, p. 48.

- (a) effectively address the threat to the orderly functioning and the integrity of the financial market or to the stability of the whole or a part of the financial system in the Union or significantly improve the ability of competent authorities to monitor the threat;
- (b) not create a risk of regulatory arbitrage;
- (c) not have a detrimental effect on the efficiency of the financial markets, including reducing liquidity in those markets or creating uncertainty for market participants, in a way that is disproportionate to the benefits of the measures.

7. Before requesting the competent authority to take or renew any measure referred to in paragraph 4, ESMA shall consult, where appropriate, the ESRB and other relevant authorities.

8. ESMA shall notify the competent authorities of the Member State of reference of the non-EU AIFM and the competent authorities of the host Member States of the non-EU AIFM concerned of the decision to request the competent authority or competent authorities to impose or renew any measure referred to in paragraph 4. The notification shall at least specify the following details:

- (a) the AIFM and the activities to which the measures apply and their duration;
- (b) the reasons why ESMA is of the opinion that it is necessary to impose the measures in accordance with the conditions and requirements set out in this Article, including the evidence in support of those reasons.

9. ESMA shall review its measures referred to in paragraph 4 at appropriate intervals and in any event at least every 3 months. If a measure is not renewed after that 3-month period, it shall automatically expire. Paragraphs 5 to 8 shall apply to a renewal of measures.

10. The competent authorities of the Member State of reference of the non-EU AIFM concerned may request ESMA to reconsider its decision. The procedure set out in the second subparagraph of Article 44(1) of Regulation (EU) No 1095/2010 shall apply.

**Article 48 AIFMD**  
**Administrative penalties**  
[Art. 51 AIFM Law]

- *Recitals 12 and 75 of the Level 1 AIFM Directive*

1. Member States shall lay down the rules on measures and penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that those rules are enforced. Without prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal penalties, Member States shall ensure, in accordance with their national law, that the appropriate administrative measures can be taken or administrative penalties be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that those measures are effective, proportionate and dissuasive.
2. Member States shall provide that the competent authorities may disclose to the public any measure or penalty that will be imposed for infringement of the provisions adopted in the implementation of this Directive, unless such disclosure would seriously jeopardise the financial markets, be detrimental to the interests of the investors or cause disproportionate damage to the parties involved.
3. ESMA shall draw up an annual report on the application of administrative measures and imposition of penalties in the case of breaches of the provisions adopted in the implementation of this Directive in the different Member States. Competent authorities shall provide ESMA with the necessary information for that purpose.

## Article 49 AIFMD

### Right of appeal

[Art. 52 AIFM Law]

1. The competent authorities shall give written reasons for any decision to refuse or withdraw authorisation of AIFMs to manage and/or market AIFs, or any negative decision taken in the implementation of the measures adopted in application of this Directive, and communicate them to applicants.

2. Member States shall provide that any decision taken under laws, regulations or administrative provisions adopted in accordance with this Directive is properly reasoned and is the subject of the right of appeal to the courts.

That right to appeal to the courts shall apply also where, in respect of an application for authorisation which provides all the information required, no decision is taken within 6 months of the submission of the application.

## SECTION 2

### Cooperation between different competent authorities

#### Article 50 AIFMD

#### Obligation to cooperate

[Art. 53 AIFM Law]

1. The competent authorities of the Member States shall cooperate with each other and with ESMA and the ESRB whenever necessary for the purpose of carrying out their duties under this Directive or of exercising their powers under this Directive or under national law.
2. Member States shall facilitate the cooperation provided for in this Section.
3. Competent authorities shall use their powers for the purpose of cooperation, even in cases where the conduct under investigation does not constitute an infringement of any regulation in force in their own Member State.
4. The competent authorities of the Member States shall immediately supply one another and ESMA with the information required for the purposes of carrying out their duties under this Directive.

The competent authorities of the home Member State shall forward a copy of the relevant cooperation arrangements entered into by them in accordance with Article 35, 37 and/or 40 to the host Member States of the AIFM concerned. The competent authorities of the home Member State shall, in accordance with procedures relating to the applicable regulatory technical standards referred to in Article 35(14), Article 37(17) or Article 40(14), forward the information received from third-country supervisory authorities in accordance with cooperation arrangements with such supervisory authorities in respect of an AIFM, or, where relevant, pursuant to Article 45(6) or (7), to the competent authorities of host Member State of the AIFM concerned.

Where a competent authority of a host Member State considers that the contents of the cooperation arrangement entered into by the home Member State of the AIFM concerned in accordance with Article 35, 37 and/or 40 does not comply with what is required pursuant to the applicable regulatory technical standards, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

5. Where the competent authorities of one Member State have clear and demonstrable grounds to suspect that acts contrary to this Directive are being or have been carried out by an AIFM not subject to supervision of those competent authorities, they shall notify ESMA and the competent authorities of the home and host Member States of the AIFM concerned thereof in as specific a manner as possible. The recipient 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 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 implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

## Article 51 AIFMD

### Transfer and retention of personal data

[Art. 54 AIFM Law]

1. With regard to transfer of personal data between competent authorities, competent authorities shall apply Directive 95/46/EC. With regard to transfer of personal data by ESMA to the competent authorities of a Member State or of a third country, ESMA shall comply with Regulation (EC) No 45/2001.
2. Data shall be retained for a maximum period of 5 years.

## Article 52 AIFMD

### Disclosure of information to third countries

[Art. 55 AIFM Law]

▪ **Recital 76 of the Level 1 AIFM Directive**

1. The competent authority of a Member State may transfer to a third country data and the analysis of data on a case-by-case basis where the conditions laid down in Article 25 or 26 of Directive 95/46/EC are met and where the competent authority of the Member State is satisfied that the transfer is necessary for the purpose of this Directive. The third country shall not transfer the data to another third country without the express written authorisation of the competent authority of the Member State.
2. The competent authority of a Member State shall only disclose information received from a competent authority of another Member State to a supervisory authority of a third country where the competent authority of the Member State concerned has obtained express agreement of the competent authority which transmitted the information and, where applicable, the information is disclosed solely for the purposes for which that competent authority gave its agreement.

**Article 115 Data protection**  
*(Level 2 AIFM Regulation)*

*Cooperation arrangements shall ensure that the transfer to third countries of data and the analysis of data takes place only in accordance with Article 52 of Directive 2011/61/EU.*

## Article 53 AIFMD

### Exchange of information relating to the potential systemic consequences of AIFM activity

[Art. 56 AIFM Law]

- **Recital 84 of the Level 1 AIFM Directive and Explanatory Memorandum section 3.2.14 (Appendix I)**

1. The competent authorities of the Member States responsible for the authorisation and/or supervision of AIFMs under this Directive shall communicate information to the competent authorities of other Member States where this is relevant for monitoring and responding to the potential implications of the activities of individual AIFMs or AIFMs collectively for the stability of systemically relevant financial institutions and the orderly functioning of markets on which AIFMs are active. ESMA and the ESRB shall also be informed and shall forward this information to the competent authorities of the other Member States.

#### Article 116 Exchange of information on the potential systemic consequences of AIFM activity (Level 2 AIFM Regulation)

*For the purposes of Article 53 of Directive 2011/61/EU, the competent authorities of the Member States responsible for the authorisation or supervision of AIFMs under that Directive shall exchange with the competent authorities of other Member States, and with ESMA and the ESRB at least:*

- (a) the information received pursuant to Article 110, whenever such information may be relevant for monitoring and responding to the potential implications of the activities of individual AIFMs or several AIFMs collectively for the stability of systemically relevant financial institutions and the orderly functioning of markets on which the AIFMs are active;*
- (b) the information received from third country authorities whenever this is necessary for the monitoring of systemic risks;*
- (c) the analysis of the information referred to in points (a) and (b) and the assessment of any situation in which the activities of one or more supervised AIFMs or of one or more AIFs under their management are considered to contribute to the build-up of systemic risk in the financial system, to the risk of disorderly markets or to risks for the long-term growth of the economy;*
- (d) the measures taken, when the activity of one or more supervised AIFMs or of one or more AIFs under their management present systemic risk or jeopardise the orderly functioning of the markets on which they are active.*

2. Subject to the conditions laid down in Article 35 of Regulation (EU) No 1095/2010, aggregated information relating to the activities of AIFMs under their responsibility shall be communicated by the competent authorities of the AIFM to ESMA and the ESRB.

3. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying the content of the information to be exchanged pursuant to paragraph 1.

4. The Commission shall adopt implementing acts specifying the modalities and frequency of the information to be exchanged pursuant to paragraph 1. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 59(2).

## Article 54 AIFMD

### Cooperation in supervisory activities

[Art. 57 AIFM Law]

- **Q&A published by EU Commission (Appendix X) ID 1179 Cooperation between Member States' competent authorities**

1. The competent authorities of one Member State may request the cooperation of the competent authorities of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation in the territory of the latter within the framework of their powers pursuant to this Directive.

Where the competent authorities receive a request with respect to an on-the-spot verification or an investigation, it shall perform one of the following:

- carry out the verification or investigation itself;
- allow the requesting authority to carry out the verification or investigation;
- allow auditors or experts to carry out the verification or investigation.

2. In the case referred to in point (a) of paragraph 1 the competent authority of the Member State which has requested cooperation may ask that members of its own personnel assist the personnel carrying out the verification or investigation. The verification or investigation shall, however, be the subject of the overall control of the Member State on whose territory it is conducted.

In the case referred to in point (b) of paragraph 1 the competent authority of the Member State on whose territory the verification or investigation is carried out may request that members of its own personnel assist the personnel carrying out the verification or investigation.

3. Competent authorities may refuse to exchange information or to act on a request for cooperation in carrying out an investigation or on-the-spot verification only in the following cases:

- the investigation, on-the-spot verification or exchange of information might adversely affect the sovereignty, security or public order of the Member State addressed;
- judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of the Member State addressed;
- 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 implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

## **Article 55 AIFMD**

### **Dispute settlement**

In case of disagreement between competent authorities of Member States on an assessment, action or omission of one competent authority in areas where this Directive requires cooperation or coordination between competent authorities from more than one Member State, competent authorities may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

**CHAPTER X**  
**TRANSITIONAL AND FINAL PROVISIONS**

**Article 56 AIFMD**

**Exercise of the delegation**

1. The powers to adopt delegated acts referred to in Articles 3, 4, 9, 12, 14 to 25, 34 to 37, 40, 42, 53, 67 and 68 shall be conferred on the Commission for a period of 4 years from 21 July 2011. The Commission shall draw up a report in respect of the delegated powers no later than 6 months before the end of the 4-year period. The delegation of power shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it in accordance with Article 57.
2. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
3. The powers to adopt delegated acts are conferred on the Commission subject to the conditions of Articles 57 and 58.

## Article 57 AIFMD

### Revocation of the delegation

1. The delegation of power referred to in Articles 3, 4, 9, 12, 14 to 25, 34 to 37, 40, 42, 53, 67 and 68 may be revoked at any time by the European Parliament or by the Council.
2. The institution which has commenced an internal procedure for deciding whether to revoke the delegation of power shall endeavour to inform the other institution and the Commission within a reasonable time before the final decision is taken, indicating the delegated power which could be subject to revocation and the possible reasons for a revocation.
3. The decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the *Official Journal of the European Union*.

## Article 58 AIFMD

### Objections to delegated acts

▪ **Recital 86 of the Level 1 AIFM Directive**

1. The European Parliament and the Council may object to a delegated act within a period of 3 months from the date of notification. At the initiative of the European Parliament or the Council that period shall be extended by 3 months.

2. If, on expiry of the period referred to in paragraph 1, neither the European Parliament nor the Council has objected to the delegated act it shall be published in the *Official Journal of the European Union* and shall enter into force at the date stated therein.

The delegated act may be published in the *Official Journal of the European Union* and enter into force before the expiry of that period if, upon a justified request by the Commission, the European Parliament and the Council have both informed the Commission of their intention not to raise objections.

3. If either the European Parliament or the Council objects to the adopted delegated act within the period referred to in paragraph 1, it shall not enter into force. In accordance with Article 296 TFEU, the institution which objects shall state the reasons for objecting to the delegated act.

## **Article 59 AIFMD**

### **Implementing measures**

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC<sup>65</sup>. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

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<sup>65</sup> OJ L 191, 13.7.2001, p. 45.

## **Article 60 AIFMD**

### **Disclosure of derogations**

Where a Member State makes use of a derogation or option provided by Articles 6, 9, 21, 22, 28, 43 and Article 61(5), it shall inform the Commission thereof as well as of any subsequent changes. The Commission shall make the information public on a web-site or by other easily accessible means.

## Article 61 AIFMD

### Transitional provisions

[Art. 58 AIFM Law]

- *See definition of "AIFM of closed-ended AIF" (Appendix VIII)*
  - *Q&A published by EU Commission (Appendix X) ID 1180, 1182, 1183, 1184, 1186 and 1188*
- Transitional provisions**

1. AIFMs performing activities under this Directive before 22 July 2013 shall take all necessary measures to comply with national law stemming from this Directive and shall submit an application for authorisation within 1 year of that date.
2. Articles 31, 32 and 33 shall not apply to the marketing of units or shares of AIFs that are subject to a current offer to the public under a prospectus that has been drawn up and published in accordance with Directive 2003/71/EC before 22 July 2013 for the duration of validity of that prospectus.
3. AIFMs in so far as they manage AIFs of the closed-ended type before 22 July 2013 which do not make any additional investments after 22 July 2013 may however continue to manage such AIFs without authorisation under this Directive.
4. AIFMs in so far as they manage AIFs of the closed-ended type whose subscription period for investors has closed prior to the entry into force of this Directive and are constituted for a period of time which expires at the latest 3 years after 22 July 2013, may, however, continue to manage such AIFs without needing to comply with this Directive except for Article 22 and, where relevant, Articles 26 to 30, or to submit an application for authorisation under this Directive.
5. The competent authorities of the home Member State of an AIF or in case where the AIF is not regulated the competent authorities of the home Member State of an AIFM may allow institutions referred to in point (a) of Article 21(3) and established in another Member State to be appointed as a depositary until 22 July 2017. This provision shall be without prejudice to the full application of Article 21, with the exception of point (a) of paragraph 5 of that Article on the place where the depositary is to be established.

## Article 63 AIFMD

### Amendments to Directive 2009/65/EC

▪ **Recital 95 of the Level 1 AIFM Directive**

Directive 2009/65/EC is amended as follows:

(1) the following Article is inserted:

"Article 50a

In order to ensure cross-sectoral consistency and to remove misalignment between the interest of firms that repackage loans into tradable securities and other financial instruments (originators) and UCITS that invest in those securities or other financial instruments, the Commission shall adopt, by means of delegated acts in accordance with Article 112a and subject to conditions of Articles 112b and 112c, measures laying down the requirements in the following areas:

- (a) the requirements that need to be met by the originator in order for a UCITS to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011, including requirements that ensure that the originator retains a net economic interest of not less than 5%;
- (b) qualitative requirements that must be met by UCITS which invest in those securities or other financial instruments.";

(2) Article 112(2) is replaced by the following:

"2. The power to adopt the delegated acts referred to in Articles 12, 14, 23, 33, 43, 51, 60, 61, 62, 64, 75, 78, 81, 95 and 111 shall be conferred on the Commission for a period of 4 years from 4 January 2011. The power to adopt the delegated acts referred to in Article 50a shall be conferred on the Commission for a period of 4 years from 21 July 2011. The Commission shall draw up a report in respect of delegated powers at the latest 6 months before the end of the 4-year period. The delegation of power shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes them in accordance with Article 112a.";

(3) Article 112a(1) is replaced by the following:

"1. The delegation of power referred to in Articles 12, 14, 23, 33, 43, 50a, 51, 60, 61, 62, 64, 75, 78, 81, 95 and 111 may be revoked at any time by the European Parliament or by the Council.".

## Article 64 AIFMD

### Amendment to Regulation (EC) No 1060/2009

▪ **Recital 95 of the Level 1 AIFM Directive**

In Regulation (EC) No 1060/2009, the first paragraph of Article 4(1) is replaced by the following:

1. Credit institutions as defined in Directive 2006/48/EC, investment firms as defined in Directive 2004/39/EC, insurance undertakings subject to the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the take-up and pursuit of the business of direct insurance other than life assurance (\*), assurance undertakings as defined in Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (\*\*), reinsurance undertakings as defined in Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance (\*\*\*), UCITS as defined in Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (\*\*\*\*), institutions for occupational retirement provision as defined in Directive 2003/41/EC and alternative investment funds as defined in Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (\*\*\*\*\*), may use credit ratings for regulatory purposes only if they are issued by credit rating agencies established in the Union and registered in accordance with this Regulation.

(\*) OJ L 228, 16.8.1973, p. 3.

(\*\*) OJ L 345, 19.12.2002, p. 1.

(\*\*\*) OJ L 323, 9.12.2005, p. 1.

(\*\*\*\*) OJ L 302, 17.11.2009, p. 32.

(\*\*\*\*\*) OJ L 174, 1.7.2011, p. 1.<sup>1</sup>.

**Article 65 AIFMD**  
Amendment to Regulation (EU) No 1095/2010

- ***Recital 95 of the Level 1 AIFM Directive***

In Article 1(2) of Regulation (EU) No 1095/2010, the words "any future legislation in the area of Alternative Investment Fund Managers (AIFM)" are replaced by the words "Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (\*)"

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(\*) OJ L 174, 1.7.2011, p. 1."

## Article 66 AIFMD

### Transposition

- *Q&A published by EU Commission (Appendix X) ID 1189 Transposition*
- *CSSF Regulation N°15-03 (Appendix XVI) Article 3*

1. By 22 July 2013, Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.
2. Member States shall apply the laws, regulations and administrative provisions referred to in paragraph 1 from 22 July 2013.
3. Notwithstanding paragraph 2, Member States shall apply the laws, regulations and administrative provisions necessary to comply with Article 35 and Articles 37 to 41 in accordance with the delegated act adopted by the Commission pursuant to Article 67(6) and from the date specified therein.
4. Member States shall ensure that the laws, regulations and administrative provisions adopted by them in compliance with Articles 36 and 42 cease to apply in accordance with the delegated act adopted by the Commission pursuant to Article 68(6) and on the date specified therein.
5. When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication.
6. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

## Article 67 AIFMD

### Delegated act on the application of Article 35 and Articles 37 to 41

▪ **Recitals 85 and 88 of the Level 1 AIFM Directive**

1. By 22 July 2015, ESMA shall issue to, the European Parliament, the Council and the Commission:
  - (a) an opinion on the functioning of the passport for EU AIFMs managing and/or marketing EU AIFs pursuant to Articles 32 and 33 and on the functioning of the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States pursuant to the applicable national regimes set out in Articles 36 and 42; and
  - (b) advice on the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the rules set out in Article 35 and Articles 37 to 41.
2. ESMA shall base its opinion and advice on the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States, inter alia, on:
  - (a) as regards the functioning of the passport for EU AIFMs managing and/or marketing EU AIFs:
    - (i) the use made of the passport;
    - (ii) the problems encountered regarding:
      - effective cooperation among competent authorities,
      - effective functioning of the notification system,
      - investor protection,
      - mediation by ESMA, including the number of cases and the effectiveness of the mediation;
    - (iii) the effectiveness of the collection and sharing of information in relation to the monitoring of systemic risks by national competent authorities, ESMA and ESRB;
  - (b) as regards the functioning of the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the applicable national regimes:
    - (i) compliance of EU AIFMs with all the requirements established in this Directive with the exception of Article 21;
    - (ii) compliance of non-EU AIFMs with Articles 22, 23 and 24 in respect of each AIF marketed by the AIFM and, where relevant, with Articles 26 to 30;
    - (iii) existence and effectiveness of cooperation arrangements for the purpose of systemic risk oversight and in line with international standards between the competent authorities of the Member State where the AIFs are marketed, in so far as applicable, the competent authorities of the home Member State of the EU AIF and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established;
    - (iv) any issues relating to investor protection that might have occurred;

(v) any features of a third-country regulatory and supervisory framework which might prevent the effective exercise by the competent authorities of their supervisory functions under this Directive;

(c) as regards the functioning of both systems, the potential market disruptions and distortions in competition (level playing field) or any general or specific difficulties which EU AIFMs encounter in establishing themselves or marketing AIFs they manage in any third country.

3. To that end, as from the entry into force of the national laws, regulations and administrative provisions necessary to comply with this Directive and until the issuance of the opinion of ESMA referred to in point (a) of paragraph 1, the competent authorities of the Member States shall, quarterly, provide ESMA with information on the AIFMs that are managing and/or marketing AIFs under their supervision, either under the application of the passport regime provided for in this Directive or under their national regimes, and with information needed for the assessment of the elements referred to in paragraph 2.

4. Where ESMA considers that there are no significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic risk, impeding the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the rules set out in Article 35 and Articles 37 to 41, it shall issue positive advice in this regard.

5. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying the contents of the information to be provided pursuant to paragraph 2.

6. The Commission shall adopt a delegated act within 3 months after having received positive advice and an opinion from ESMA, and taking into account the criteria listed in paragraph 2 and the objectives of this Directive, such as those relating to the internal market, investor protection and the effective monitoring of systemic risk, in accordance with Article 56 and subject to the conditions of Articles 57 and 58, specifying the date when the rules set out in Article 35 and Articles 37 to 41 become applicable in all Member States.

If there is objection to the delegated act referred to in the first subparagraph in accordance with Article 58, the Commission shall re-adopt the delegated act pursuant to which the rules set out in Article 35 and Articles 37 to 41 shall become applicable in all Member States, in accordance with Article 56 and subject to the conditions of Articles 57 and 58, at a later stage which seems appropriate to it, taking into account the criteria listed in paragraph 2 and the objectives of this Directive, such as those relating to the internal market, investor protection and the effective monitoring of systemic risk.

7. If ESMA has not issued its advice within the time limit referred to in paragraph 1, the Commission shall request the advice to be provided within a new time limit.

## Article 68 AIFMD

### Delegated act on the termination of the application of Articles 36 and 42

▪ **Recitals 85 and 90 of the Level 1 AIFM Directive**

1. 3 years after the entry into force of the delegated act referred to in Article 67(6) pursuant to which the rules set out in Article 35 and Articles 37 to 41 have become applicable in all Member States, ESMA shall issue to the European Parliament, the Council and the Commission:
  - (a) an opinion on the functioning of the passport for EU AIFMs marketing non-EU AIFs in the Union pursuant to Article 35 and for non-EU AIFMs managing and/or marketing AIFs in the Union pursuant to Articles 37 to 41, and on the functioning of the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States pursuant to the applicable national regimes as set out in Articles 36 and 42; and
  - (b) advice on the termination of the existence of the national regimes set out in Articles 36 and 42 in parallel with the existence of the passport in accordance with the rules set out in Article 35 and Articles 37 to 41.
2. ESMA shall base its opinion and advice on the termination of the existence of the national regimes set out in Articles 36 and 42 inter alia:
  - (a) as regards the functioning of the passport for EU AIFMs marketing non-EU AIFs in the Union and for non-EU AIFMs managing and/or marketing AIFs in the Union:
    - (i) the use made of the passport;
    - (ii) the problems encountered regarding:
      - effective cooperation among competent authorities,
      - effective functioning of the notification system,
      - the indication of the Member State of reference,
      - the effective exercise by the competent authorities of their supervisory functions being prevented by the laws, regulations or administrative provisions of a third country governing AIFMs, or by limitations in the supervisory and investigatory powers of the third country supervisory authorities,
      - investor protection,
      - investor access in the Union,
      - the impact on developing countries,
      - mediation by ESMA, including the number of cases and the effectiveness of the mediation;
    - (iii) the negotiation, conclusion, existence and effectiveness of the required cooperation arrangements;
    - (iv) the effectiveness of the collection and sharing of information in relation to the monitoring of systemic risks by national competent authorities, ESMA and the ESRB;
    - (v) results of peer reviews referred to in Article 38;
  - (b) as regards the functioning of the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the applicable national regimes:

- (i) compliance of EU AIFMs with all the requirements established in this Directive with the exception of Article 21;
  - (ii) compliance of non-EU AIFMs with Articles 22, 23 and 24 in respect of each AIF marketed by the AIFM and, where relevant, with Articles 26 to 30;
  - (iii) existence and effectiveness of cooperation arrangements for the purpose of systemic risk oversight and in line with international standards between the competent authorities of the Member State where the AIFs are marketed, in so far as applicable, the competent authorities of the home Member State of the EU AIF concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established;
  - (iv) any issues relating to investor protection that might have occurred;
  - (v) any features of a third country regulatory and supervisory framework which might prevent the effective exercise by the competent authorities of the Union of their supervisory functions under this Directive;
- (c) as regards the functioning of both systems, the potential market disruptions and distortions in competition (level playing field) and any potential negative effect on investor access or investment in or for the benefit of developing countries;
- (d) a quantitative assessment identifying the number of third-country jurisdictions in which there is established an AIFM that is marketing an AIF in a Member State either under the application of the passport regime referred to in Article 40 or under the national regimes referred to in Article 42.

3. To that end, as from the entry into force of the delegated act referred to in Article 67(6) and until the issuance of the ESMA opinion referred to in point (a) of paragraph 1 of this Article, the competent authorities shall, quarterly, provide ESMA with information on the AIFMs that are managing and/or marketing AIFs under their supervision, either under the application of the passport regime provided for in this Directive, or under their national regimes.

4. If ESMA considers that there are no significant obstacles regarding investor protection, market disruption, competition or the monitoring of systemic risk, impeding the termination of the national regimes pursuant to Articles 36 and 42 and making the passport for the marketing of non-EU AIFs by EU AIFMs in the Union and the management and/or marketing of AIFs by non-EU AIFM in the Union in accordance with the rules set out in Article 35 and Articles 37 to 41 the sole possible regime for such activities by the relevant AIFMs in the Union, it shall issue positive advice in this regard.

5. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying the contents of the information to be provided pursuant to paragraph 2.

6. The Commission shall adopt a delegated act within 3 months after having received positive advice and an opinion from ESMA and taking into account the criteria listed in paragraph 2 and the objectives of this Directive, such as those relating to the internal market, investor protection and the effective monitoring of systemic risk, in accordance with Article 56 and subject to the conditions of Articles 57 and 58, specifying the date when the national regimes set out in Articles 36 and 42 are to be terminated and the passport regime provided for in Article 35 and Articles 37 to 41 shall become the sole and mandatory regime applicable in all Member States.

If there is objection to the delegated act referred to in the first subparagraph in accordance with Article 58, the Commission shall re-adopt the delegated act pursuant to which the national regimes set out in Articles 36 and 42 are to be terminated and the passport regime provided for in Article 35 and Articles 37 to 41 shall become the sole and mandatory regime applicable in all Member States, in accordance with Article 56 and subject to the conditions of Articles 57 and 58, at a later stage which seems appropriate to it, taking into account the criteria listed in paragraph 2 and the objectives of this Directive, such as those relating to the internal market, investor protection and the effective monitoring of systemic risk.

7. If ESMA has not issued its advice within the time limit referred to in paragraph 1, the Commission shall request the advice to be provided within a new time limit.

## Article 69 AIFMD

### Review

▪ **Recitals 5 and 91 to 93 of the Level 1 AIFM Directive**

1. By 22 July 2017, the Commission shall, on the basis of public consultation and in the light of the discussions with competent authorities, start a review on the application and the scope of this Directive. That review shall analyse the experience acquired in applying this Directive, its impact on investors, AIFs or AIFMs, in the Union and in third countries, and the degree to which the objectives of this Directive have been achieved. The Commission shall, if necessary, propose appropriate amendments. The review shall include a general survey of the functioning of the rules in this Directive and the experience acquired in applying them, including:

- (a) the marketing by EU AIFMs of non-EU AIFs in the Member States taking place through national regimes;
- (b) the marketing of AIFs in the Member States by non-EU AIFMs taking place through national regimes;
- (c) the management and marketing of AIFs in the Union by AIFMs authorised in accordance with this Directive taking place through the passport regime provided for in this Directive;
- (d) the marketing of AIFs in the Union by or on behalf of persons or entities other than AIFMs;
- (e) the investment into AIFs by or on behalf of European professional investors;
- (f) the impact of the depositary rules set out in Article 21 on the depositary market in the Union;
- (g) the impact of the transparency and reporting requirements set out in Articles 22 to 24, 28 and 29 on the assessment of systemic risk;
- (h) the potential adverse impact on retail investors;
- (i) the impact of this Directive on the operation and viability of the private equity and venture capital funds;
- (j) the impact of this Directive on the investor access in the Union;
- (k) the impact of this Directive on investment in or for the benefit of developing countries;
- (l) the impact of this Directive on the protection of non-listed companies or issuers provided by Articles 26 to 30 of this Directive and on the level playing field between AIFs and other investors after the acquisition of major holdings in or control over such non-listed companies or issuers.

When reviewing marketing and/or management of AIFs referred to in points (a), (b) and (c) of the first subparagraph, the Commission shall analyse the appropriateness of entrusting ESMA with further supervisory responsibilities in this area.

2. For the purposes of the review referred to in paragraph 1, Member States shall provide the Commission annually with information on the AIFMs that are managing and/or marketing AIFs under their supervision, either under the passport regime provided for in this Directive, or under their national regimes, with an indication of the date on which the passport regime has been transposed and, if relevant, applied, in their jurisdiction.

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

The information referred to in the first and second subparagraphs shall include:

- (a) information on where the AIFMs concerned are established;
- (b) if applicable, identification of the EU AIFs managed and/or marketed by them;

- (c) if applicable, identification of the non-EU AIFs managed by EU AIFMs but not marketed in the Union;
- (d) if applicable, identification of the non-EU AIFs marketed in the Union;
- (e) information on the applicable regime, whether national or Union, under which the relevant AIFMs are performing their activities; and
- (f) any other information relevant to the understanding of how the management and the marketing of AIFs by AIFMs in the Union operates in practice.

3. The review referred to in paragraph 1 shall take due account of developments at international level and discussions with third countries and international organisations.

4. After finalising its review, the Commission shall, without undue delay, submit a report to the European Parliament and the Council. If appropriate, the Commission shall make proposals, including amendments to this Directive, taking into account the objectives of this Directive and its effects on investor protection, market disruption and competition, the monitoring of systemic risk and potential impacts on investors, AIFs or AIFMs in the Union and in third countries.

## **Article 69a AIFMD**

### **Assessment of the passport regime**

Before the entry into force of the delegated acts referred to in Article 67(6) pursuant to which the rules set out in Article 35 and Articles 37 to 41 become applicable, the Commission shall submit a report to the European Parliament and to the Council, taking into account the result of an assessment of the passport regime provided in this Directive including the extension of that regime to non-EU AIFMs. That report shall be accompanied, where appropriate, by a legislative proposal.

## Article 69b AIFMD

### Accessibility of information on the European single access point

From 10 January 2030, the information referred to in Article 7(5), second subparagraph, of this Directive shall be made accessible on the European single access point (ESAP) established under Regulation (EU) 2023/2859 of the European Parliament and of the Council<sup>66</sup>. For that purpose, the collection body as defined in Article 2, point (2), of Regulation (EU) 2023/2859 shall be ESMA.

That information shall comply with the following requirements:

- (a) be submitted in a data extractable format as defined in Article 2, point (3), of Regulation (EU) 2023/2859;
- (b) be accompanied by the following metadata:
  - (i) all the names of the AIFM authorised under this Directive and the list of AIFs managed or marketed by that AIFM to which the information relates;
  - (ii) where available, the legal entity identifier of the AIFM authorised under this Directive and the list of AIFs managed or marketed by that AIFM, as specified pursuant to Article 7(4), point (b), of Regulation (EU) 2023/2859;
  - (iii) the type of information, as classified pursuant to Article 7(4), point (c), of that Regulation;
  - (iv) an indication of whether the information contains personal data.

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<sup>66</sup> Regulation (EU) 2023/2859 of the European Parliament and of the Council of 13 December 2023 establishing a European single access point providing centralised access to publicly available information of relevance to financial services, capital markets and sustainability (OL L, 2023/2859, 20.12.2023, ELI: <http://data.europa.eu/eli/reg/2023/2859/oj>).

## Article 70 AIFMD

### Entry into force

- **Recital 136 of the Level 2 AIFM Regulation (Appendix II)**

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

#### Article 117 Entry into force (Level 2 AIFM Regulation)

*This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. This Regulation shall apply from 22 July 2013.*

## Article 71 AIFMD

### Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 8 June 2011.

*For the European Parliament*

*The President*

J. BUZEK

*For the Council*

*The President*

GYŐRI E.

**ANNEX I AIFMD**

[Annex I AIFM Law]

- **Q&A published by ESMA (Appendix XIV) Section VIII Delegation Question 2, Question 3, Question 6**

1. Investment management functions which an AIFM shall at least perform when managing an AIF:
  - (a) portfolio management;
  - (b) risk management.
2. Other functions that an AIFM may additionally perform in the course of the collective management of an AIF:
  - (a) Administration:
    - i. legal and fund management accounting services;
    - ii. customer inquiries;
    - iii. valuation and pricing, including tax returns;
    - iv. regulatory compliance monitoring;
    - v. maintenance of unit-/shareholder register;
    - vi. distribution of income;
    - vii. unit/shares issues and redemptions;
    - viii. contract settlements, including certificate dispatch;
    - ix. record keeping;
  - (b) Marketing;
  - (c) Activities related to the assets of AIFs, namely services necessary to meet the fiduciary duties of the AIFM, facilities management, real estate administration activities, advice to undertakings on capital structure, industrial strategy and related matters, advice and services relating to mergers and the purchase of undertakings and other services connected to the management of the AIF and the companies and other assets in which it has invested.

## ANNEX II AIFMD: Remuneration policy

[Annex II AIFM Law] [Art. 13 AIFMD] [↻ Appendix XIV \(Q&A published by ESMA\) Section I Remuneration](#)

▪ **Q&A published by ESMA (Appendix XIV) Section I Remuneration Question 1**

1. When establishing and applying the total remuneration policies, inclusive of salaries and discretionary pension benefits, for those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the AIFMs or of AIFs they manage, AIFMs shall comply with the following principles in a way and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities:
  - (a) the remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs they manage;
  - (b) the remuneration policy is in line with the business strategy, objectives, values and interests of the AIFM and the AIFs it manages or the investors of such AIFs, and includes measures to avoid conflicts of interest;
  - (c) the management body of the AIFM, in its supervisory function, adopts and periodically reviews the general principles of the remuneration policy and is responsible for its implementation;
  - (d) the implementation of the remuneration policy is, at least annually, subject to central and independent internal review for compliance with policies and procedures for remuneration adopted by the management body in its supervisory function;
  - (e) staff engaged in control functions are compensated in accordance with the achievement of the objectives linked to their functions, independent of the performance of the business areas they control;
  - (f) the remuneration of the senior officers in the risk management and compliance functions is directly overseen by the remuneration committee;
  - (g) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit or AIF concerned and of the overall results of the AIFM, and when assessing individual performance, financial as well as non-financial criteria are taken into account;
  - (h) the assessment of performance is set in a multi-year framework appropriate to the life-cycle of the AIFs managed by the AIFM in order to ensure that the assessment process is based on longer term performance and that the actual payment of performance-based components of remuneration is spread over a period which takes account of the redemption policy of the AIFs it manages and their investment risks;
  - (i) guaranteed variable remuneration is exceptional, occurs only in the context of hiring new staff and is limited to the first year;
  - (j) fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy, on variable remuneration components, including the possibility to pay no variable remuneration component;
  - (k) payments related to the early termination of a contract reflect performance achieved over time and are designed in a way that does not reward failure;

- (l) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes a comprehensive adjustment mechanism to integrate all relevant types of current and future risks;
- (m) subject to the legal structure of the AIF and its rules or instruments of incorporation, a substantial portion, and in any event at least 50 % of any variable remuneration consists of units or shares of the AIF concerned, or equivalent ownership interests, or share-linked instruments or equivalent non-cash instruments, unless the management of AIFs accounts for less than 50 % of the total portfolio managed by the AIFM, in which case the minimum of 50 % does not apply.

The instruments referred to in this point shall be subject to an appropriate retention policy designed to align incentives with the interests of the AIFM and the AIFs it manages and the investors of such AIFs. Member States or their competent authorities may place restrictions on the types and designs of those instruments or ban certain instruments as appropriate. This point shall be applied to both the portion of the variable remuneration component deferred in line with point (n) and the portion of the variable remuneration component not deferred;

- (n) a substantial portion, and in any event at least 40 %, of the variable remuneration component, is deferred over a period which is appropriate in view of the life cycle and redemption policy of the AIF concerned and is correctly aligned with the nature of the risks of the AIF in question.

The period referred to in this point shall be at least three to 5 years unless the life cycle of the AIF concerned is shorter; remuneration payable under deferral arrangements vests no faster than on a pro-rata basis; in the case of a variable remuneration component of a particularly high amount, at least 60 % of the amount is deferred;

- (o) the variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the AIFM as a whole, and justified according to the performance of the business unit, the AIF and the individual concerned.

The total variable remuneration shall generally be considerably contracted where subdued or negative financial performance of the AIFM or of the AIF concerned occurs, taking into account both current compensation and reductions in payouts of amounts previously earned, including through malus or clawback arrangements;

- (p) the pension policy is in line with the business strategy, objectives, values and long-term interests of the AIFM and the AIFs it manages.

If the employee leaves the AIFM before retirement, discretionary pension benefits shall be held by the AIFM for a period of 5 years in the form of instruments defined in point (m). In the case of an employee reaching retirement, discretionary pension benefits shall be paid to the employee in the form of instruments defined in point (m), subject to a 5 year retention period;

- (q) staff are required to undertake not to use personal hedging strategies or remuneration- and liability-related insurance to undermine the risk alignment effects embedded in their remuneration arrangements;
- (r) variable remuneration is not paid through vehicles or methods that facilitate the avoidance of the requirements of this Directive.

2. The principles set out in paragraph 1 shall apply to remuneration of any type paid by the AIFM, to any amount paid directly by the AIF itself, including carried interest, and to any transfer of units or shares of the AIF, made to the benefits of those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile or the risk profiles of the AIF that they manage.
3. AIFMs that are significant in terms of their size or the size of the AIFs they manage, their internal organisation and the nature, the scope and the complexity of their activities shall establish a remuneration committee.

The remuneration committee shall be constituted in a way that enables it to exercise competent and independent judgment on remuneration policies and practices and the incentives created for managing risk.

The remuneration committee shall be responsible for the preparation of decisions regarding remuneration, including those which have implications for the risk and risk management of the AIFM or the AIF concerned and which are to be taken by the management body in its supervisory function. The remuneration committee shall be chaired by a member of the management body who does not perform any executive functions in the AIFM concerned. The members of the remuneration committee shall be members of the management body who do not perform any executive functions in the AIFM concerned.

## **ANNEX III AIFMD: Information to be provided in case of intended marketing in the home Member State of the AIFM**

[Annex III AIFM Law] [Art. 31 AIFMD] [↻ Appendix XIV \(Q&A published by ESMA Section II Notifications of AIFs\)](#)

- (a) A notification letter, including a programme of operations identifying the AIFs the AIFM intends to market and information on where the AIFs are established;
- (b) the AIF rules or instruments of incorporation;
- (c) identification of the depositary of the AIF;
- (d) a description of, or any information on, the AIF available to investors;
- (e) information on where the master AIF is established if the AIF is a feeder AIF;
- (f) any additional information referred to in Article 23(1) for each AIF the AIFM intends to market;
- (g) where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF.

## **ANNEX IV AIFMD: Information to be provided in case of intended marketing in Member States other than the home Member State of the AIFM**

[Annex IV AIFM Law] [Art. 32 AIFMD] [↪ Appendix XIV \(Q&A published by ESMA Section II Notifications of AIFs\)](#)

- (a) A notification letter, including a programme of operations identifying the AIFs the AIFM intends to market and information on where the AIFs are established;
- (b) the AIF rules or instruments of incorporation;
- (c) identification of the depositary of the AIF;
- (d) a description of, or any information on, the AIF available to investors;
- (e) information on where the master AIF is established if the AIF is a feeder AIF;
- (f) any additional information referred to in Article 23(1) for each AIF the AIFM intends to market;
- (g) the indication of the Member State in which it intends to market the units or shares of the AIF to professional investors;
- (h) information about arrangements made for the marketing of AIFs and, where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF.
- (i) the details necessary, including the address, for the invoicing or for the communication of any applicable regulatory fees or charges by the competent authorities of the host Member State;
- (j) information on the facilities for performing the tasks referred to in Article 43a.

# APPENDICES

## Appendix I: Explanatory Memorandum of the Level 2 AIFM Regulation

### 1. CONTEXT OF THE DELEGATED ACT

The Directive on Alternative Investment Fund Managers<sup>67</sup> (AIFMD) introduces harmonised requirements for entities involved in the management of alternative investment funds (AIFs) marketed to professional investors in the EU<sup>68</sup>. Minimum standards are being set for the managers of AIFs that are marketed to retail investors under national rules.

The Directive covers a wide variety of AIFs and their managers (AIFM) ranging from equity funds to funds investing in illiquid assets (real estate, private equity, infrastructure, commodities or goods such as wine or art). It covers all possible investment strategies and legal forms of AIFMs and AIFs.

To obtain authorisation the AIFM has to comply with the requirements of the Directive, which range from, among other things, capital requirements, risk and liquidity management, and the appointment of a single depository to rules regarding disclosure to investors and reporting to competent authorities.

With the AIFMD, all investment funds in the EU fall into one of the following two categories: they are either UCITS (undertakings for collective investment in transferable securities) or AIFs. UCITS funds are governed by the UCITS Directive (2009/65/EC) and are authorised for sale to the retail market. They are not the subject of this Delegated Regulation. With almost € 6trillion of assets under management in the EU the UCITS sector is almost three times as big as the AIF sector (€ 2.2trillion). In 2010, the overall assets under management (AuM) by all categories of AIFs amounted to 18% of EU GDP. More than two thirds (68%) of the assets of AIFs are held by institutional investors, 70% of which are pension funds or insurance companies.

The AIFMD makes provision for a very extensive set of implementing measures ("level 2 measures") covering a wide range of topics which include, among other things: calculation of the assets under management, the method for calculating the leverage, clarification of certain operating conditions for AIFMs, the delegation of AIFM functions, specific provisions related to risk and liquidity management, clarification of a depository's duties and liability, transparency requirements, and rules relating to third countries.

This Delegated Regulation implements the empowerments for delegated acts contained in the AIFMD and thereby creates a single rulebook that ensures a level playing field among AIFMs in the Union.

A Regulation is the appropriate legal instrument for creating a single rulebook that contains uniform rules for all AIFMs. Since there is no substantial transposition, the risk of divergent application in the different Member States is avoided. As a consequence, the use of a Regulation facilitates the cross-border management and marketing of AIFs by AIFMs.

### 2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

While the AIFMD does not contain deadlines for the delivery of these delegated acts, the Commission aims to adopt the entire package of implementing legislation before the end of the transposition period for the AIFMD (July 2013).

On 2 December 2010, the Commission sent a request for technical advice on the level 2 measures to the Committee of European Securities Regulators (CESR). The European Securities and Markets Authority (ESMA,

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<sup>67</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF>

<sup>68</sup> The AIFMD also covers the marketing of AIFs established in third countries to professional investors in the Union and the management of AIFs established in the Union, even if they are not marketed to investors in the Union.

which replaced the CESR as of 1 January 2011) transmitted its technical advice to the European Commission on 15 November 2011.

Throughout the process of drafting its advice, ESMA was in close contact with the industry through bilateral meetings and public consultations. Stakeholders showed great engagement, as evidenced by the number of responses that ESMA received to its written consultations.

In addition to the written consultations, ESMA organised three open hearings covering the Call for Evidence and the two parts of the draft technical advice, the first in January and the other in September 2011. ESMA also invited around 20 selected experts to participate in a series of targeted workshops on the different parts of the technical advice between March and May 2011.

The Commission itself held extensive discussions with national supervisors and stakeholders, in particular trade associations, fund managers, and depositaries, from Member States and from non-EU countries, including major financial centres such as the Channel Islands, the Caribbean islands, the United States and Switzerland.

In line with its "Better Regulation" policy, the Commission conducted an impact assessment (IA) of policy options related to eight strategic issues in six domains that were to be covered by the Delegated Regulation: (1) the calculation of assets under management, (2) the method for calculating leverage, (3) additional own funds, (4) the depositary's duties and liability, (5) reporting frequencies, and (6) the use of leverage on a substantial basis.

The draft IA report was examined by the Impact Assessment Board (IAB) by written procedure in February/March 2012. On the basis of the IAB's opinion of 16 March 2012 the draft IA report was revised in order to take the views of the IAB into account as far as possible.

In order to clarify the scope of the initiative, some more background on the initiative has been provided. In the chapter on "options" the limitations set by the AIFMD have been explained in more detail. The analysis of impacts includes some discussion of the extent to which impacts are triggered by level 1 and by level 2. The suggestion to strengthen the analysis of impacts with quantitative input could not be followed as such information could not be obtained from the industry or supervisory bodies or any other third party.

A comparison of the options against a "do nothing" was not possible as there is no clear-cut baseline. It is not trivial to define an appropriate baseline for these level 2 measures as they, on the one hand, address an area which has not been regulated at Union level so far, in parts not even at national level, but on the other hand will be affected by the impacts of the level 1 Directive anyway. It is also almost impossible to construct such a baseline in a meaningful way that would allow quantifying impacts because of the differences in current practices on the one hand and in the ways the AIFMD would be transposed if no level 2 measures were adopted. To improve the presentation, the report has been shortened in some parts. The impact analysis sections have been amended with indications as to how the preferred options in this impact assessment deviate from the technical advice by ESMA.

### **3. LEGAL ELEMENTS OF THE DELEGATED ACT**

#### **3.1. Subsidiarity and proportionality**

The European Commission's and the EU's right to act is discussed in the impact assessment which accompanied the AIFMD. The AIFMD aims to provide a clear and consistent framework for the regulation and supervision of AIFMs in the EU; it establishes at European level a mechanism for creating a single European market for alternative investment funds in line with the legal basis underpinning EU legislation in this area (Article 53(1) TFEU).

The legal basis for delegated acts is provided (and circumscribed) by the power to adopt delegated acts and implementing measures conferred on the Commission in Articles 56 to 58 of Directive 2011/61/EU. The Directive requires delegated acts and implementing measures to be adopted in specified areas in order to ensure that the Directive is implemented consistently across the EU.

##### *3.1.1. Choice of the legal form*

A single rule book is essential for AIFMs as, given the cross-border activities of such managers, they have to comply with a uniform set of rules, such as: diligence requirements, inducements or conflicts of interest, which may arise in the course of their activities. It has been acknowledged that although the impact of AIFMs on the market is largely beneficial, their activities may also amplify risks through the financial system. It is therefore necessary that requirements related to the risk and liquidity management, valuation and investments in securitisation positions are even and applied in the same manner by AIFMs irrespective of the Member State where they are authorised. Furthermore, the Delegated Regulation contains detailed requirements concerning the calculation of assets under management, methods and calculation of leverage as well as the content and frequency of reporting to competent authorities and investors. Similarly, precise and unequivocal rules on delegation and depositaries are warranted. They mark a clear line between the tasks and responsibilities of the AIFM, the AIF's depositary and the AIFM's delegate, if appointed. It should be noted, however, that the family of AIFMs and AIFs is so diverse that it is neither possible nor desirable to try to create tailored rules for each type of AIFM. Therefore, this Delegated Regulation has to allow for certain flexibility so that its rules can be applied in a proportionate way, where justified by the size and the organisation of the AIFM and the nature, scale and complexity of the managed AIF. It is the role of competent authorities to supervise the manner in which AIFMs apply the Delegated Regulation.

A single rule book covering all aspects of managing AIFs is necessary in preparing for the smooth introduction of a marketing and operating passport for third country managers. Only a high level of convergence between management and quality standards would ensure a level playing field between EU based operators and those established in other jurisdictions.

The form of a Regulation is the best possible guarantee to ensure a level playing field, uniform conditions of competition and the highest possible standard of investor protection.

### *3.1.2. Subsidiarity and proportionality*

This Delegated Regulation should ensure the requisite degree of harmonisation, taking due account of the principle of subsidiarity. Given the nature and scope of this Regulation, action solely at Member State level would not be able to effectively or efficiently address those issues, given the centrality of the single market and the cross-border dimension of the AIFM sector. Action solely at Member State level would run the risk of creating or maintaining barriers to further integration and of impeding the efficient management and marketing of AIFs in the EU, thereby potentially raising costs and risks for investors, while also increasing administrative costs.

The principle of proportionality requires that any intervention is targeted and does not go beyond what is necessary in order to achieve the objectives. This principle has guided the process from the identification and evaluation of alternative policy options to the drafting of this proposal.

## **3.2. Detailed explanations of the proposal**

### *3.2.1. Calculation of assets under management (Articles 2-5) - Article 3 AIFMD [↪ Art. 3 AIFMD](#)*

The Delegated Regulation establishes the procedure to be followed by an AIFM when calculating its assets under management (AuM) and the methodology to be used for specific categories of assets (Article 2). In accordance with Article 2, the AIFM has to calculate total AuM by determining the value of all assets it manages, without deducting liabilities, and valuing financial derivative instruments (FDIs) at the value of an equivalent position in the underlying assets. Valuing FDIs as if the underlying assets were acquired by the fund represents a key policy choice as this method of valuation best reflects the AIF's exposure to those assets.

The Regulation also requires assets under management to be constantly monitored by the AIFM (Article 3) and action to be taken when the thresholds laid down in Article 3 AIFMD are occasionally breached (Article 4). Competent authorities should have the right to check the correctness of the calculation (Article 5).

### *3.2.2. Methods and calculation of leverage (Articles 6-11) - Article 4 AIFMD*

Article 4(1)(v) AIFMD defines leverage as 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. The AIFMD makes the use of leverage subject to several obligations. For example, the AIFM

has to report figures on leverage to investors and supervisory authorities<sup>69</sup>, it has to set out the policy with regard to leverage when applying for authorisation<sup>70</sup> and it has to set a maximum level of leverage which it may employ on behalf of each AIF it manages<sup>71</sup>. In order to ensure uniform compliance with these obligations and achieve the aim of the AIFMD to grant an objective overview of the leverage used by an AIFM, Articles 6 to 11 of the Regulation provide two methods for calculating the leverage.

According to the IA, the best results are achieved by combining what are known as the "gross" and "commitment" methods. The leverage ratios that result from applying the gross method are consistent with the objective of monitoring macro-prudential risks. The commitment method is well established and recognised in the asset management sector. Its results can be easily compared with those for UCITS funds. It provides, in particular when combined with the gross method, a good insight into the investment strategies and exposure of AIFs relevant for both investors and supervisors. As reflected in recital 12, if it is necessary, the Commission may adopt additional delegated acts on an additional and optional method for the calculation of leverage, on the basis of technical advice developed by ESMA. Recourse to an advanced method should not obviate the calculation of leverage according to the gross and commitment method —both remain obligatory for all AIFMs.

[↪ Art. 4 AIFMD](#) | [↪ Art. 23 AIFMD](#) | [↪ Art. 24 AIFMD](#) | [↪ Art. 25 AIFMD](#)

### 3.2.3. *Additional own funds and professional indemnity insurance (Articles 12-15) – Article 9 AIFMD*

The AIFMD requires AIFMs to hold appropriate additional own funds or professional indemnity insurance (PII) to cover potential liability risks arising from professional negligence. This Delegated Regulation specifies the appropriateness of such additional own funds or PII to ensure that AIFMs hold sufficient coverage to protect investors.

To determine the appropriateness of coverage the Delegated Regulation establishes a common definition for professional liability risks, provides an indicative list of events to be covered (Article 12), and lays down some qualitative requirements for AIFMs to appropriately monitor operational risks (Article 13). An AIFM's additional own funds are considered to be appropriate if they represent at least 0,01% of the value of the portfolios of AIFs managed, the amount being subject to ongoing adjustments to reflect the risk profile of the AIFM (Article 14). Several qualitative and quantitative conditions are established for determining the appropriateness of professional indemnity insurance when it is chosen by the AIFM for covering its professional liability risks (Article 15): PII with a coverage of 0.9% of AuM for claims in aggregate per year and 0.7% of AuM per individual claim seems appropriate to protect investors from damage resulting from any professional failure of the AIFM.

[↪ Art. 9 AIFMD](#)

### 3.2.4. *Operating conditions for AIFMs – general principles and conflicts of interest (Articles 16-37) - Articles 12 and 14 AIFMD*

The AIFMD requires the Commission to specify the criteria to be used by competent authorities to assess whether AIFMs comply with obligations to act honestly, with due skill, care and diligence, in the best interests of the AIFs, treat investors fairly, employ appropriate resources and procedures and take measures with regard to conflicts of interest.

This Delegated Regulation clarifies the general duty of AIFMs to act in the best interests of the AIF or the investors in the AIF and the integrity of the market. It clarifies the scope of due diligence in general and the scope of due diligence which should be applied if investments are made in assets of limited liquidity and where AIFMs are selecting and appointing counterparties and prime brokers. This Delegated Regulation sets out rules on inducements and handling of orders, including: reporting obligations in respect of execution of subscription and redemption orders, and rules on placing orders to deal on behalf of AIFs with other entities for execution and aggregation and allocation of orders.

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<sup>69</sup> Article 24(4) of Directive 2011/61/EU

<sup>70</sup> Article 7(3)(a) of Directive 2011/61/EU

<sup>71</sup> Article 15(4) of Directive 2011/61/EU

The Delegated Regulation specifies the types of conflicts of interest that may arise and lays down a conflicts of interests policy which includes procedures and arrangements AIFMs are expected to implement and apply in order to identify, prevent, manage, monitor and disclose conflicts of interest.

[↪ Art. 12 AIFMD](#) | [↪ Art. 14 AIFMD](#)

### *3.2.5. Operating conditions for AIFMs—risk management (Articles 38-45)- Article 15 AIFMD*

This Delegated Regulation lays down rules concerning the risk management system that should be established and applied by AIFMs. The system comprises the organisational structure, policies and procedures for managing the risks relevant to each AIF's investment strategy and the processes and techniques used to measure and manage those risks. In terms of organisational structure, the Regulation requires a permanent risk management function to be established and entrusts it with specific tasks, including: implementation of the risk management policy, risk monitoring and measuring the risk level and ensuring that it complies with the AIF's risk profile. The Regulation also lays down conditions for functional and hierarchical separation of the risk management function from operating units and specifies safeguards against conflicts of interest which should ensure that the risk management activities are carried out independently.

[↪ Art. 15 AIFMD](#)

### *3.2.6. Operating conditions for AIFMs – liquidity management (Articles 46 – 49) – Article 16 AIFMD*

The AIFMD requires the AIFM to employ, for each AIF it manages, that is not an unleveraged closed-ended AIF, an appropriate liquidity management system and to adopt procedures that enable it to monitor the AIF's liquidity risk and to ensure that the liquidity profile of the AIF's investments complies with its underlying obligations.

This Delegated Regulation specifies that the liquidity management systems and procedures should allow AIFMs to apply tools and arrangements necessary to cope with illiquid assets in order to respond to redemption requests. Such arrangements may include "special arrangements" such as "side-pockets". Furthermore, it is proposed that AIFMs should, where appropriate considering the nature, scale and complexity of each AIF they manage, set up suitable limits for liquidity/illiquidity of the AIF consistent with its redemption policy. AIFMs should conduct stress tests at least annually.

[↪ Art. 16 AIFMD](#)

### *3.2.7. Operating conditions for AIFMs — investment in securitisation positions (Articles 50-56) - Article 17 AIFMD*

The provisions on investment in securitisation positions are intended to address the potential misalignment between the interests of firms that repackage loans into tradable securities and originators, on the one hand, and the AIFMs that invest in those securities, on the other hand, with a view also to achieving cross-sectorial consistency.

Article 51 lays down a requirement for retained material net economic interest as a precondition for an AIFM assuming exposure to the credit risk of a securitisation on behalf of one or more AIFs. In addition, the AIFM has to ensure that the sponsor and originator have certain features (Article 52) and the AIFM has itself to comply with a set of qualitative requirements (Article 53). Article 54 provides for corrective action if the retained net economic interest is below the required level. To ensure cross-sectorial consistency with the corresponding provisions in Directive 2006/48/EC a grandfathering clause (Article 55) and an interpretation provision Article 56) are introduced.

### *3.2.8. Organisational requirements – general principles (Articles 57 – 66) - Article 18 AIFMD*

AIFMs are required to use, at all times, adequate and appropriate human and technical resources necessary for the proper management of AIFs, including administrative and accounting procedures and adequate internal control mechanisms. This Delegated Regulation requires AIFMs to establish a well-documented organisational structure that clearly assigns responsibilities, defines control mechanisms and ensures a good flow of information between all parties involved. When allocating functions internally, the AIFM should ensure that the governing body, the senior management and, where relevant, the supervisory function, are responsible for the AIFM's complying with its obligations under the AIFMD. AIFMs should also apply policies and procedures designed to

detect any risk of failure to comply with their obligations under the AIFMD. The permanent compliance function and the permanent internal audit function should be separate and independent from other functions in order to be able to fulfil their tasks. AIFMs should also establish systems to safeguard information and ensure business continuity. When establishing these procedures and structures, AIFMs should take into account the principle of proportionality which allows procedures, mechanisms and the organisational structure to be calibrated to the nature, scale and complexity of the AIFM's business and to the nature and range of activities carried out in the course of its business.

### [↪ Art. 18 AIFMD](#)

#### *3.2.9. Valuation (Articles 67-74) – Article 19 AIFMD*

The AIFM has to ensure that, for each AIF it manages, appropriate and consistent procedures are established so that a proper and independent valuation of the AIF's assets can be performed in accordance with Article 19 of the AIFMD and the applicable national and AIF rules.

Article 67 requires the AIFM to establish, maintain and implement for each AIF policies and procedures for the valuation of assets, and lays down the main features of such valuation policies and procedures. Specific rules are adopted for the use of models for valuing assets (Article 68). Article 69 spells out the principle of consistent application of valuation policies and procedures. The Delegated Regulation further lays down rules for the periodic review of valuation policies and procedures (Article 70), the review of individual values of assets (Article 71), the calculation of the net asset value per unit or share (Article 72), the professional guarantees to be provided by an external valuer (Article 73) and the frequency of valuation of assets held by open-ended AIFs (Article 74).

### [↪ Art. 19 AIFMD](#)

#### *3.2.10. Delegation of AIFM functions (Article 75 - 82) - Article 20 AIFMD*

Subject to the requirements and limitations set out in Article 20, the AIFMD allows AIFMs to delegate the performance of some of their functions, essentially in order to make the conduct of business more efficient. Articles 75 to 81 of the Regulation spell out the conditions under which the AIFM is allowed to delegate taking into account the fact that an AIFM should not be prevented from acting in the best interests of its investors and retains responsibility for the delegated functions. In particular, the extent to which an AIFM is allowed to delegate is laid down in Article 82. The AIFM has at least to keep the decision making functions which are in fact its primary business role. It therefore has to perform at least functions relating to either risk or portfolio management. The ability to manage and control the AIF would not be ensured if the AIFM was not closely involved in the decision-making of its delegates.

### [↪ Art. 20 AIFMD](#)

#### *3.2.11. Depositary (Articles 83 – 102) - Article 21 AIFMD*

The Regulation contains detailed provisions about the obligations and rights of depositaries taking into account that the core function of such entities is the protection of the AIF's investors. Criteria are established, inter alia, for monitoring the cash flows of an AIF, the scope of financial instruments to be held in custody, general oversight duties, delegation of custody and liability for the loss of a financial instrument held in custody. Articles 85 and 86 of the Regulation spell out the requirements for access and flow of information which are necessary to enable the depositary to have a clear overview and effectively monitor the AIF's cash flows as provided for by Article 21(7) AIFMD. To ensure a high standard of investor protection Article 88 sets out the scope of custody. Under this Article, all financial instruments which can be registered in a financial instruments account (essentially, transferable securities, money market instruments and units in collective investment undertakings) and which belong to an AIF must be held in custody. As clarified in recital 98, assets belonging to an AIF may not be excluded from the scope of custody simply because they are subject to particular business transactions such as collateral arrangements. Therefore, should an AIF provide its assets as collateral to a collateral taker, the AIFMD requires these assets to be kept in custody as long as the AIF owns the financial instruments. In these circumstances, custody can be arranged in several ways: (1) the collateral taker is the depositary of the AIF or is appointed by the AIF's depositary as sub-custodian over the AIF's collateralised assets; (2) the AIF's depositary appoints a sub-

custodian that acts for the collateral taker; or (3) the collateralised assets remain with the AIF's depositary and are "earmarked" in favour of the collateral taker (recital 98).

Article 92 contains in particular requirements with respect to the oversight and control function of a depositary in order to enable it to properly assess and supervise the AIFM. With respect to the liability regime Articles 100-102 ensure uniform interpretation of Article 21(12) of the AIFMD. Article 21(13) of the AIFMD states that the depositary's liability shall not be affected by any delegation referred to in paragraph 11. According to the IA, this means that the depositary will be liable to return an instrument in custody if the loss of that instrument is caused by events in the operational sphere of a depositary or its appointed network of sub-custodians.

In the event of insolvency of a sub-custodian, operational failures on its part (e.g. failure to implement the segregation requirement) would also give rise to the return obligation while external events, such as natural disasters, acts of public authority or government measures (e.g. market closures), would not unless it is proved that the consequences could have been avoided. To mitigate the consequences of Article 101, Article 102 lists the objective reasons for contracting a discharge of liability.

#### [↪ Art. 21 AIFMD](#)

#### *3.2.12. Transparency requirements and the exchange of information (Articles 103-112) - Articles 22, 23 and 24 AIFMD*

One of the main objectives of the AIFMD is to increase the transparency of an AIFM vis-à-vis investors and supervisory authorities so that they can properly assess and be aware of the risks that might be entailed in an AIF. Therefore, Articles 103 to 111 spell out the requirements of Articles 22 to 24 AIFMD, laying down minimum standards and ensuring uniform application of the AIFMD. Articles 103 to 107 outline some minimum requirements for the content of the annual report, reflecting recognised practices, accounting standards and rules. Articles 108 and 109 stipulate the content and format of the disclosure of the information to investors and Article 110 establishes the content, format and frequency of information to be provided to the competent authorities. Article 111 determines, in particular, when an AIFM is deemed to use leverage on a substantial basis. Under this Article, an AIF would be considered to be employing leverage on a substantial basis when its exposure, calculated using the "commitment method", exceeds three times its net asset value (NAV). The preferred option provides the best trade-off between adequate reporting on leverage and the administrative burden on the AIFM and the competent authorities. This threshold would also provide AIFMs with a level playing field and legal certainty as to their reporting obligations and identify the AIFM for which competent authorities are supposed to receive information on leverage.

#### [↪ Art. 22 AIFMD](#) | [↪ Art. 23 AIFMD](#) | [↪ Art. 24 AIFMD](#)

#### *3.2.13. Rules related to third countries (Articles 113-115) - Articles 34, 35, 36, 37, 40 and 42 AIFMD*

There are a number of provisions in the AIFMD that require cooperation arrangements to be established between European competent authorities and supervisory authorities from the country of origin of a non-EU AIFM or a non-EU AIF. The Delegated Regulation specifies some aspects of those cooperation arrangements in order to design a common framework to facilitate the establishment of such cooperation arrangements with third countries. Article 113 lays down the scope, form and objectives of the cooperation arrangements. Article 114 requires cooperation arrangements to provide for such mechanisms, instruments and procedures as are necessary for the EU competent authorities to perform their duties pursuant to the AIFMD. Article 115 requires cooperation arrangements to include a data protection safeguard in line with Article 52 of the AIFMD.

#### [↪ Art. 34 AIFMD](#) | [↪ Art. 35 AIFMD](#) | [↪ Art. 36 AIFMD](#) | [↪ Art. 37 AIFMD](#) | [↪ Art. 40 AIFMD](#) | [↪ Art. 42 AIFMD](#)

#### *3.2.14. Exchange of information relating to potential systemic consequences (Article 116) – Article 53 AIFMD*

Article 116 specifies the exchange of information between the competent authorities of the Member States, ESMA and the ESRB which is required under Article 53 of the AIFMD for the purpose of identifying potential systemic consequences of AIFM activity. [↪ Art. 53 AIFMD](#)

## **4. BUDGETARY IMPLICATION**

The tasks envisaged in this Delegated Regulation for ESMA have neither budgetary implications for the EU budget, nor for the budget of ESMA. No additional funding and no additional posts for ESMA will be therefore required in relation to this act.

## Appendix II: Recitals of the Level 2 AIFMD Regulation

(1) Directive 2011/61/EU empowers the Commission to adopt delegated acts specifying, in particular, the rules relating to calculation of the threshold, leverage, operating conditions for Alternative Investment Fund Managers (hereinafter "AIFMs"), including risk and liquidity management, valuation and delegation, requirements detailing the functions and duties of depositaries of Alternative Investment Funds (hereinafter "AIFs"), rules on transparency and specific requirements relating to third countries. It is important that all these supplementing rules begin to apply at the same time as Directive 2011/61/EU so that the new requirements imposed on AIFMs can be effectively put into operation. The provisions in this Regulation are closely interrelated, since they deal with the authorisation, ongoing operation and transparency of AIFMs which manage and, as the case may be, or market AIFs in the Union, which are inextricably linked aspects inherent to the taking up and pursuit of the asset management business. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and compact access to them by persons subject to those obligations, including investors that are non-Union residents, it is desirable to include all delegated acts required by Directive 2011/61/EU in a single Regulation.

(2) It is important to ensure that the objectives of Directive 2011/61/EU are achieved uniformly throughout the Member States, to enhance the integrity of the internal market and offer legal certainty for its participants, including institutional investors, competent authorities and other stakeholders, by adopting a Regulation. The form of a Regulation ensures a coherent framework for all market operators and is the best possible guarantee for a level playing field, uniform conditions of competition and the common appropriate standard of investor protection. Furthermore it ensures the direct applicability of detailed uniform rules concerning the operation of AIFMs, which by their nature are directly applicable and therefore require no further transposition at national level. The recourse to a regulation allows, in addition, to avoid a delayed application of Directive 2011/61/EU in the Member States.

(3) As the Delegated Regulation specifies the tasks and responsibilities of the "governing body" and of the "senior management" it is important to clarify the meaning of these terms, in particular the fact that a governing body may be comprised of senior managers. Furthermore, as this Regulation introduces also the term "supervisory function" the definition of the governing body should make clear that it is the body which comprises the managerial function in case the supervisory and the managerial functions are separated in accordance with national company law. Directive 2011/61/EU requires AIFMs to provide certain information to competent authorities, including the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature. This Regulation clarifies the meaning of special arrangements so that AIFMs know exactly what information they should provide to competent authorities.

(4) Directive 2011/61/EU provides for a lighter regime applicable to those AIFMs who manage portfolios of AIFs whose total assets under management do not exceed the relevant thresholds. It is necessary to specify clearly how the total value of assets under management should be calculated. In this context it is essential to define the steps necessary for calculating the total value of assets, to determine clearly which assets are not included in the calculation, to clarify how the assets acquired through the use of leverage should be valued and to provide rules for handling of cases of cross-holding among AIFs managed by an AIFM. [🔗 Art. 3 AIFMD](#)

(5) The total value of assets under management needs to be calculated at least annually and using up-to date information. The value of assets should therefore be determined in the twelve months preceding the date of calculation of the total value of assets under management and as close as possible to such a date. [🔗 Art. 3 AIFMD](#)

(6) To ensure that an AIFM remains eligible to benefit from the lighter regime provided for in Directive 2011/61/EU, it should put in place a procedure making it possible to observe on an ongoing basis the total value of assets under management. The AIFM may consider the types of AIFs under management and the different classes of assets invested in order to assess the likelihood of breaching the threshold or the need for an additional calculation. [🔗 Art. 3 AIFMD](#)

(7) Where an AIFM no longer meets the conditions related to the thresholds it should notify its competent authority and apply for an authorisation within 30 calendar days. [🔗 Art. 3 AIFMD](#)

However, where exceeding or falling below the thresholds occurs only occasionally within a given calendar year and such situations are considered as temporary the AIFM should not be obliged to make an application for authorisation. In those cases, the AIFM should inform the competent authority of the breach of the threshold, and explain why it considers such breach to be of a temporary nature. A situation lasting for more than three months cannot be considered as being temporary. When assessing the likelihood of a situation to be temporary, the AIFM should consider anticipated subscription and redemption activity or, where applicable, capital draw-downs and distribution. The AIFM should not use anticipated market movements as part of this assessment.

[↪ Art. 3 AIFMD](#)

(8) Data used by AIFMs to calculate the total value of assets under management do not need to be available to the public or to investors. However, competent authorities must be able to verify that the AIFM is correctly calculating and monitoring the total value of assets under management, including the assessment of occasions when the total value of assets under management temporarily exceeds the relevant threshold and should therefore have access to these data on request. [↪ Art. 3 AIFMD](#)

(9) It is important that AIFMs benefiting from the provisions of the lighter regime in Directive 2011/61/EU provide the competent authorities with up-to-date information at the time of registration. Not all types of AIFMs may have updated offering documents reflecting the latest developments related to the AIFs they manage and such AIFMs may find it more practical to specify the required information in a separate document describing the funds' investment strategy. This could be the case of private equity or venture capital funds which often raise money through negotiations with potential investors. [↪ Art. 3 AIFMD](#)

(10) An AIF which holds only equity shares in listed companies should not be regarded as being leveraged as long as the equity shares are not acquired through borrowing. Where the same AIF purchases options on an equity index, it should be regarded as being leveraged, since it has increased the exposure of the AIF to a given investment. [↪ Art. 3 AIFMD](#)

(11) In order to ensure a uniform application of AIFM obligations to grant an objective overview of the leverage used, it is necessary to provide two methods to calculate the leverage. As it results from market studies, the best results can be achieved by combining the so-called "gross" and "commitment" methods. [↪ Art. 4 AIFMD](#)

(12) In order to receive appropriate information for monitoring systemic risks and to gain a complete picture of the use of leverage by the AIFM, information about the exposure of an AIF should be provided to competent authorities and investors both on a gross and on a commitment method basis and all AIFMs should therefore calculate exposure using both the gross and the commitment method. The gross method gives the overall exposure of the AIF whereas the commitment method gives insight in the hedging and netting techniques used by the manager; therefore both methods shall be seen in conjunction. Specifically, the degree to which overall exposure differs between the gross method and the commitment method may provide useful information. If necessary to ensure that any increase of the exposure of AIFs is adequately reflected the Commission may adopt additional delegated acts on an additional and optional method for the calculation of leverage. [↪ Art. 24 AIFMD](#) | [↪ Art. 4 AIFMD](#)

(13) When calculating the exposure, all positions of the AIF should initially be included, including short and long assets and liabilities, borrowings, derivative instruments and any other method increasing the exposure where the risks and rewards of assets or liabilities are with the AIF, and all other positions that make up the net asset value. [↪ Art. 4 AIFMD](#)

(14) Borrowing arrangements entered into by the AIF should be excluded if they are temporary in nature and relate to and are fully covered by capital commitments from investors. Revolving credit facilities should not be considered being temporary in nature. [↪ Art. 4 AIFMD](#)

(15) In addition to calculating exposure using the gross method, all AIFMs should calculate exposure using the commitment method. According to the commitment method financial derivative instruments should be converted into equivalent positions in the underlying asset. However, if an AIF invests in certain derivatives in order to off-set the market risk of other assets in which the AIF is invested, under certain conditions, those derivatives should not be converted into an equivalent position in the underlying assets as the exposures of the two investments balance one another. That should be the case where, for instance, an AIF portfolio invests in a certain index and holds a derivative instrument which swaps the performance of that index with the performance

of a different index, that should be equivalent to holding exposure to the second index in the portfolio and therefore the AIF's net asset value would not depend on the performance of the first index. [↪ Art. 4 AIFMD](#)

(16) When calculating exposure according to the commitment method, derivatives which fulfil the criteria set out in this Regulation do not provide any incremental exposure. Thus, if the AIF invests in index future contracts and holds a cash position equal to the total underlying market value of future contracts, this would be equivalent to directly investing in index shares and therefore the index future contract should not be taken into account for the purpose of calculating the exposure of the AIF. [↪ Art. 4 AIFMD](#)

(17) When calculating exposure according to the commitment method, AIFMs should be allowed to consider hedging and netting arrangements provided they fulfil the criteria relating to the commitment method. [↪ Art. 4 AIFMD](#)

(18) The requirement that netting arrangements refer to the same underlying asset should be interpreted strictly so that assets which the AIFM considers as equivalent or highly correlated, such as different share classes or bonds issued by the same issuer, should not be considered as identical for the purposes of netting arrangements. The definition of netting arrangements aims to ensure that only those trades which offset the risks linked to other trades, leaving no material residual risk, are taken into account. Combinations of trades which aim to generate a return, however small, by reducing some risks while keeping others should not be considered as netting arrangements, as with arbitrage investment strategies which aim to generate a return by taking advantage of pricing discrepancies between derivative instruments with the same underlying but different maturities. [↪ Art. 4 AIFMD](#)

(19) A portfolio management practice which aims to reduce the duration risk by combining an investment in a long-dated bond with an interest rate swap or to reduce the duration of an AIF bond portfolio by concluding a short position on bond future contracts representative of the interest rate risk of the portfolio (duration hedging) should be considered as a hedging arrangement provided that it complies with the hedging criteria. [↪ Art. 4 AIFMD](#)

(20) A portfolio management practice, which aims to offset the significant risks linked to an investment in a well diversified portfolio of shares by taking a short position on a stock market index future, where the composition of the equity portfolio is very close to that of the stock market index and its return highly correlated to that of the stock market index and where the short position on the stock market index future allows an unquestionable reduction of the general market risk related to the equity portfolio and the specific risk is insignificant, such as a beta-hedging of a well-diversified equity portfolio where the specific risk is considered to be insignificant, should be considered as complying with the hedging criteria. [↪ Art. 4 AIFMD](#)

(21) A portfolio management practice which aims to offset the risk linked to an investment in a fixed interest rate bond by combining a long position on a credit default swap and an interest rate swap which swaps that fixed interest rate with an interest rate equal to an appropriate money market reference rate plus a spread should be considered as a hedging arrangement where all the hedging criteria of the commitment method are in principle complied with. [↪ Art. 4 AIFMD](#)

(22) A portfolio management practice which aims to offset the risk of a given share by taking a short position through a derivative contract on a share that is different to but strongly correlated with that first share should not be considered as complying with the hedging criteria. Although such a strategy relies on taking opposite positions on the same asset class, it does not hedge the specific risk linked to the investment in a certain share. Therefore, it should not be considered as a hedging arrangement as laid down in the criteria related to the commitment method. [↪ Art. 4 AIFMD](#)

(23) A portfolio management practice which aims to keep the alpha of a basket of shares (comprising a limited number of shares) by combining the investment in that basket of shares with a beta-adjusted short position on a future on a stock market index should not be considered as complying with the hedging criteria. Such a strategy does not aim to offset the significant risks linked to the investment in that basket of shares but to offset the beta (market risk) of that investment and keep the alpha. The alpha component of the basket of shares may dominate over the beta component and as such lead to losses at the level of the AIF. For that reason, it should not be considered as a hedging arrangement. [↪ Art. 4 AIFMD](#)

(24) A merger arbitrage strategy is a strategy that combines a short position on a stock with a long position on another stock. Such a strategy aims to hedge the beta (market risk) of the positions and generate a return linked to the relative performance of both stocks. Similarly, the alpha component of the basket of shares may dominate over the beta component and as such lead to losses at the level of the AIF. It should not be considered as a hedging arrangement as laid down in the criteria related to the commitment method. [↪ Art. 4 AIFMD](#)

(25) A strategy, which aims to hedge a long position in a stock or bond with purchased credit protection on the same issuer, relates to two different asset classes and therefore should not be considered as a hedging arrangement. [↪ Art. 4 AIFMD](#)

(26) When using methods which increase the exposure of an AIF, the AIFM should observe general principles such as considering the substance of the transaction in addition to its legal form. Specifically with respect to repurchase transactions, the AIFM should consider whether the risks and rewards of the assets involved are passed or retained by the AIF. The AIFM should also look through derivative instruments or other contractual arrangements to the underlying assets to determine the possible future commitments of the AIF resulting from those transactions. [↪ Art. 4 AIFMD](#)

(27) As the commitment method leads to interest rates with different maturities being considered as different underlying assets, AIFs that according to their core investment policy primarily invest in interest rate derivatives may use specific duration netting rules in order to take into account the correlation between the maturity segments of the interest rate curve. When setting out its investment policy and risk profile, an AIF should be able to define the level of the interest rate risk and consequently to determine its target duration. The AIF should take into account the predefined target duration when making its investment choices. When the portfolio duration diverges from the target duration, the strategy should not be considered as a duration netting arrangement as laid down in the criteria related to the commitment method. [↪ Art. 4 AIFMD](#)

(28) The duration netting rules allow long positions to be netted with short positions whose underlying assets are different interest rates. The maturities serving as the thresholds of the maturity ranges are two years, seven years and 15 years. Within each maturity range, netting positions should be allowed. [↪ Art. 4 AIFMD](#)

(29) Netting positions between two different maturity ranges should be partially allowed. Penalties have to be applied to the netted positions to allow only partial netting. They should be expressed by means of percentages relying on the average correlations between the maturity ranges for two years, five years, ten years and 30 years of the interest rate curve. The longer the difference between the maturities of the positions, the more their netting must be subject to a penalty, and therefore the percentages must increase. [↪ Art. 4 AIFMD](#)

(30) Positions whose modified duration is much longer than the whole portfolio's modified duration are not in line with the investment strategy of the AIF and fully matching them should not be allowed. Thus, it should not be acceptable to match an 18 months maturity short position (set in maturity range 1) with a 10 years maturity long position (set in maturity range 3), if the target duration of the AIF is around 2 years. [↪ Art. 4 AIFMD](#)

(31) When calculating the exposure, AIFs can firstly identify the hedging arrangements. The derivatives involved in these arrangements are then excluded from the global exposure calculation. AIFs should use an exact calculation in hedging arrangements. AIFs should not use duration netting rules in the hedging calculation. The duration netting rules may be used to convert the remaining interest rate derivatives into their equivalent underlying asset positions. [↪ Art. 4 AIFMD](#)

(32) Pursuant to Directive 2011/61/EU, an AIFM has to ensure that the potential professional liability risks resulting from its activities are appropriately covered either by way of additional own funds or by way of professional indemnity insurance. Uniform application of this provision requires a common understanding of the potential professional liability risks to be covered. The general specification of the risks arising from an AIFM's professional negligence should determine the features of the relevant risk events and identify the scope of potential professional liability, including damage or loss caused by persons who are directly performing activities for which the AIFM has legal responsibility, such as the AIFM's directors, officers or staff, and persons performing activities under a delegation arrangement with the AIFM. In line with the provisions of Directive 2011/61/EU, the liability of the AIFM should not be affected by delegation or sub-delegation and the AIFM should provide adequate coverage for professional risks related to such third parties for whom it is legally liable. [↪ Art. 9 AIFMD](#)

(33) To ensure a common understanding of the general specification, a list of examples should serve as benchmark for identifying potential professional liability risk events. That list should include a wide range of events resulting from negligent actions, errors or omissions, such as the loss of documents evidencing title to investments, misrepresentations, or breach of the various obligations or duties incumbent on the AIFM. It should also include the failure to prevent, by means of adequate internal control systems, fraudulent behaviour within the AIFM's organisation. Damage resulting from failure to carry out sufficient due diligence on an investment that turned out to be fraudulent would trigger the AIFM's liability for professional liability and should be appropriately covered. However, losses incurred because an investment has lost value as a result of adverse market conditions should not be covered. The list should also include valuations that are improperly carried out, which should be understood as a valuation failure breaching Article 19 of Directive 2011/61/EU and the corresponding delegated acts. [↪ Art. 9 AIFMD](#)

(34) In line with their risk management obligations, AIFMs should have appropriate qualitative internal control mechanisms to avoid or mitigate operational failures, including professional liability risks. Therefore, an AIFM should have, as part of its risk management policy, adequate policies and procedures for operational risk management, appropriate to the nature, scale and complexity of its business. Such procedures and policies should in any event enable an internal loss database to be built up to serve for the purpose of assessing the operational risk profile. [↪ Art. 9 AIFMD](#)

(35) To ensure that additional own funds and professional liability insurance appropriately cover potential professional liability risks, quantitative minimum benchmarks should be established for determining the proper level of coverage. Such quantitative benchmarks should be determined by the AIFM as a specific percentage of the value of portfolios of AIFs managed, calculated as the sum of the absolute value of all assets of all AIFs managed, irrespective of whether they are acquired through use of leverage or with investors' money. In this context, derivative instruments should be valued at their market price as they could be replaced at that price. As coverage through professional indemnity insurance is by nature more uncertain than coverage provided through additional own funds, different percentages should apply to the two different instruments used for covering professional liability risk. [↪ Art. 9 AIFMD](#)

(36) To ensure that professional indemnity insurance is effective in covering losses that result from insured events, it should be taken out from an insurance undertaking which is authorised to provide professional indemnity insurance. This includes EU insurance undertakings and non-EU undertakings to the extent that they are permitted to provide such insurance service by Union law or by national law. [↪ Art. 9 AIFMD](#)

(37) In order to allow some flexibility when devising appropriate professional indemnity insurance, it should be possible for the AIFM and the insurance undertaking to agree on a clause providing that a defined amount will be borne by the AIFM as the first part of any loss (defined excess). Where such a defined excess is agreed, the AIFM should provide own funds corresponding to the defined amount of loss to be borne by the AIFM. Such own funds should be in addition to the initial capital of the AIFM and to the own funds to be provided by the AIFM pursuant to Article 9(3) of Directive 2011/61/EU. [↪ Art. 9 AIFMD](#)

(38) As a matter of principle, the adequacy of coverage through additional own funds or professional indemnity insurance should be reviewed at least once a year. However, the AIFM should have procedures in place that ensure ongoing monitoring of the total value of AIF portfolios managed and ongoing adjustments to the amount of coverage of professional liability risks should there be significant mismatches identified. Furthermore, the competent authority of the home Member State of an AIFM may lower or increase the minimum requirement for additional own funds, after taking into account the risk profile of the AIFM, its loss history and the adequacy of its additional own funds or professional indemnity insurance. [↪ Art. 9 AIFMD](#)

(39) Directive 2011/61/EU requires AIFMs to act in the best interests of AIFs, the investors in the AIFs and the integrity of the market. AIFMs should therefore apply appropriate policies and procedures which allow them to prevent malpractices such as market timing or late trading. Market timers take advantage of out of date or stale prices for portfolio securities that impact the calculation of AIF's net asset value (NAV) or buy and redeem units of the AIF within a few days, thereby exploiting the way the AIF calculates its NAV. Late trading involves placing of orders to buy or redeem units of AIFs after a designated cut off point but the price received is the one of the cut off point. Both malpractices harm the interests of long term investors as they dilute their return and have detrimental effects on AIF's returns as they increase transaction costs and disrupt portfolio management. AIFMs should also establish appropriate procedures to ensure that the AIF is managed efficiently and should act in such a way as to prevent undue costs being charged to the AIF and its investors. [↪ Art. 12 AIFMD](#)

(40) In line with the approach applied to UCITS managers, AIFMs should ensure a high standard of diligence in the selection and monitoring of investments. They should have appropriate professional expertise and knowledge of the assets in which AIFs are invested. In order to ensure that investment decisions are carried out in compliance with the investment strategy and, where applicable, risk limits of the AIFs managed, AIFMs should establish and implement written policies and procedures on due diligence. These policies and procedures should be reviewed and updated on a regular basis. When AIFMs invest in specific types of assets for a long duration, less liquid assets such as real estate or partnership interests, due diligence requirements should apply also to the negotiation phase. The activities performed by the AIFM before closing an agreement should be well documented in order to demonstrate that they are consistent with the economic and financial plan and therefore with the duration of the AIF. AIFMs should maintain minutes of the relevant meetings, the preparatory documentation and the economic and financial analysis conducted for assessing the feasibility of the project and the contractual commitment. [↪ Art. 12 AIFMD](#)

(41) The requirement that AIFMs act with due skill, care and diligence should also apply where the AIFM appoints a prime broker or counterparty. The AIFM should select and appoint only those prime brokers and counterparties, which are subject to ongoing supervision, are financially sound and have the necessary organisational structure appropriate to the services to be provided to the AIFM or the AIF. In order to ensure that investors' interests are adequately protected, it is important to clarify that one of the criteria against which financial soundness should be assessed is whether or not prime brokers or counterparties are subject to relevant prudential regulation, including adequate capital requirements, and effective supervision. [↪ Art. 12 AIFMD](#)

(42) In line with Directive 2011/61/EU, which requires AIFMs to act honestly, fairly and with due skill, persons who effectively direct the business of the AIFM, who are members of the governing body or of the senior management, in the case of entities which do not have a governing body, should possess sufficient knowledge, skills and experience to exercise their tasks, in particular to understand the risks associated with the activity of the AIFM. In line with the Commission's Green Paper on corporate governance in the financial sector<sup>72</sup>, persons who effectively direct the business of the AIFM should also commit sufficient time to perform their functions in the AIFM and act with honesty, integrity and independence of mind to, inter alia, effectively assess and challenge the decisions of the senior management. [↪ Art. 12 AIFMD](#)

(43) To ensure that the relevant activities are performed properly, AIFMs should employ personnel with the necessary skills, knowledge and expertise to carry out tasks assigned to them. [↪ Art. 12 AIFMD](#)

(44) AIFMs that provide the service of individual portfolio management have to comply with inducement rules laid down in 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<sup>73</sup>. For reasons of consistency, those principles should extend to AIFMs that provide the service of collective portfolio management, and marketing. The existence, nature and amount of the fee, commission or benefit, or, where the amount cannot be ascertained, the method of calculating the amount, should be disclosed in the AIFM's annual report. [↪ Art. 12 AIFMD](#)

(45) Investors in AIFs should benefit from protection similar to that of AIFM clients to whom AIFMs provide the service of individual portfolio management, as in such a case they have to comply with the best execution rules laid down in 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<sup>74</sup> and Directive 2006/73/EC. However, the differences between the various types of assets in which AIFs are invested should be taken into account, since best execution is not relevant, for instance, when the AIFM invests in real estate or partnership interests and the investment is made after extensive negotiations on the terms of the agreement. Where there is no choice of different execution venues, the AIFM should be able to demonstrate to the competent authorities and auditors that there is no choice of different execution venues. [↪ Art. 12 AIFMD](#)

(46) For reasons of consistency with requirements applying to UCITS managers, rules on handling of orders and on aggregation and allocation of trading orders should apply to AIFMs when providing collective portfolio

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<sup>72</sup> COM(2010)284.

<sup>73</sup> OJ L 241, 2.9.2006, p. 26.

<sup>74</sup> OJ L 145, 30.4.2004, p. 1.

management. However, such rules should not apply where the investment in assets is made after extensive negotiations on the terms of the agreement, such as investment in real estate, partnership interests or non-listed companies as in such cases no order is executed. [↪ Art. 12 AIFMD](#)

(47) It is important to specify the situations where conflicting interests are likely to occur, in particular where there is a prospect of financial gain or avoidance of financial loss or where financial or other incentives are provided to steer the behaviour of the AIFM in such a way that it favours particular interests at the expense of interests of other parties, such as another AIF, its clients, undertakings for collective investments in transferable securities (UCITS) or other clients of the AIFM. [↪ Art. 14 AIFMD](#)

(48) The conflicts of interest policy established by the AIFM should identify situations in which activities carried out by the AIFM could constitute conflicts of interest that do or do not lead to potential risks of damage to the AIF's interests or the interests of its investors. To identify them the AIFM should take into account not only the activity of collective portfolio management but also other activities it is authorised to carry out, including activities of its delegates, sub-delegates, external valuer or counterparty. [↪ Art. 14 AIFMD](#)

(49) In line with the approach considered in Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)<sup>75</sup> for UCITS management companies and in Directive 2004/39/EC for investment firms, AIFMs should adopt procedures and measures to ensure that relevant persons engaged in different business activities that could involve conflicts of interest carry out these activities at an independent level, appropriate to the size and activities of the AIFM. [↪ Art. 14 AIFMD](#)

(50) It is essential to provide for a general framework according to which conflicts of interest, if they occur, should be managed and disclosed. The detailed steps and procedures to be followed in such situations should be clarified in the conflicts of interest policy to be established by the AIFM. [↪ Art. 14 AIFMD](#)

(51) One of the central components of a risk management system is a permanent risk management function. In the interest of consistency, its tasks and responsibilities should be similar in nature to those assigned by Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company<sup>76</sup> to the permanent risk management function in UCITS management companies. This function should have a primary role in shaping the risk policy of the AIF, risk monitoring and risk measuring in order to ensure that the risk level complies on an ongoing basis with the AIF's risk profile. The permanent risk management function should have the necessary authority, access to all relevant information and regular contacts with the senior management and the governing body of the AIFM in order to provide them with updates so that they can take prompt remedial action where needed. [↪ Art. 15 AIFMD](#)

(52) The risk management policy forms another pillar of the risk management system. That policy should be appropriately documented and should explain, in particular, measures and procedures employed to measure and manage risks, the safeguards for independent performance of the risk management function, the techniques used to manage risks and the details of the allocation of responsibilities within the AIFM for risk management and operating procedures. In order to ensure its effectiveness, the risk management policy should be reviewed at least annually by the senior management. [↪ Art. 15 AIFMD](#)

(53) As required by Directive 2011/61/EU, the function of risk management should be functionally and hierarchically separated from the operating units. It should thus be clarified that such separation should be ensured up to the governing body of the AIFM and that those in the risk management function should not carry out any conflicting tasks or be supervised by someone who is in charge of conflicting functions. [↪ Art. 15 AIFMD](#)

(54) It is essential to specify the safeguards to be employed by the AIFM in any event in order to ensure the independent performance of the risk management function, and in particular, that those performing the risk management function should not be entrusted with conflicting duties, that they should make decisions on the

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<sup>75</sup> OJ L 302, 17.11.2009, p. 32.

<sup>76</sup> OJ L 176, 10.7.2010, p. 42.

basis of the data which they can appropriately assess and that the decision making process should be capable of being reviewed. [↪ Art. 15 AIFMD](#)

(55) Although Directive 2011/61/EU does not impose any investment restrictions on AIFs, the risks incurred by each AIF cannot be managed effectively if the risk limits have not been set in advance by AIFMs. The risk limits should be in line with the risk profile of the AIF, and should be disclosed to investors in accordance with Directive 2011/61/EU. [↪ Art. 15 AIFMD](#)

(56) For consistency reasons, the requirements relating to identification, measuring and monitoring of risk are built on similar provisions of Directive 2010/43/EU. AIFMs should deal appropriately with the possible vulnerability of their risk measurement techniques and models by carrying out stress tests, back tests and scenario analysis. Where stress tests and scenario analysis reveal particular vulnerability to a given set of circumstances, AIFMs should take prompt steps and corrective actions. [↪ Art. 15 AIFMD](#)

(57) Directive 2011/61/EU requires the Commission to specify the liquidity management systems and procedures enabling the AIFM to monitor the liquidity risk of the AIF, except where the AIF is an un-leveraged closed-ended AIF, and ensure that the liquidity profile of the AIF's investments complies with its underlying obligations. Therefore, it is important to set out fundamental general requirements addressed to all AIFMs, the application of which should be adapted to the size, structure and nature of the AIFs managed by the AIFM concerned. [↪ Art. 16 AIFMD](#)

(58) AIFMs should be able to demonstrate to their competent authorities that appropriate and effective liquidity management policies and procedures are in place. That requires due consideration to be given to the nature of the AIF, including the type of underlying assets and the amount of liquidity risk to which the AIF is exposed, the scale and complexity of the AIF or the complexity of the process to liquidate or sell assets. [↪ Art. 16 AIFMD](#)

(59) Liquidity management systems and procedures can allow AIFMs to apply the tools and arrangements necessary to cope with illiquid assets and related valuation problems in order to respond to redemption requests. Such tools and arrangements may include, where allowed under national law, gates, partial redemptions, temporary borrowings, notice periods and pools of liquid assets. "Side pockets" and other mechanisms where certain assets of the AIF are subject to similar arrangements between the AIF and its investors should be regarded as "special arrangements" as they impact the specific redemption rights of investors in the AIF. The suspension of an AIF should not be considered as a special arrangement as this applies to all of the AIF's assets and all of the AIF's investors. The use of tools and special arrangements to manage liquidity should be made dependent on concrete circumstances and should vary according to the nature, scale and investment strategy of the AIF. [↪ Art. 16 AIFMD](#)

(60) The requirement to monitor the liquidity management of underlying collective investment undertakings in which AIFs invest, along with the requirements to put in place tools and arrangements to manage liquidity risk and identify, manage and monitor conflicts of interest between investors should not apply to AIFMs managing AIFs of the closed-ended type regardless of whether they are deemed to be employing leverage. The exemption from those redemption-related liquidity management requirements should reflect the differences in the general redemption terms of investors in a closed-ended AIF compared to those in an open-ended AIF. [↪ Art. 16 AIFMD](#)

(61) The use of minimum limits regarding the liquidity or illiquidity of the AIF could provide an effective monitoring tool for certain types of AIFMs. Exceeding a limit may not of itself require action by the AIFM as this depends on the facts and circumstances and the tolerances set by the AIFM. Limits could thus be used in practice in relation to monitoring average daily redemption versus fund liquidity in terms of days over the same period. That could also be used to monitor investor concentration to support stress testing scenarios. Those limits could provide triggers for continued monitoring or remedial action depending on the circumstances. [↪ Art. 16 AIFMD](#)

(62) The stress tests should, where appropriate, simulate shortage of liquidity of the assets as well as atypical redemption requests. Recent and expected future subscriptions and redemptions should be taken into consideration together with the impact of anticipated AIF performance relative to peers on such activity. The AIFM should analyse the period of time required to meet redemption requests in the stress scenarios simulated. The AIFM should also conduct stress tests on market factors such as foreign exchange movements which could materially impact the credit profile of the AIFM or that of the AIF and as a result collateral requirements. The

AIFM should account for valuation sensitivities under stressed conditions in its approach to stress testing or scenario analysis. [↪ Art. 16 AIFMD](#)

(63) The frequency with which stress tests should be conducted should depend on the nature of the AIF, the investment strategy, liquidity profile, type of investor and redemption policy of the AIF. However, it is expected that those tests will be conducted at least on an annual basis. Where stress tests suggest significantly higher than expected liquidity risk, the AIFM should act in the best interest of all AIF investors taking into consideration the liquidity profile of the AIF's assets, the level of redemption requests and where appropriate the adequacy of the liquidity management policies and procedures. [↪ Art. 16 AIFMD](#)

(64) Directive 2011/61/EU requires the Commission to specify how the investment strategy, liquidity profile and redemption policy are to be aligned. The consistency between those three elements is ensured if investors are able to redeem their investments in accordance with the AIF redemption policy, which should cover conditions for redemption in both normal and exceptional circumstances, and in a manner consistent with the fair treatment of investors. [↪ Art. 16 AIFMD](#)

(65) Directive 2011/61/EU requires cross-sectoral consistency and the removal of misalignment between the interests of originators that repackage loans into tradable securities and AIFMs that invest in those securities or other financial instruments on behalf of AIFs. To achieve that aim, the relevant provisions of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006<sup>77</sup> relating to the taking up and pursuit of the business of credit institutions that lay down the quantitative and qualitative requirements to be met by investors exposed to the credit risk of a securitisation, by originators and by sponsors have been taken into account. As the same objective of aligning the interests of the originator or sponsor and the interests of investors are pursued by this Regulation and the relevant provisions of Directive 2006/48/EC it is essential that the terminology is used consistently in both legal acts, therefore the definitions given in Directive 2006/48/EC are taken as reference. Given that the Committee of European Banking Supervisors, the predecessor of the European Banking Authority, has provided detailed Guidelines for interpreting the relevant provisions of Directive 2006/48/EC<sup>78</sup>, achieving cross-sectoral consistency requires the current provisions seeking to align interests between originators, sponsors and AIFMs to be interpreted in light of those Guidelines.

(66) It is important that transactions that re-package loans into tradable securities are not structured in such a way as to avoid the application of the requirements relating to investments in securitisation positions. Therefore, the reference to an investment in tradable securities or other financial instruments based on repackaged loans should not be interpreted strictly as a legally valid and binding transfer of title with respect to such instruments, but as an investment made in a material economic sense so that any other forms of synthetic investments should be covered and subject to the specific requirements. To avoid misunderstandings and align the language with that used in the banking legislation, the terms "assumption of exposure to the credit risk of a securitisation" should be used instead of "investment in tradable securities or other financial instruments based on repackaged loans".

(67) The requirements that need to be met by institutions acting as originators, sponsors or original lenders of a securitisation are directly imposed on them by way of Directive 2006/48/EC. It is therefore important to prescribe the corresponding duties of an AIFM assuming exposure to securitisations. Consequently, the AIFM should assume exposure to securitisations only if the originator, sponsor or original lender has explicitly disclosed to the AIFM the retention of a significant economic interest in the underlying asset, known as retention requirement. Furthermore, the AIFM should ensure that various qualitative requirements imposed on the sponsor and originator through Directive 2006/48/EC are met. In addition, the AIFM should itself meet qualitative requirements in order to have a comprehensive and thorough understanding of the securitisation investment and its underlying exposure. To achieve that, AIFMs should make their investment decision only after having conducted careful due diligence from which they should have adequate information on and knowledge of the securitisations concerned.

(68) There are circumstances in which entities meet the definition of originator or sponsor, or fulfil the role of original lender; however, another entity that neither meets the definition of sponsor or originator, nor fulfils the

<sup>77</sup> OJ L177, 30.6.2006

<sup>78</sup> Committee of European Banking Supervisors, Guidelines to Article 122a of the Capital Requirements Directive of 31 December 2010, <http://www.eba.europa.eu/cebs/media/Publications/Standards%20and%20Guidelines/2010/Application%20of%20Art.%20122a%20of%20the%20CRD/Guidelines.pdf>.

role of original lender — but whose interests are most optimally aligned with those of investors — may seek to fulfil the retention requirement. For the sake of legal certainty, such other entity should not be required to fulfil the retention requirement if the retention requirement is fulfilled by the originator, sponsor or original lender.

(69) In case of a breach of the retention requirement or the qualitative requirements the AIFM should consider taking some corrective action, such as hedging, selling or reducing the exposure or approaching the party in breach of the retention requirement with a view to reinstating compliance. Such corrective action should always be in the interest of the investors and should not involve any direct obligation to sell the assets immediately after the breach has become apparent, therefore avoiding a "fire sale". The AIFM should take the breach into account when considering making another investment in a further transaction in which the party in breach of the requirement is involved.

(70) In order to comply with the requirements of Directive 2011/61/EU to specify internal procedures and organisational arrangements, which each AIFM should apply, AIFMs should be required to establish a well-documented organisational structure that clearly assigns responsibilities, defines control mechanisms and ensures a good flow of information between all parties involved. AIFMs should also establish systems to safeguard information and ensure business continuity. When establishing those procedures and structures, AIFMs should take into account the principle of proportionality which allows procedures, mechanisms and organisational structure to be calibrated to the nature, scale and complexity of the AIFM's business and to the nature and range of activities carried out in the course of its business. [↪ Art. 18 AIFMD](#)

(71) Disclosure to investors is of paramount importance to protect those investors, so AIFMs should implement appropriate policies and procedures to ensure that the redemption terms applicable to a particular AIF are disclosed in sufficient detail and with sufficient prominence to investors before they invest and in the event of material changes. That could include disclosure of notice periods in relation to redemptions, details of lock-up periods, an indication of circumstances in which normal redemption mechanisms might not apply or may be suspended, and details of any measures that may be considered by the governing body, such as gates, side pocketing, as they have an impact on the specific redemption rights of investors in the particular AIF. [↪ Art. 18 AIFMD](#) | [↪ Art. 23 AIFMD](#)

(72) To ensure that the relevant activities are performed properly, AIFMs, in particular, should use suitable electronic systems in order to fulfil the recording requirements with regard to portfolio transactions or subscription and redemption orders and establish, implement and maintain accounting policies and procedures to ensure that the calculation of the net asset value is carried out as required in Directive 2011/61/EU and this Regulation. [↪ Art. 18 AIFMD](#)

(73) In order to ensure consistency with the requirements imposed on UCITS managers by Directive 2009/65/EC, the governing body, the senior management, or, where relevant the supervisory function of the AIFM should be entrusted with similar types of tasks to which adequate responsibilities should be allocated. However, such allocation of responsibilities should be consistent with the role and responsibilities of the governing body, the senior management and the supervisory function under applicable national law. Senior management may include some or all of the members of the governing body. [↪ Art. 18 AIFMD](#)

(74) The requirement to establish a permanent and effective compliance function should always be fulfilled by the AIFM, irrespective of the size and complexity of its business. However, details of the technical and personnel organisation of the compliance function should be calibrated to the nature, scale and complexity of the AIFM's business and the nature and range of its services and activities. The AIFM should not have to establish an independent compliance unit if such a requirement would be disproportionate in view of the size of the AIFM or the nature, scale and complexity of its business. [↪ Art. 18 AIFMD](#)

(75) Valuation standards differ across jurisdictions and asset classes. This Regulation should supplement the common general rules and establish benchmarks for AIFMs when developing and implementing appropriate and consistent policies and procedures for the proper and independent valuation of the assets of AIFs. The policies and procedures should describe the obligations, roles and responsibilities pertaining to all parties involved in the valuation, including external valuers. [↪ Art. 19 AIFMD](#)

(76) The value of assets can be determined, in different ways, such as by reference to observable prices in an active market or by an estimate using other valuation methodologies according to national law, the AIF rules or its instruments of incorporation. As the value of individual assets and liabilities can be determined by different

methodologies and can be taken from different sources, the AIFM should determine and describe the valuation methodologies it uses. [↪ Art. 19 AIFMD](#)

(77) Where a model is used for valuing assets, the valuation procedures and policies should indicate the main features of the model. Before it is used, that model should be subject to a validation process conducted by an internal or external individual who was not involved in the process of building the model. A person should be considered qualified to conduct a validation process in respect of the model used to value assets if he is in possession of adequate competence and experience in the valuation of assets using such models; such person could be an auditor. [↪ Art. 19 AIFMD](#)

(78) Since AIFs operate in a dynamic environment where investment strategies may change over time, valuation policies and procedures should be reviewed at least yearly and in any event before AIFs engage with a new investment strategy or a new type of asset. Any change in the valuation policies and procedures, including the valuation methodologies, should follow a predetermined process. [↪ Art. 19 AIFMD](#)

(79) The AIFM has to ensure that the individual assets of an AIF have been valued properly, in line with the valuation policies and procedures. For some assets, especially complex and illiquid financial instruments, there is a higher risk of inappropriate valuation. To address this type of situation, the AIFM should put in place sufficient controls to ensure that an appropriate degree of objectivity can be attached to the value of the AIF's assets. [↪ Art. 19 AIFMD](#)

(80) Calculation of the net asset value per unit or share is subject to national law and, as the case may be, or the fund rules or instruments of incorporation. This Regulation covers only the procedure for the calculation, and not the methodology of the calculation. The AIFM may itself carry out the calculation of the net asset value per unit or share as part of the administration functions it performs for the AIF. Alternatively, a third party may be appointed to perform administration, including calculation of the net asset value. A third party that carries out the calculation of the net asset value for an AIF should not be considered an external valuer for the purposes of Directive 2011/61/EU, as long as it does not provide valuations for individual assets, including those requiring subjective judgement, but incorporates into the calculation process values which are obtained from the AIFM, pricing sources or an external valuer. [↪ Art. 19 AIFMD](#) | [↪ FAQ AIFM published by CSSF \(Appendix XV\) Section 15 Valuation Question 15.b\)](#)

(81) There are valuation procedures that can be performed on a daily basis such as the valuation of financial instruments, but there are also valuation procedures that cannot be carried out with the same frequency as issues, subscriptions, redemptions and cancellations take place, for instance the valuation of real estate. The frequency of valuation of the assets held by an open-ended fund should take into account the differences in the valuation procedures with respect to the types of assets held by the AIF. [↪ Art. 19 AIFMD](#)

(82) The strict requirements and limitations which have to be complied with when an AIFM intends to delegate the task of carrying out functions are set out in Directive 2011/61/EU. The AIFM remains at all times fully responsible for the proper performance of the delegated tasks and their compliance with Directive 2011/61/EU and its implementing measures. The AIFM should therefore ensure that the delegate performs and applies the quality standards which would be applied by the AIFM itself. Also, if necessary to ensure that delegated functions are performed to a consistently high standard, the AIFM has to be able to terminate the delegation and the delegation arrangement should therefore confer flexible termination rights on the AIFM. The delegation limitations and requirements should apply to the management functions set out in Annex I of Directive 2011/61/EU, whereas supporting tasks like administrative or technical functions assisting the management tasks such as logistical support in the form of cleaning, catering and procurement of basic services or products, should not be deemed to constitute delegation of AIFM functions. Other examples of technical or administrative functions are buying standard software "off-the-shelf" and relying on software providers for ad hoc operational assistance in relation to off-the-shelf systems or providing human resources support such as sourcing of temporary employees or processing of payroll. [↪ Art. 20 AIFMD](#)

(83) To ensure a high level of investor protection in addition to the increase of the efficiency of the conduct of the business of the AIFM the entire delegation should be based on objective reasons. When assessing these reasons, competent authorities should consider the structure of the delegation and its impact on the structure of the AIFM and the interaction of the delegated activities with the activities remaining with the AIFM. [↪ Art. 20 AIFMD](#)

(84) In order to assess whether the person who effectively conducts the business of the delegate is of sufficiently good repute, the person's conduct of business should be verified as well as whether he has committed offences regarding financial activities. Any other relevant information concerning personal qualities which might adversely affect the person's conduct of business such as doubts in relation to his honesty and integrity should be considered when assessing the requirement of sufficient good repute. [↪ Art. 20 AIFMD](#)

(85) Investment companies authorised under Directive 2009/65/EC are not deemed to be undertakings which are authorised or registered for the purposes of asset management and subject to supervision because they are not allowed to engage in activities other than collective portfolio management under that Directive. Similarly, an internally managed AIF should not be deemed to be classified as such an undertaking because it should not engage in activities other than the internal management of the AIF. [↪ Art. 20 AIFMD](#)

(86) Where the delegation concerns portfolio management or risk management, which are the core business of the AIFM and therefore of high relevance with respect to investor protection and systemic risk, in addition to the requirements of Article 20(1)(c) of Directive 2011/61/EU the competent authority of the home Member State of the AIFM and the supervisory authority of the third country undertaking should have concluded a cooperation arrangement based on a written agreement. The arrangement should be in place prior to the delegation. The details of this agreement should take international standards into consideration. [↪ Art. 20 AIFMD](#)

(87) Written arrangements should confer on competent authorities the right to carry out on-site inspections, including where they request the third-country supervisory authority of the undertaking, to which functions were delegated, to carry out on-site inspections and where they request permission from the third-country supervisory authority to carry out the inspection themselves, or to accompany staff of the third-country supervisory authority in order to assist them in carrying out on-site inspections. [↪ Art. 20 AIFMD](#)

(88) Based on the obligations laid down in Directive 2011/61/EU, AIFMs should always act in the best interests of the AIFs or the investors in the AIFs they manage. Therefore, delegation should be admissible only if it does not prevent the AIFM from acting or managing the AIF in the best interests of the investors. [↪ Art. 20 AIFMD](#)

(89) To maintain a high standard of investor protection possible conflicts of interest have to be taken into account for any delegation. Several criteria should set benchmarks for identifying situations which would result in a material conflict of interest. Those criteria should be understood as non-exhaustive and meaning that non-material conflicts of interest are also relevant for the purposes of Directive 2011/61/EU. Thus, the carrying out of compliance or audit functions should be deemed as conflicting with portfolio management tasks, whereas market making or underwriting should be understood as conflicting with portfolio or risk management. That obligation is without prejudice to the obligation of the delegate to separate functionally and hierarchically the tasks of portfolio and risk management from each other according to the provisions of Article 15 of Directive 2011/61/EU. [↪ Art. 15 AIFMD](#) | [↪ Art. 18 AIFMD](#) | [↪ Art. 20 AIFMD](#)

(90) The requirements applying to the delegation of the task of carrying out functions on behalf of the AIFM should apply *mutatis mutandis* where the delegate sub-delegates any of the functions delegated to it and also in the case of any further sub-delegation. [↪ Art. 20 AIFMD](#)

(91) To ensure that in any event the AIFM performs investment management functions, the AIFM should not 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 letterbox entity. The AIFM should at all times keep sufficient resources to supervise the delegated functions efficiently. The AIFM has to perform itself investment management functions, to have the necessary expertise and resources, to keep the power to take decisions which fall under senior management responsibility and to perform senior management functions, which could include implementation of the general investment policy and investment strategies. [↪ Art. 20 AIFMD](#)

(92) The assessment of a delegation structure is a complex exercise that has to be based on a series of criteria in order for the competent authorities to form their judgement. The combination is necessary to take into account the variety of fund structures and investment strategies across the Union. ESMA may develop guidelines to ensure a consistent assessment of delegation structures across the Union. [↪ Art. 20 AIFMD](#)

(93) The Commission shall monitor how the criteria are applied and their impact on the markets. The Commission shall review the situation after two years and, should it prove necessary, shall take appropriate measures to further specify the conditions under which the AIFM shall be deemed to have delegated its functions to such an

extent that it becomes a letter box entity and can no longer be considered to be the manager of the AIF. [↪ Art. 20 AIFMD](#)

(94) Directive 2011/61/EU lays down an extensive set of requirements regarding the depositary of an AIF in order to ensure a high standard of investor protection. The respective concrete rights and obligations of the depositary, the AIFM and, as the case may be, or the AIF and third parties should therefore be set out clearly. The written contract should comprise all details necessary for the appropriate safe-keeping of all the AIF's assets by the depositary or a third party to whom safe-keeping functions are delegated in accordance with Directive 2011/61/EU and for the depositary to properly fulfil its oversight and control functions. In order to allow the depositary to assess and monitor custody risk, the contract should provide sufficient detail on the categories of assets in which the AIF may invest and cover the geographical regions in which the AIF plans to invest. The contract should also contain details of an escalation procedure. Thus, the depositary should alert the AIFM to any material risk identified in a particular market's settlement system. With respect to the termination of the contract, it should reflect the fact that the termination of the contract is the depositary's last resort if it is not satisfied that the assets are sufficiently protected. It should also prevent moral hazard whereby the AIFM would make investment decisions irrespective of custody risks on the basis that the depositary would be liable in most cases. In order to maintain a high standard of investor protection, the requirement laying down the details for the monitoring of third parties should be applied in relation to the whole custody chain. [↪ Art. 21 AIFMD](#)

(95) A depositary established in a third country should be subject to public prudential regulation and to prudential supervision performed by a supervisory authority which is competent for ongoing supervision, undertaking investigations and imposing sanctions. Where that supervision of the depositary involves multiple supervisory authorities, one supervisory authority should act as the contact point for the purposes of Directive 2011/61/EU and all delegated and implementing measures adopted pursuant to it. [↪ Art. 21 AIFMD](#)

(96) The assessment of the law of the third country according to Article 21(6) last sub-paragraph of Directive 2011/61/EU should be made by the European Commission by comparing the authorisation criteria and the ongoing operating conditions applicable to the depositary in the third country with the corresponding requirements applicable under Union law to credit institutions and, as the case may be, or to investment firms for access to the depositary business and performance of the depositary functions, with a view to ascertaining whether the local criteria have the same effect as those established under Union law. A depositary which is subject to prudential oversight and licensed in the third country under a local category other than a credit institution or an investment firm may be assessed by the European Commission with a view to ascertaining whether the relevant provisions of the law of the third country have the same effect as those established by the law of the Union for credit institutions and, as the case may be, or for investment firms. [↪ Art. 21 AIFMD](#)

(97) In order for the depositary to have a clear overview of all inflows and outflows of cash of the AIF in all instances, the AIFM should ensure that the depositary receives without undue delay accurate information related to all cash flows, including from any third party with which an AIF's cash account is opened. [↪ Art. 21 AIFMD](#)

(98) In order for the AIF's cash flows to be properly monitored the depositary's obligation consists of making sure that there are procedures in place and effectively implemented to appropriately monitor the AIF's cash flows and that these procedures are periodically reviewed. In particular, the depositary should look into the reconciliation procedure to satisfy itself that the procedure is suitable for the AIF and performed at appropriate intervals taking into account the nature, scale and complexity of the AIF. Such a procedure should for example compare one by one each cash flow as reported in the bank account statements with the cash flows recorded in the AIF's accounts. Where reconciliations are performed on a daily basis as for most open-ended AIFs, the depositary should perform its reconciliation also on a daily basis. The depositary should in particular monitor the discrepancies highlighted by the reconciliation procedures and the corrective measures taken in order to notify without undue delay the AIFM of any anomaly which has not been remedied and to conduct a full review of the reconciliation procedures. Such a review should be performed at least once a year. The depositary should also identify on a timely basis significant cash flows and in particular those which could be inconsistent with the AIF's operations, such as changes in positions in AIF's assets or subscriptions and redemptions, and it should receive periodically cash account statements and check the consistency of its own records of cash positions with those of the AIFM. The depositary should keep its record up to date in accordance with Article 21(8)(b) of Directive 2011/61/EU. [↪ Art. 21 AIFMD](#)

(99) The depositary has to 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 booked in one or more cash accounts in accordance with

Directive 2011/61/EU. The AIFM should therefore ensure that the depositary is provided with the relevant information it needs to properly monitor the receipt of investors' payments. The AIFM has to ensure that the depositary obtains this information without undue delay when the third party receives an order to redeem or issue shares or units of an AIF. The information should therefore be transmitted at the close of the business day from the entity which is responsible for the subscription and redemption of shares or units of an AIF to the depositary in order to avoid any misuse of investors' payments. [↪ Art. 21 AIFMD](#)

(100) Depending on the type of assets to be safe-kept, assets are either to be held in custody, as with financial instruments which can be registered in a financial instruments account, or which can be physically delivered to the depositary in accordance with Directive 2011/61/EU, or to be subject to ownership verification and record-keeping. The depositary should hold in custody all financial instruments of the AIF or of the AIFM acting on behalf of the AIF that could be registered or held in an account directly or indirectly in the name of the depositary or a third party to whom custody functions are delegated, notably at the level of the central securities depositary. In addition to these situations those financial instruments are to be held in custody that are only directly registered with the issuer itself or its agent in the name of the depositary or a third party to whom custody functions are delegated. Those financial instruments that in accordance with applicable national law are only registered in the name of the AIF with the issuer or its agent, such as investments in non-listed companies by private equity and venture capital funds, should not be held in custody. All financial instruments which could be physically delivered to the depositary should be held in custody. Provided that the conditions on which financial instruments are to be held in custody are fulfilled, financial instruments which are provided as collateral to a third party or are provided by a third party for the benefit of the AIF have to be held in custody too by the depositary itself or by a third party to whom custody functions are delegated as long as they are owned by the AIF or the AIFM acting on behalf of the AIF. Also, financial instruments owned by the AIF or by the AIFM on behalf of the AIF, for which the AIF, or the AIFM on behalf of the AIF, has given its consent to re-use by the depositary, remain in custody as long as the right of re-use has not been exercised. [↪ Art. 21.8\(a\) AIFMD](#)

(101) Financial instruments which are held in custody should be subject to due care and protection at all times. To ensure that the custody risk is properly assessed, in exercising due care, the depositary should in particular know which third parties constitute the custody chain, ensure that the due-diligence and segregation obligations have been maintained throughout the whole custody chain, ensure that it has an appropriate right of access to the books and records of third parties to whom custody functions are delegated, ensure compliance with these requirements, document all of these duties and make these documents available to and report to the AIFM. [↪ Art. 21.8\(a\) AIFMD](#)

(102) In order to avoid circumvention of the requirements of Directive 2011/61/EU, the depositary should apply the safe-keeping duties to the underlying assets of financial structures and, as the case may be, or legal structures controlled directly or indirectly by the AIF or by the AIFM acting on behalf of the AIF. That look-through provision should not apply to funds of funds or master-feeder structures provided they have a depositary which safe-keeps the fund's assets appropriately. [↪ Art. 21.8\(a\) AIFMD](#) | [↪ Art. 21.8\(b\) AIFMD](#)

(103) The depositary should at all times have a comprehensive overview of all assets that are not financial instruments to be held in custody. Those assets would be subject to the obligation to verify the ownership and maintain a record under Directive 2011/61/EU. Examples of such assets are physical assets which do not qualify as financial instruments under Directive 2011/61/EU or could not be physically delivered to the depositary, financial contracts such as derivatives, cash deposits or investments in privately held companies and interests in partnerships. [↪ Art. 21.8\(b\) AIFMD](#) | [↪ Appendix XIV \(Q&A published by ESMA Section VI Question 5 Depositaries\)](#)

(104) To achieve a sufficient degree of certainty that the AIF or the AIFM acting on behalf of the AIF is indeed the owner of the assets, the depositary should make sure it receives all information it deems necessary to be satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership right over the asset. That information could be a copy of an official document evidencing that the AIF or the AIFM acting on behalf of the AIF is the owner of the asset or any formal and reliable evidence that the depositary considers appropriate. If necessary, the depositary should request additional evidence from the AIF or the AIFM or as the case may be from a third party. [↪ Art. 21.8\(b\) AIFMD](#)

(105) The depositary should keep a record of all assets for which it is satisfied that the AIF holds ownership. It may set up a procedure to receive information from third parties, whereby procedures which ensure that the assets could not be transferred without the depositary or the third party to whom safe-keeping functions are

delegated having been informed of such transactions may be feasible in the case of AIFs with infrequent transactions and, as the case may be, or transactions which are subject to pre-settlement negotiation. The requirement to have access to documentary evidence of each transaction from a third party could be appropriate for AIFs with more frequent portfolio trading, such as investments in listed derivatives. [↪ Art. 21.8\(b\) AIFMD](#)

(106) In order to ensure that the depositary is able to conduct its duties, it is necessary to clarify the tasks provided for in Article 21(9) of Directive 2011/61/EU, and in particular the second layer controls to be undertaken by the depositary. Such tasks should not prevent the depositary from conducting ex-ante verifications where it deems appropriate, and in agreement with the AIFM. In order to ensure that it is able to conduct its duties, the depositary should establish its own escalation procedure to address situations where irregularities have been detected. That procedure should ensure the notification of competent authorities of any material breaches. The oversight responsibilities of the depositary towards third parties specified by this Regulation are without prejudice to the responsibilities incumbent on the AIFM under Directive 2011/61/EU. [↪ Art. 21 AIFMD](#)

(107) The depositary should check the consistency between the number of units or shares issued and the subscription proceeds received. Moreover, to ensure that payments made by investors upon subscription have been received, the depositary should further ensure that another reconciliation is conducted between the subscription orders and the subscription proceeds. The same reconciliation should be performed with regard to redemption orders. The depositary should also verify that the number of units or shares in the AIF's accounts matches the number of outstanding units or shares in the AIF's register. The depositary should adapt its procedures accordingly, taking into account the frequency of subscriptions and redemptions. [↪ Art. 21 AIFMD](#)

(108) The depositary should take all necessary steps to ensure that appropriate valuation policies and procedures for the assets of the AIF are effectively implemented, through the performance of sample checks or by comparing the consistency of the change in the NAV calculation over time with that of a benchmark. When setting up its procedures, the depositary should have a clear understanding of the valuation methodologies used by the AIFM or the external valuer to value the AIF's assets. The frequency of such checks should be consistent with the frequency of the AIF's asset valuation. [↪ Art. 21 AIFMD](#)

(109) By virtue of its obligation of oversight under Directive 2011/61/EU, the depositary should set up a procedure to verify on an ex-post basis the AIF's compliance with applicable law and regulations and its rules and instruments of incorporation. This covers areas such as checking that the AIF's investments are consistent with its investment strategies as described in the AIF's rules and offering documents and ensuring that the AIF does not breach its investment restrictions, if any. The depositary should monitor the AIF's transactions and investigate any unusual transactions. If the limits or restrictions set out in the applicable national law or regulations or the AIF rules and instruments of incorporation are breached, the depositary should, for example, obtain an instruction from the AIFM to reverse the transaction that was in breach at its own costs. This Regulation does not prevent the depositary from adopting an ex ante approach where it deems it appropriate and in agreement with the AIFM. [↪ Art. 21 AIFMD](#)

(110) The depositary should ensure that the income is calculated accurately in accordance with Directive 2011/61/EU. In order to achieve this the depositary has to ensure that the income distribution is appropriate and, where it identifies an error, that the AIFM takes appropriate remedial action. Once the depositary has ensured this, it should verify the completeness and accuracy of the income distribution and in particular of the dividend payments. [↪ Art. 21 AIFMD](#)

(111) When delegating safe-keeping functions related to other assets according to Directive 2011/61/EU, delegation is likely to concern administrative functions in most cases. Where the depositary delegates record-keeping functions, it would therefore be required to implement and apply an appropriate and documented procedure to ensure that the delegate complies with the requirements of Article 21(11)(d) of Directive 2011/61/EU at all times. In order to ensure a sufficient level of protection of assets, it is necessary to set out certain principles that should be applied in relation to the delegation of safekeeping. For the delegation of custody duties it is important to set out some key principles which have to be effectively applied throughout the delegation process. Those principles should not be taken to be exhaustive, either in terms of setting out all details of the depositary's exercise of due skill care and diligence, or in terms of setting out all the steps that a depositary should take in relation to these principles themselves. The obligation to monitor on an ongoing basis the third party, to whom safekeeping functions have been delegated should consist of verifying that this third party correctly performs all the delegated functions and complies with the delegation contract. The third party should act honestly, in good faith with a view to the best interests of the AIF and its investors, in compliance with

regulatory and supervisory requirements, and should exercise care, diligence and skill that are normally expected from a highly prudent operator of that financial profession in comparable circumstances. The depositary should review *inter alia* elements assessed during the selection and appointment process and put these elements into perspective by comparing them with the development of the market. The form of the regular review should reflect circumstances, so that the depositary is in a position to appropriately assess the risks related to the decision to entrust assets to the third party. The frequency of the review should be adapted so as to always remain consistent with market conditions and associated risks. For the depositary to effectively respond to a possible insolvency of the third party, it should undertake contingency planning, including the design of alternative strategies and the possible selection of alternative providers as may be relevant. While such measures may reduce the custody risk faced by a depositary, they do not alter the obligation to return the financial instruments or pay the corresponding amount should they be lost, which depends on whether or not the requirements of Article 21(12) of Directive 2011/61/EU are fulfilled. [↪ Art. 21 AIFMD](#)

(112) When delegating safe-keeping functions, the depositary should ensure that the requirements of Article 21(11)(d)(iii) of Directive 2011/61/EU are fulfilled and that the assets of the AIF clients of the depositary are properly segregated. This obligation should particularly ensure that assets of the AIF are not lost due to insolvency of the third party to whom safekeeping functions are delegated. In order to minimise that risk in countries where the effects of segregation are not recognised by insolvency law, the depositary should take further steps. The depositary could make a disclosure to the AIF and the AIFM acting on behalf of the AIF so that such aspects of the custody risk are properly taken into account in the investment decision or take such measures as are possible in the local jurisdictions to make the assets as insolvency-proof as possible according to local law. Furthermore, the depositary could prohibit temporary deficits in client assets, use buffers or put in place arrangements prohibiting the use of a debit balance for one client to offset a credit balance for another. While such measures may reduce the custody risk faced by a depositary when delegating custody functions, they do not alter the obligation to return the financial instruments or pay the corresponding amount where these are lost, which depends on whether or not the requirements of Directive 2011/61/EU are fulfilled. [↪ Art. 21 AIFMD](#)

(113) The depositary's liability under Article 21(12) second subparagraph of Directive 2011/61/EU is triggered in the event of the loss of a financial instrument held in custody by the depositary itself or by a third party to whom the custody has been delegated, provided that the depositary does not demonstrate that the loss results from an external event beyond reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary. That loss should be distinguished from an investment loss for investors resulting from a decrease in the value of assets as a consequence of an investment decision. [↪ Art. 21 AIFMD](#)

(114) To be ascertained as such, it is important that the loss is definitive, and there is no prospect of recovering the financial asset. Thus, situations where a financial instrument is only temporarily unavailable or frozen should not count as losses within the meaning of Article 21(12) of Directive 2011/61/EU. In contrast, three types of situations can be identified where the loss should be deemed to be definitive: where the financial instrument no longer exists or never did exist; where the financial instrument exists but the AIF has definitively lost its right of ownership over it; and where the AIF has the ownership right but can no longer transfer title of or create limited property rights in the financial instrument on a permanent basis. [↪ Art. 21 AIFMD](#)

(115) A financial instrument is deemed no longer to exist for instance when it has disappeared following an accounting error that cannot be corrected, or if it never existed, when the AIF's ownership was registered on the basis of falsified documents. Situations where the loss of financial instruments is caused by fraudulent conduct should be deemed a loss. [↪ Art. 21 AIFMD](#)

(116) No loss can be ascertained when the financial instrument has been substituted by or converted into another financial instrument, for example in situations where shares are cancelled and replaced by the issue of new shares in a company reorganisation. An AIF should not be considered as permanently deprived of its right of ownership over the financial instrument if the AIF or the AIFM acting on behalf of the AIF has legitimately transferred ownership to a third party. Where there is a distinction between the legal ownership and the beneficial ownership of the assets, the definition of loss should refer to loss of the beneficial ownership right. [↪ Art. 21 AIFMD](#)

(117) Only in the case of an external event beyond the reasonable control of the depositary, the consequences of which are unavoidable despite all reasonable efforts to the contrary, could the depositary avoid to be held

liable under Article 21(12) of Directive 2011/61/EU. The cumulative fulfilment of these conditions should be proven by the depositary in order for it to be discharged of liability. [↪ Art. 21 AIFMD](#)

(118) It should first be determined whether the event which led to the loss was external. The depositary's liability should not be affected by delegation and therefore an event should be deemed external if it does not occur as a result of any act or omission of the depositary or the third party to whom the custody of financial instruments held in custody has been delegated. Then, it should be assessed whether the event is beyond the reasonable control, by verifying that there was nothing a prudent depositary could reasonably have done to prevent the occurrence of the event. Under these steps both natural events and acts of a public authority may be considered as external events beyond reasonable control. Thus, in the context of the insolvency of a third party to whom custody was delegated, the law of the country where the instruments are held in custody, which does not recognise the effects of an appropriately implemented segregation, is deemed to be an external event beyond reasonable control. In contrast, a loss caused by failure to apply the segregation requirements laid down in Article 21(11) (d) (iii) of Directive 2011/61/EU or the loss of assets because of disruption in the third party's activity in relation to its insolvency cannot be seen as being external events beyond reasonable control. [↪ Art. 21 AIFMD](#)

(119) Finally, the depositary should prove that the loss could not have been avoided despite all reasonable efforts to the contrary. In this context, the depositary should inform the AIFM and take appropriate action depending on the circumstances. For instance, in a situation where the depositary believes the only appropriate action is to dispose of the financial instruments, the depositary should duly inform the AIFM, which must in turn instruct the depositary in writing whether to continue holding the financial instruments or to dispose of them. Any instruction to the depositary to continue holding the assets should be reported to the AIF's investors without undue delay. The AIFM or the AIF should give due consideration to the depositary's recommendations. Depending on the circumstances, if the depositary remains concerned that the standard of protection of the financial instrument is not sufficient, despite repeated warnings, it should consider further possible action, such as termination of the contract provided the AIF is given a period of time to find another depositary in accordance with national law. [↪ Art. 21 AIFMD](#)

(120) To ensure the same standard of investor protection, the same considerations should also apply to the delegate to whom a depositary has contractually transferred its liability. Therefore, in order to be discharged of liability under Article 21(12) of Directive 2011/61/EU the delegate should prove that it fulfils cumulatively the same conditions. [↪ Art. 21 AIFMD](#)

(121) A depositary is allowed under certain circumstances to discharge itself of liability for the loss of financial instruments held in custody by a third party to which custody was delegated. For such liability discharge to be permitted there must be an objective reason for contracting such discharge that is accepted by both the depositary and the AIF or the AIFM acting on behalf of the AIF. An objective reason should be established for each discharge of liability taking into account the concrete circumstances in which custody has been delegated. [↪ Art. 21 AIFMD](#)

(122) When considering an objective reason, the right balance should be established to ensure that the contractual discharge can be effectively relied upon if needed and that sufficient safeguards are put in place to avoid any misuse of the contractual discharge of liability by the depositary. The contractual discharge of liability should under no circumstances be used to circumvent the depositary's liability requirements under Directive 2011/61/EU. The depositary should demonstrate that it was forced by the specific circumstances to delegate custody to a third party. Contracting a discharge should be always in the best interest of the AIF or its investors, and the AIF or the AIFM acting on behalf of the AIF should make it explicit that they act in such best interest. Examples of scenarios should indicate the situations where a depositary may be considered as not having other options but to delegate custody to third parties. [↪ Art. 21 AIFMD](#)

(123) It is important for competent authorities to obtain appropriate and sufficient information in order to supervise activities of AIFMs and the risks related to them appropriately and consistently. Also, since the activities of AIFMs could have effects across borders and on the financial markets, competent authorities should monitor AIFMs and AIFs closely in order to take appropriate action to avoid the build-up of systemic risks. The increased transparency and consistency through provisions on reporting and disclosing relevant information as outlined in the implementing measures should make it possible for competent authorities to detect and respond to risks in the financial markets. [↪ Art. 24 AIFMD](#)

(124) It is essential for investors to obtain the minimum information necessary with respect to particular AIFMs and AIFs and their structure in order to be able to take the right investment decision tailored to their needs and risk appetite. That information should be clear, reliable, readily understandable and clearly presented, whereas the usefulness of the information is enhanced when it is comparable from AIFM to AIFM and AIF to AIF and from one period to the next. An AIFM should not engage in activities which might be detrimental to the objective understanding and practical use of the information to investors prior to its disclosure such as window dressing.

[↪ Art. 23 AIFMD](#)

(125) It is necessary to set out a framework which provides for minimum standards with respect to annual reporting requirements, including key elements and a non-exhaustive list of items. Material changes in the information as referred to in Article 22(2) (d) of Directive 2011/61/EU should be disclosed in the annual report within the financial statements. In addition to the non-exhaustive list of underlying line items additional line items, headings and sub totals may be included where the presentation of these items is relevant for the understanding of an AIF's overall financial position or performance. Items of a dissimilar nature or function could be aggregated provided such items are individually not materially relevant. Those items could be aggregated under "other category" such as "other assets" or "other liabilities". Where line items do not apply to a particular AIF at all, they do not need to be presented. Regardless of the accounting standards followed in accordance with Directive 2011/61/EU, all assets should be valued at least once a year. The balance sheet or the statement of assets and liabilities under Directive 2011/61/EU should include, inter alia, cash and cash equivalents. Thus, cash equivalents should be considered highly liquid investments for the purpose of calculating the exposure of an AIF.

[↪ Art. 22 AIFMD](#)

(126) With respect to the content and format of the report on activities for the financial year which has to be part of the annual report under Directive 2011/61/EU, the report should include a fair and balanced review of the activities of the AIF with a description of the principal risks and investments or economic uncertainties that it faces. That disclosure should not result in the publication of proprietary information of the AIF which would be to the detriment of the AIF and its investors. Therefore, if the publication of particular proprietary information would have such effect, it could be aggregated to a level that would avoid the detrimental effect and would not need to capture, for example, the performance or statistics of an individual portfolio company or investment that could lead to the disclosure of proprietary information of the AIF. This information should form part of the management report insofar as this is usually presented alongside the financial statements. [↪ Art. 22 AIFMD](#)

(127) With respect to the content and format of the disclosure of remuneration where information is presented at the level of the AIFM, further information should be provided by disclosing an allocation or breakdown of the total remuneration as it relates to the relevant AIF. This could be achieved through disclosure of the total AIFM remuneration data split into fixed and variable components, a statement that these data relate to the entire AIFM, and not to the AIF, the number of AIFs and UCITS funds managed by the AIFM and the total assets under management of such AIFs and UCITS with an overview of the remuneration policy and a reference to where the full remuneration policy of the AIFM is available at the request of investors. [↪ Art. 13 AIFMD](#) | [↪ Art. 22 AIFMD](#)

Further details may be provided by disclosure of the total variable remuneration funded by the AIF through payment by it of performance fees or carried interest, as the case may be. In addition to the remuneration disclosure, it may be appropriate for AIFMs to provide information relating to the financial and non-financial criteria of the remuneration policies and practices for relevant categories of staff to enable investors to assess existing incentives created.

(128) Where the AIF issues units, transfers of any assets to side pockets should be calculated, at the time of transfer, based on the number of units allocated on transfer of assets multiplied by the price per unit. The valuation basis should be clearly disclosed in all circumstances and include the date at which the valuation was performed. [↪ Art. 23 AIFMD](#)

(129) In order to manage liquidity AIFMs should be permitted to enter into borrowing arrangements on behalf of AIFs they manage. Those arrangements can be short term or more permanent. In the latter case it is more likely that such an arrangement would be a special arrangement for the purpose of managing illiquid assets. [↪ Art. 16 AIFMD](#) | [↪ Art. 23 AIFMD](#)

(130) In line with the principle of differentiation, and recognising the diversity of types of AIFs, the disclosure to investors required of an AIFM should vary according to the type of AIF and would depend on other factors such as investment strategy and the portfolio composition. [↪ Art. 23 AIFMD](#)

(131) Directive 2011/61/EU requires AIFMs to provide certain information on a regular basis to the competent authority of their home Member State for each EU AIFs they manage and for each of the AIF they market in the Union. It is therefore important to further specify the information to be provided and the frequency of the reporting which depend on the value of assets under management in portfolios of AIFs managed by a given AIFM. Pro-forma reporting templates should be provided for and should be completed by the AIFM for the AIFs it manages. Where an entity which is authorised as an AIFM markets AIFs which are managed by other AIFMs, it does not act as the manager of those AIFs but as an intermediary as any investment firm covered by Directive 2004/39/EC. It therefore should not have to report for these AIFs, as this would lead to double- or multiple reporting. This reporting requirement should nevertheless apply to non-EU AIFMs that manage AIFs which are marketed in the Union. [↪ Art. 24 AIFMD](#)

(132) The threshold provided in this Regulation triggers only reporting requirements laid down in Article 24(4) of Directive 2011/61/EU. An AIF with a leverage ratio calculated in accordance with the commitment method of less than three times its net asset value would not be considered as employing leverage on a substantial basis.

However, competent authorities may request additional information where necessary for the effective monitoring of systemic risks. Setting a reporting threshold also ensures that information relating to the build-up of systemic risk is collected throughout the Union in a consistent way and provides certainty to AIFMs. [↪ Art. 24 AIFMD](#)

(133) A competent authority's supervisory powers under Article 25(3) of Directive 2011/61/EU are exercised within the new supervisory system, forming part of what are ongoing supervisory processes and systemic risk assessments of AIFMs by competent authorities and the European supervisory authorities, with reference to the stability and integrity of the financial system. Competent authorities should make appropriate use of the information they receive and should impose limits to leverage employed by an AIFM or other restrictions on the management of the AIF with respect to the AIFs managed where they deem this necessary in order to ensure the stability and integrity of the financial system. The assessment of systemic risk is likely to vary depending on the economic environment, whereby any AIFM, with respect to the AIFs it manages, has the potential to be systemically relevant. It is therefore a basic requirement that competent authorities obtain all the information necessary to assess those situations appropriately in order to avoid the build-up of systemic risk. Competent authorities should then assess the information thoroughly and take appropriate measures. [↪ Art. 25 AIFMD](#)

(134) To allow EU AIFMs to manage and market non-EU AIFs and non-EU AIFMs to manage and market AIFs in the Union, Directive 2011/61/EU requires appropriate cooperation arrangements to be put in place with the relevant supervisory authorities of the third country where the non-EU AIF and, as the case may be, or the non-EU AIFM is established. Such cooperation arrangements should ensure at least an efficient exchange of information that allows Union competent authorities to carry out their duties in accordance with Directive 2011/61/EU. [↪ Art. 34 AIFMD](#) | [↪ Art. 35 AIFMD](#) | [↪ Art. 36 AIFMD](#) | [↪ Art. 37 AIFMD](#) | [↪ Art. 40 AIFMD](#) | [↪ Art. 42 AIFMD](#)

(135) Cooperation arrangements should allow competent authorities to carry out their supervisory and enforcement duties in respect of third country entities. Cooperation arrangements should therefore set out a clear concrete framework for access to information, for the carrying out of on-site inspections, and for assistance to be provided by the third country authorities. The cooperation arrangements should make sure that information received may be shared with other competent authorities concerned as well as with ESMA and the ESRB. [↪ Art. 34 AIFMD](#) | [↪ Art. 35 AIFMD](#) | [↪ Art. 36 AIFMD](#) | [↪ Art. 37 AIFMD](#) | [↪ Art. 40 AIFMD](#) | [↪ Art. 42 AIFMD](#)

(136) In order to allow competent authorities, AIFMs and depositaries to adapt to the new requirements contained in this Regulation so that they can be applied in an efficient and effective manner, the starting date of application of this Regulation should be aligned with the transposition date of Directive 2011/61/EU. [↪ Art. 70 AIFMD](#)

## Appendix III: Methods of increasing the exposure of an AIF

### Art. 4 AIFMD

#### Annex I of the Level 2 AIFM Regulation

1. Unsecured cash borrowings: When cash borrowings are invested they have the propensity to increase the exposure of the AIF by the total amount of those borrowings. Therefore, the minimum exposure is always the amount of the borrowing. It might be higher if the value of the investment realised with the borrowing is greater than the borrowed amount. To avoid double counting, cash borrowings that are used to finance the exposure shall not be included within the calculation. If the cash borrowings are not invested but remain in cash or cash equivalent as defined in Article 7(a) they will not increase the exposure of the AIF.

2. Secured cash borrowings: Secured cash borrowings are similar to unsecured cash borrowings but the loan may be secured by a pool of assets or a single asset. If the cash borrowings are not invested but remain in cash or cash equivalent as defined in Article 7(a) they will not increase the exposure of the AIF

3. Convertible borrowings: Convertible borrowings are purchased debt which has the ability, under certain circumstances, to enable the holder or issuer to convert that debt into another asset. The exposure of the AIF is the market value of such borrowings.

4. Interest rate swaps: An interest rate swap is an agreement to exchange interest rate cash flows, calculated on a notional principal amount, at specified intervals (payment dates) during the life of the agreement. Each party's payment obligation is computed using a different interest rate based on the notional exposures.

5. Contracts for differences: A contract for differences (CFD) is an agreement between two parties — the investor and the CFD provider — to pay the other the change in the price of an underlying asset. Depending on which way the price moves, one party pays the other the difference from the time the contract was agreed to the point in time where it ends. Exposure is the market value of the underlying asset. The same treatment must be applied to financial spread bets.

6. Futures contracts: A futures contract is an agreement to buy or sell a stated amount of a security, currency, commodity, index or other asset at a specific future date and at a pre-agreed price. The exposure is the market value of the equivalent underlying asset.

7. Total return swaps: A total return swap is an agreement in which one party (total return payer) transfers the total economic performance of a reference obligation to the other party (total return receiver). Total economic performance includes income from interest and fees, gains or losses from market movements, and credit losses.

The exposure of the AIF is the market value of the equivalent reference assets which have a bearing on the economic performance of the swap.

8. Forward agreements: A forward agreement is a customised, bilateral agreement to exchange an asset or cash flows at a specified future settlement date at a forward price agreed on the trade date. One party to the forward is the buyer (long), who agrees to pay the forward price on the settlement date; the other is the seller (short), who agrees to receive the forward price. Entering into a forward contract typically does not require the payment of a fee. The exposure of the AIF is the market value of the equivalent underlying asset. This may be replaced by the notional value of the contract where this is more conservative.

9. Options: An option is an agreement that gives the buyer, who pays a fee (premium), the right — but not the obligation — to buy or sell a specified amount of an underlying asset at an agreed price (strike or exercise price) on or until the expiration of the contract (expiry). A call option is an option to buy, and a put option an option to sell. The bounds of the exposure of the fund will be on the one side a potential unlimited exposure and on the other side an exposure that is limited to the higher of the premium paid or the market value of that option. The exposure between these two bounds is determined as the delta (an options delta measures the sensitivity of an option's price solely to a change in the price of the underlying asset) adjusted equivalent of the underlying position. The same approach must be adopted for embedded derivatives, e.g. in structured products. The structure should be broken down into its component parts and the effect of layers of derivative exposures must be adequately captured.

10. Repurchase agreements: The repurchase agreement normally occurs where an AIF "sells" securities to a reverse-repo counterparty and agrees to buy them back at an agreed price in the future. The AIF will incur a financing cost from engaging in this transaction and will therefore need to re-invest the cash proceeds (effectively cash collateral) in order to generate a return greater than the financing cost incurred. This reinvestment of "cash collateral" means that incremental market risk will be carried by the AIF and consequently must be taken into account in the global exposure calculation. The economic risks and rewards of the "sold" securities remain with the AIF. Also, a repo transaction will almost always give rise to leverage as the cash collateral will be reinvested. In the event that non-cash collateral is received as part of the transaction and this collateral is further used as part of another repo, or stock-loan agreement, the full market value of the collateral must be included in the global exposure amount. The exposure of the AIF is increased by the reinvested part of the cash collateral.

11. Reverse repurchase agreements: This transaction occurs where an AIF "purchases" securities from a repo counterparty and agrees to sell them back at an agreed price in the future. AIFs normally engage in these transactions to generate a low-risk money market type return, and the "purchased" securities act as collateral. Therefore no global exposure is generated; nor does the AIF take on the risks and rewards of the "purchased" securities, i.e. there is no incremental market risk. However, it is possible for the "purchased" securities to be further used as part of a repo or security-loan transaction, as described above, and in that case the full market value of the securities must be included in the global exposure amount. The economic risks and rewards of the purchased securities remain with the counterparty and therefore this does not increase the exposure of the AIF.

12. Securities lending arrangements: An AIF engaging in a securities lending transaction will lend a security to a security-borrowing counterparty (who will normally borrow the security to cover a physical short sale transaction) for an agreed fee. The security borrower will deliver either cash or non-cash collateral to the AIF. Only where cash collateral is reinvested in instruments other than those defined in Article 7 point (a) will global exposure be created. If the non-cash collateral is further used as part of a repo or another security lending transaction, the full market value of the securities must be included in the global exposure amount as described above. Exposure is created to the extent that the cash collateral has been reinvested.

13. Securities borrowing arrangements: An AIF engaging in the borrowing of securities will borrow a security from a security-lending counterparty for an agreed fee. The AIF will then sell the security in the market. The AIF is now short that security. To the extent that the cash proceeds from the sale are reinvested this will also increase the exposure of the AIF. Exposure is the market value of the shorted securities; additional exposure is created to the extent that the cash received is reinvested.

14. Credit default swaps: A credit default swap (CDS) is a credit derivative agreement that gives the buyer protection, usually the full recovery, in case the reference entity defaults or suffers a credit event. In return the seller of the CDS receives from the buyer a regular fee, called the spread. For the protection seller, the exposure is the higher of the market value of the underlying reference assets or the notional value of the credit default swap. For the protection buyer, the exposure is the market value of the underlying reference asset.

## Appendix IV: Conversion methodologies for derivative instruments

### Art. 4 AIFMD

- **Q&A published by ESMA (Appendix XIV) Section III Reporting Question 48**

### Annex II of the Level 2 AIFM Regulation

1. The following conversion methods shall be applied to the non-exhaustive list below of standard derivatives:

(a) Futures

- Bond future: Number of contracts \* notional contract size \* market price of the cheapest-to-deliver reference bond
- Interest rate future: Number of contracts \* notional contract size
- Currency future: Number of contracts \* notional contract size
- Equity future: Number of contracts \* notional contract size \* market price of underlying equity share
- Index futures: Number of contracts \* notional contract size \* index level

(b) Plain vanilla options (bought/sold puts and calls)

- Plain vanilla bond option: Notional contract value \* market value of underlying reference bond \* delta
- Plain vanilla equity option: Number of contracts \* notional contract size \* market value of underlying equity share \* delta
- Plain vanilla interest rate option: Notional contract value \* delta
- Plain vanilla currency option: Notional contract value of currency leg(s) \* delta
- Plain vanilla index options: Number of contracts \* notional contract size \* index level \* delta
- Plain vanilla options on futures: Number of contracts \* notional contract size \* market value of underlying asset \* delta
- Plain vanilla swaptions: Reference swap commitment conversion amount \* delta
- Warrants and rights: Number of shares/bonds \* market value of underlying referenced instrument \* delta

(c) Swaps

- Plain vanilla fixed/floating rate interest rate and inflation swaps: notional contract value
- Currency swaps: Notional value of currency leg(s)
- Cross currency interest rate swaps: Notional value of currency leg(s)
- Basic total return swap: Underlying market value of reference asset(s)
- Non-basic total return swap: Cumulative underlying market value of both legs of the TRS

- Single name credit default swap:

Protection seller - The higher of the market value of the underlying reference asset or the notional value of the Credit Default Swap

Protection buyer – Market value of the underlying reference asset

- Contract for differences: Number of shares/bonds \* market value of underlying referenced instrument

(d) Forwards

- FX forward: notional value of currency leg(s)
- Forward rate agreement: notional value

(e) Leveraged exposure to indices with embedded leverage

A derivative providing leveraged exposure to an underlying index, or indices that embed leveraged exposure to their portfolio, must apply the standard applicable commitment approach to the assets in question.

2. The following conversion methods shall be applied to the non-exhaustive list below of financial instruments which embed derivatives

- Convertible bonds: Number of referenced shares \* market value of underlying referenced shares \* delta
- Credit linked notes: Market value of underlying reference asset(s)
- Partly paid securities: Number of shares/bonds \* market value of underlying referenced instruments
- Warrants and rights: Number of shares/bonds \* market value of underlying referenced instrument \* delta

3. List of examples of non-standard derivatives with the related commitment methodology being used:

- Variance swaps: Variance swaps are contracts that allow investors to gain exposure to the variance (squared volatility) of an underlying asset and, in particular, to trade future realised (or historical) volatility against current implied volatility. According to market practice, the strike and the variance notional are expressed in terms of volatility. For the variance notional, this gives:

$$\text{variance notional} = \frac{\text{veganotional}}{2 \times \text{strike}}$$

The vega notional provides a theoretical measure of the profit or loss resulting from a 1% change in volatility.

As realised volatility cannot be less than zero, a long swap position has a known maximum loss. The maximum loss on a short swap is often limited by the inclusion of a cap on volatility. However without a cap, a short swap's potential losses are unlimited.

The conversion methodology to be used for a given contract at time t is:

Variance notional \* (current) variance<sub>t</sub> (without volatility cap)

Variance notional \* min [(current) variance<sub>t</sub>; volatility cap<sup>2</sup>] (with volatility cap)

whereby: (current) variance<sub>t</sub> is a function of the squared realized and implied volatility, more precisely:

$$(current) variance_t = \frac{t}{T} * realized\ volatility(0, t)^2 + \frac{T-t}{T} * implied\ volatility(t, T)^2$$

– Volatility swaps

By analogy with the variance swaps, the following conversion formulae should be applied to volatility swaps:

- Vega notional \* (current) volatility<sub>t</sub> (without volatility cap)
- Vega notional \* min [(current) volatility<sub>t</sub>; volatility cap] (with volatility cap)

whereby the (current) volatility<sub>t</sub> is a function of the realized and implied volatility.

4. Barrier (knock-in knock-out) options

Number of contracts \* notional contract size \* market value of underlying equity share \* delta.

## Appendix V: Duration netting rules

### Art. 4 AIFMD

#### Annex III of the Level 2 AIFM Regulation

1. An interest rate derivative shall be converted into its equivalent underlying asset position in accordance with the following methodology:

The equivalent underlying asset position of each interest rate derivative instrument shall be calculated as its duration divided by the target duration of the AIF and multiplied by the equivalent underlying asset position:

$$\text{Equivalent underlying asset position} = \frac{\text{duration}_{FDI}}{\text{duration}_{target}} \times CV_{\text{derivative}}$$

where:

- $\text{duration}_{FDI}$  is the duration (sensitivity of the market value of the financial derivative instrument to interest rate movements) of the interest rate derivative instrument;
  - $\text{duration}_{target}$  is in line with the investment strategy, the directional positions and the expected level of risk at any time and will be regularised otherwise. It is also in line with the portfolio duration under normal market conditions;
  - $CV_{\text{derivative}}$  is the converted value of the derivative position as defined by the Annex II.
2. The equivalent underlying asset positions calculated in accordance with to paragraph 1 shall be netted as follows:

- (a) Each interest rate derivative instrument shall be allocated to the appropriate maturity range of the following maturity-based ladder:

Maturities ranges

1. 0 - 2 years

2. 2 - 7 years

3. 7 - 15 years

4. > 15 years

- (b) The long and short equivalent underlying asset positions shall be netted within each maturity range. The amount of the former which is netted with the latter is the netted amount for that maturity range.
- (c) Starting with the shortest maturity range, the netted amounts between two adjoining maturity ranges shall be calculated by netting the amount of the remaining unnetted long (or short) position in the maturity range (i) with the amount of the remaining unnetted short (long) position in the maturity range (i+ 1).
- (d) Starting with the shortest maturity range, the netted amounts between two remote maturity ranges separated by another one shall be calculated by netting the amount of the remaining unnetted long (or short) position in the maturity range (i) with the amount of the remaining unnetted short (long) position in the maturity range (i + 2).
- (e) The netted amount shall be calculated between the remaining unnetted long and short positions of the two most remote maturity ranges.

3. The AIF shall calculate its exposures as the sum of absolute values:
  - 0% of the netted amount for each maturity range;
  - 40% of the netted amounts between two adjoining maturity ranges (i) and (i+1);
  - 75% of the netted amounts between two remote maturity ranges separated by another one, meaning maturity ranges (i) and (i+2);
  - 100% of the netted amounts between the two most remote maturity ranges; and – 100% of the remaining unnetted positions.

## Appendix VI: Reporting Templates - Art. 3(3)(d) and 24 AIFMD

🔗 Art. 3 AIFMD | 🔗 Art. 24 AIFMD

- **Q&A published by ESMA (Appendix XIV) Section III Reporting Question 39**

### Annex IV of the Level 2 AIFM Regulation

**REPORTING TEMPLATES: AIFM**  
(Articles 3 (3)(d) and 24 of Directive 2011/61/EU)

| AIFM-SPECIFIC INFORMATION TO BE REPORTED<br>(Article 3(3)(d) and Article 24(1) of Directive 2011/61/EU) |  |   |  |   |  |
|---|--|---|--|---|--|
|   | Most important market/instrument   | Second most important market/instrument | Third most important market/instrument | Fourth most important market/instrument     | Fifth most important market/instrument |
| 1   | Principal markets in which it trades on behalf of the AIFs it manages                      |   |  |   |  |
| 2   | Principal instruments in which it trades on behalf of the AIFs it manages                  |   |  |   |  |
| 3   | Values of assets under management for all AIFs managed, calculated as set out in Article 2 |   |  | In base currency (if the same for all AIFs) |  |
|   |  |   |  | In EUR                                      |  |
| Please provide official name, location and jurisdiction of markets                                      |  |   |  |   |  |

| DETAILED LIST OF ALL AIFs WHICH THE AIFM MANAGES<br>to be provided on request for the end of each quarter<br>(Article 24(3) of Directive 2011/61/EU) |                          |  |  |  |                |  |     |                   |
|--|--------------------------|--|--|--|----------------|--|-----|-------------------|
| Name of the AIF  | Fund identification code |  |  |  | Inception date | AIF type<br>(Hedge Fund, Private Equity, Real Estate, Fund of Funds, Other*) | NAV | EU AIF:<br>Yes/No |
|  |                          |  |  |  |                |  |     |                   |
|  |                          |  |  |  |                |  |     |                   |
|  |                          |  |  |  |                |  |     |                   |

\* If Other please indicate the strategy that best describes the AIF type.  
Monetary values should be reported in the base currency of the AIF.

**REPORTING TEMPLATES: AIF**  
(Article 3 (3)(d) and Article 24 of Directive 2011/61/EU)

| AIF-SPECIFIC INFORMATION TO BE PROVIDED<br>(Article 3(3)(d) and Article 24(1) of Directive 2011/61/EU) |   |  |                  |
|--|---|--|------------------|
| Data Type  |   | Reported Data  |                  |
| <b>IDENTIFICATION OF THE AIF</b>   |   |  |                  |
| 1  | AIF name  | EU AIF: yes/no   |                  |
| 2  | Fund manager<br><i>(Legal name and standard code, where available)</i>  | EU AIFM: yes/no  |                  |
| 3  | Fund identification codes, as applicable  |  |                  |
| 4  | Inception date of the AIF   |  |                  |
| 5  | Domicile of the AIF   |  |                  |
| 6  | Identification of prime broker(s) of the AIF<br><i>(Legal name and standard code, where available)</i>  |  |                  |
| 7  | Base currency of the AIF according to ISO 4217 and assets under management calculated as set out in Article 2   | Currency   | Total AuM        |
| 8  | Jurisdictions of the three main funding sources (excluding units or shares of the AIF bought by investors)  |  |                  |
| 9  | Predominant AIF type <i>(select one)</i>  | Hedge Fund<br>Private Equity Fund<br>Real Estate Fund<br>Fund of Funds Other<br>None |                  |
| 10   | Breakdown of investment strategies<br><i>(Provide a breakdown of the investment strategies of the AIF depending on the predominant AIF type selected in question 1. See guidance notes for further information on how to complete this question.)</i> | Indicate the strategy that best describe the AIF's strategy                          | Share in NAV (%) |

| AIF-SPECIFIC INFORMATION TO BE PROVIDED<br>(Article 3(3)(d) and Article 24(1) of Directive 2011/61/EU)  |               |  |
|---|---------------|--|
| Data Type   | Reported Data |  |
| <b>a) Hedge Fund Strategies</b><br>(Complete this question if you selected 'Hedge Fund' as the predominant AIF type in question 1.)<br>Indicate the hedge fund strategies that best describe the AIFs' strategies<br>Equity: Long Bias<br>Equity: Long / Short<br>Equity: Market Neutral<br>Equity: Short Bias<br>Relative Value: Fixed Income Arbitrage<br>Relative Value: Convertible Bond Arbitrage<br>Relative Value: Volatility Arbitrage<br>Event Driven: Distressed / Restructuring<br>Event Driven: Risk Arbitrage / Merger Arbitrage<br>Event Driven: Equity Special Situations<br>Credit Long / Short<br>Credit Asset Based Lending<br>Macro<br>Managed Futures / CTA: Fundamental<br>Managed Futures / CTA: Quantitative<br>Multi-strategy hedge fund<br>Other hedge fund strategy |               |  |
| <b>b) Private Equity Strategies</b><br>(Complete this question if you selected 'Private Equity' as the predominant AIF type in question 1.)<br>Indicate the private equity strategies that best describe the AIFs' strategies<br>Venture Capital<br>Growth Capital<br>Mezzanine Capital<br>Multi-strategy private equity fund<br>Other private equity fund strategy   |               |  |
| <b>c) Real Estate Strategies</b><br>(Complete this question if you selected 'Real Estate' as the predominant AIF type in question 1.)<br>Indicate the real estate strategies that best describe the AIFs' strategies<br>Residential real estate<br>Commercial real estate<br>Industrial real estate   |               |  |

| AIF-SPECIFIC INFORMATION TO BE PROVIDED<br>(Article 3(3)(d) and Article 24(1) of Directive 2011/61/EU)   |   |   |                       |
|--|---|---|-----------------------|
| Data Type  | Reported Data                             |   |                       |
| Multi-strategy real estate fund<br>Other real estate strategy  |   |   |                       |
| <b>d) Fund of Fund Strategies</b><br>(Complete this question if you selected 'Fund of Funds' as the predominant AIF type in question 1.)<br>Indicate the 'fund of fund' strategy that best describe the AIFs' strategies<br>Fund of hedge funds<br>Fund of private equity<br>Other fund of funds |   |   |                       |
| <b>e) Other Strategies</b><br>(Complete this question if you selected 'Other' as the predominant AIF type in question 1.)<br>Indicate the 'other' strategy that best describe the AIFs' strategies<br>Commodity fund<br>Equity fund<br>Fixed income fund<br>Infrastructure fund<br>Other fund    |   |   |                       |
| <b>PRINCIPAL EXPOSURES AND MOST IMPORTANT CONCENTRATION</b>  |   |   |                       |
| <b>11 Main instruments in which the AIF is trading</b>   |   |   |                       |
|  | Type of instrument/instrument code        | Value (as calculated under Article 3 AIFMD) | Long / short position |
|  | Most important instrument                 |   |                       |
|  | 2 <sup>nd</sup> most important instrument |   |                       |
|  | 3 <sup>rd</sup> most important instrument |   |                       |
|  | 4 <sup>th</sup> most important instrument |   |                       |
|  | 5 <sup>th</sup> most important instrument |   |                       |
| <b>12 Geographical focus</b>   |   |   |                       |
| Provide a geographical breakdown of the investments held by the AIF by percentage of the total net asset value of the AIF  |   | % of NAV                                    |                       |
|  | Africa                                    |   |                       |
|  | Asia and Pacific (other than Middle East) |   |                       |
|  | Europe (EEA)                              |   |                       |

Appendix VI: Reporting Templates - Art. 3(3)(d) and 24 AIFMD

| AIF-SPECIFIC INFORMATION TO BE PROVIDED<br>(Article 3(3)(d) and Article 24(1) of Directive 2011/61/EU)  |                         |   |  |                            |                                     |                                  |
|---|-------------------------|---|--|----------------------------|-------------------------------------|----------------------------------|
| Data Type   |                         |   |  |                            | Reported Data                       |                                  |
| Europe (other than EEA)   |                         |   |  |                            |                                     |                                  |
| Middle East   |                         |   |  |                            |                                     |                                  |
| North America   |                         |   |  |                            |                                     |                                  |
| South America   |                         |   |  |                            |                                     |                                  |
| Supranational / multiple region   |                         |   |  |                            |                                     |                                  |
| <b>13 10 principal exposures of the AIF at the reporting date</b> (most valuable in absolute terms):  |                         |   |  |                            |                                     |                                  |
|   | Type of asset/liability | Name/description of the asset/liability | Value<br>(as calculated under Article 3)                       | % of gross<br>market value | Long/short position                 | Counterparty<br>(where relevant) |
| 1 <sup>st</sup>   |                         |   |  |                            |                                     |                                  |
| 2 <sup>nd</sup>   |                         |   |  |                            |                                     |                                  |
| 3 <sup>rd</sup>   |                         |   |  |                            |                                     |                                  |
| 4 <sup>th</sup>   |                         |   |  |                            |                                     |                                  |
| 5 <sup>th</sup>   |                         |   |  |                            |                                     |                                  |
| 6 <sup>th</sup>   |                         |   |  |                            |                                     |                                  |
| 7 <sup>th</sup>   |                         |   |  |                            |                                     |                                  |
| 8 <sup>th</sup>   |                         |   |  |                            |                                     |                                  |
| 9 <sup>th</sup>   |                         |   |  |                            |                                     |                                  |
| 10 <sup>th</sup>  |                         |   |  |                            |                                     |                                  |
| <b>14 5 most important portfolio concentrations:</b>  |                         |   |  |                            |                                     |                                  |
|   | Type of asset/liability | Name/description of the market          | Value of aggregate exposure<br>(as calculated under Article 3) | % of gross<br>market value | Long / short position               | Counterparty (where<br>relevant) |
| 1 <sup>st</sup>   |                         |   |  |                            |                                     |                                  |
| 2 <sup>nd</sup>   |                         |   |  |                            |                                     |                                  |
| 3 <sup>rd</sup>   |                         |   |  |                            |                                     |                                  |
| 4 <sup>th</sup>   |                         |   |  |                            |                                     |                                  |
| 5 <sup>th</sup>   |                         |   |  |                            |                                     |                                  |
| <b>15 Typical deal/position size</b><br>(Complete this question if you selected as your predominant AIF type 'private equity fund' in question 1) |                         |   |  |                            | [Select one]<br>Very small<br>Small |                                  |

| AIF-SPECIFIC INFORMATION TO BE PROVIDED<br>(Article 3(3)(d) and Article 24(1) of Directive 2011/61/EU)  |  |   |
|---|--|---|
| Data Type   |  | Reported Data   |
|   |  | Lower mid<br>market<br>Upper mid<br>market<br>Large cap<br>Mega cap |
| <b>16 Principal markets in which AIF trades</b>   |  |   |
| <i>Please enter name and identifier (e.g. MIC code) where available, of market with greatest exposure</i>   |  |   |
| <i>Please enter name and identifier (e.g. MIC code) where available, of market with second greatest exposure</i>  |  |   |
| <i>Please enter name and identifier (e.g. MIC code) where available, of market with third greatest exposure</i>   |  |   |
| <b>17 Investor Concentration</b>  |  |   |
| Specify the approximate percentage of the AIF's equity that is beneficially owned by the five beneficial owners that have the largest equity interest in the AIF (as a percentage of outstanding units/ shares of the AIF; <b>look-through to the beneficial owners where known or possible</b> ) |  |   |
| Breakdown of investor concentration by status of investors (estimate if no precise information available):  |  | %   |
| - Professional clients (as defined in Directive 2004/39/EC (MiFID):   |  |   |
| - Retail investors:   |  |   |

Monetary values should be reported in the base currency of the AIF.

| AIF-SPECIFIC INFORMATION TO BE PROVIDED TO COMPETENT AUTHORITIES<br>(Article 24(2) of Directive 2011/61/EU)            |          |                 |
|--|----------|-----------------|
| Data Type  |          | Reported Data   |
| <b>IDENTIFICATION OF THE AIF</b>   |          |                 |
| <b>1 AIF name</b>  |          | EU AIF: yes/no  |
| <b>2 Fund manager</b>  |          | EU AIFM: yes/no |
| <b>1 AIF name</b>  |          |                 |
| <b>2 Fund manager</b>  |          |                 |
| <b>3 Fund identification codes, as applicable</b>  |          |                 |
| <b>4 Inception date of the AIF</b>   |          |                 |
| <b>5 Base currency of the AIF according to ISO 4217 and assets under management calculated as set out in Article 2</b> | Currency | Total AuM       |
| <b>6 Identification of prime broker(s) of the AIF</b>  |          |                 |
| <b>7 Jurisdictions of the three main funding sources</b>   |          |                 |

Appendix VI: Reporting Templates - Art. 3(3)(d) and 24 AIFMD

| AIF-SPECIFIC INFORMATION TO BE PROVIDED TO COMPETENT AUTHORITIES<br>(Article 24(2) of Directive 2011/61/EU) |  |  |                    |
|---|--|--|--------------------|
| Data Type   |  | Reported Data  |                    |
| <b>INSTRUMENTS TRADED AND INDIVIDUAL EXPOSURES</b>  |  |  |                    |
| <b>8</b>  | <b>Individual Exposures in which it is trading and the main categories of assets in which the AIF invested as at the reporting date:</b> |  |                    |
| <b>a)</b>   | <b>Securities</b>  |  |                    |
|   | Cash and cash equivalents  |  | <i>Long Value</i>  |
|   | <i>Of which are:</i>   |  | <i>Short Value</i> |
|   |  | <i>Certificates of deposit</i>   |                    |
|   |  | <i>Commercial papers</i>   |                    |
|   |  | <i>Other deposits</i>  |                    |
|   |  | <i>Other cash and cash equivalents (excluding government securities)</i> |                    |
|   | Listed equities  |  |                    |
|   | <i>Of which are:</i>   |  |                    |
|   |  | <i>Issued by financial institutions</i>                                  |                    |
|   |  | <i>Other listed equity</i>   |                    |
|   | Unlisted equities  |  |                    |
|   | Corporate bonds not issued by financial institutions   |  |                    |
|   | <i>Of which are:</i>   |  |                    |
|   |  | <i>Investment grade</i>  |                    |
|   |  | <i>Non-investment grade</i>  |                    |
|   | Corporate bonds issued by financial institutions   |  |                    |
|   | <i>Of which are:</i>   |  |                    |
|   |  | <i>Investment grade</i>  |                    |
|   |  | <i>Non-investment grade</i>  |                    |
|   | Sovereign bonds  |  |                    |
|   | <i>Of which are:</i>   |  |                    |
|   |  | <i>EU bonds with a 0-1-year term to maturity</i>                         |                    |
|   |  | <i>EU bonds with a 1+year term to maturity</i>                           |                    |
|   |  | <i>Non-G10 bonds with a 0-1-year term to maturity</i>                    |                    |
|   |  | <i>Non-G10 bonds with a 1+year term to maturity</i>                      |                    |
|   | Convertible bonds not issued by financial institutions   |  |                    |
|   | <i>Of which are:</i>   |  |                    |
|   |  | <i>Investment grade</i>  |                    |
|   |  | <i>Non-investment grade</i>  |                    |
|   | Convertible bonds issued by financial institutions   |  |                    |
|   | <i>Of which are:</i>   |  |                    |
|   |  | <i>Investment grade</i>  |                    |
|   |  | <i>Non-investment grade</i>  |                    |
|   | Loans  |  |                    |

| AIF-SPECIFIC INFORMATION TO BE PROVIDED TO COMPETENT AUTHORITIES<br>(Article 24(2) of Directive 2011/61/EU) |  |  |                    |
|---|--|--|--------------------|
| Data Type   |  | Reported Data                                |                    |
|   | <i>Of which are:</i>                       |  |                    |
|   |  | <i>Leveraged loans</i>                       |                    |
|   |  | <i>Other loans</i>                           |                    |
|   | Structured/securitised products            |  |                    |
|   | <i>Of which are:</i>                       |  |                    |
|   |  | <i>ABS</i>                                   |                    |
|   |  | <i>RMBS</i>                                  |                    |
|   |  | <i>CMBS</i>                                  |                    |
|   |  | <i>Agency MBS</i>                            |                    |
|   |  | <i>ABCP</i>                                  |                    |
|   |  | <i>CDO/CLO</i>                               |                    |
|   |  | <i>Structured certificates</i>               |                    |
|   |  | <i>ETP</i>                                   |                    |
|   |  | <i>Other</i>                                 |                    |
| <b>b)</b>   | <b>Derivatives</b>                         |  |                    |
|   | Equity derivatives                         |  |                    |
|   | <i>Of which are:</i>                       |  |                    |
|   |  | <i>Related to financial institutions</i>     |                    |
|   |  | <i>Other equity derivatives</i>              |                    |
|   | Fixed income derivatives                   |  |                    |
|   | CDS  |  |                    |
|   | <i>Of which are:</i>                       |  |                    |
|   |  | <i>Single name financial CDS</i>             |                    |
|   |  | <i>Single name sovereign CDS</i>             |                    |
|   |  | <i>Single name other CDS</i>                 |                    |
|   |  | <i>Index CDS</i>                             |                    |
|   |  | <i>Exotic (incl. credit default tranche)</i> |                    |
|   | Foreign exchange (for investment purposes) |  | <i>Gross Value</i> |
|   | Interest rate derivatives                  |  |                    |
|   | Commodity derivatives                      |  |                    |
|   | <i>Of which are:</i>                       |  |                    |
|   |  | <i>Energy</i>                                |                    |
|   |  | <i>Of which: - Crude oil</i>                 |                    |
|   |  | <i>- Natural gas</i>                         |                    |
|   |  | <i>- Power</i>                               |                    |
|   |  | <i>Precious metals</i>                       |                    |

Appendix VI: Reporting Templates - Art. 3(3)(d) and 24 AIFMD

| AIF-SPECIFIC INFORMATION TO BE PROVIDED TO COMPETENT AUTHORITIES<br>(Article 24(2) of Directive 2011/61/EU) |  |   |                    |
|---|--|---|--------------------|
| Data Type   |  | Reported Data                                     |                    |
|   | <i>Of which: Gold</i>  |   |                    |
|   | <i>Other commodities</i>   |   |                    |
|   | <i>Of which: -Industrial metals</i>                                    |   |                    |
|   | <i>- Livestock</i>   |   |                    |
|   | <i>- Agricultural products</i>   |   |                    |
|   | Other derivatives  |   |                    |
| <b>c)</b>   | <b>Physical (Real / Tangible) Assets</b>                               | <i>Long Value</i>                                 |                    |
|   | Physical: Real estate  |   |                    |
|   | <i>Of which are:</i>   | <i>Residential real estate</i>                    |                    |
|   |  | <i>Commercial real estate</i>                     |                    |
|   | Physical: Commodities  |   |                    |
|   | Physical: Timber   |   |                    |
|   | Physical: Art and collectables   |   |                    |
|   | Physical: Transportation assets  |   |                    |
|   | Physical: Other  |   |                    |
| <b>d)</b>   | <b>Collective Investment Undertakings</b>                              | <i>Long Value</i>                                 |                    |
|   | Investments in CIU operated/managed by the AIFM                        |   |                    |
|   | <i>Of which are:</i>   | <i>Money Market Funds and Cash management CIU</i> |                    |
|   |  | <i>ETF</i>  |                    |
|   |  | <i>Other CIU</i>                                  |                    |
|   | Investments in CIU not operated/managed by the AIFM                    |   |                    |
|   | <i>Of which are:</i>   | <i>Money Market Funds and Cash management CIU</i> |                    |
|   |  | <i>ETF</i>  |                    |
|   |  | <i>Other CIU</i>                                  |                    |
| <b>e)</b>   | <b>Investments in other asset classes</b>                              | <i>Long Value</i>                                 | <i>Short Value</i> |
|   | Total Other  |   |                    |
| <b>9</b>  | <b>Value of turnover in each asset class over the reporting months</b> |   |                    |
| <b>a)</b>   | <b>Securities</b>  | <i>Market Value</i>                               |                    |
|   | Cash and cash equivalents  |   |                    |
|   | Listed equities  |   |                    |
|   | Unlisted equities  |   |                    |
|   | Corporate bonds not issued by financial institutions                   |   |                    |

| AIF-SPECIFIC INFORMATION TO BE PROVIDED TO COMPETENT AUTHORITIES<br>(Article 24(2) of Directive 2011/61/EU) |  |                                  |                     |
|---|--|----------------------------------|---------------------|
| Data Type   |  | Reported Data                    |                     |
|   | <i>Of which are:</i>   | <i>Investment grade</i>          |                     |
|   |  | <i>Non-investment grade</i>      |                     |
|   | Corporate bonds issued by financial institutions   |                                  |                     |
|   | Sovereign bonds  |                                  |                     |
|   | <i>Of which are:</i>   | <i>EU Member State bonds</i>     |                     |
|   |  | <i>Non EU Member State bonds</i> |                     |
|   | Convertible bonds  |                                  |                     |
|   | Loans  |                                  |                     |
|   | Structured/securitised products  |                                  |                     |
| <b>b)</b>   | <b>Derivatives</b>   | <i>Notional Value</i>            | <i>Market Value</i> |
|   | Equity derivatives   |                                  |                     |
|   | Fixed income derivatives   |                                  |                     |
|   | CDS  |                                  |                     |
|   | Foreign exchange (for investment purposes)   |                                  |                     |
|   | Interest rate derivatives  |                                  |                     |
|   | Commodity derivatives  |                                  |                     |
|   | Other derivatives  |                                  |                     |
| <b>c)</b>   | <b>Physical (Real / Tangible) Assets</b>   | <i>Market Value</i>              |                     |
|   | Physical: Commodities  |                                  |                     |
|   | Physical: Real estate  |                                  |                     |
|   | Physical: Timber   |                                  |                     |
|   | Physical: Art and collectables   |                                  |                     |
|   | Physical: Transportation assets  |                                  |                     |
|   | Physical: Other  |                                  |                     |
| <b>d)</b>   | <b>Collective investment undertakings</b>  |                                  |                     |
| <b>e)</b>   | <b>Other asset classes</b>   |                                  |                     |
|   | Currency of Exposures  |                                  |                     |
| <b>10</b>   | <b>Total long and short value of exposures (before currency hedging) by the following currency groups:</b> | <i>Long Value</i>                | <i>Short Value</i>  |
|   | AUD  |                                  |                     |
|   | CAD  |                                  |                     |
|   | CHF  |                                  |                     |
|   | EUR  |                                  |                     |



Appendix VI: Reporting Templates - Art. 3(3)(d) and 24 AIFMD

| AIF-SPECIFIC INFORMATION TO BE PROVIDED TO COMPETENT AUTHORITIES<br>(Article 24(2) of Directive 2011/61/EU)   |            |             |              |   |                       |                    |
|---|------------|-------------|--------------|---|-----------------------|--------------------|
| Data Type   |            |             |              | Reported Data   |                       |                    |
| Counterparty 4  |            |             |              |   |                       |                    |
| Counterparty 5  |            |             |              |   |                       |                    |
| <b>b) Identify the top five counterparties that have the greatest mark-to-market net counterparty credit exposure to the AIF, measured as a percentage of the NAV of the AIF.</b> |            |             |              | <i>Name</i>   | <i>Total Exposure</i> |                    |
| Counterparty 1  |            |             |              |   |                       |                    |
| Counterparty 2  |            |             |              |   |                       |                    |
| Counterparty 3  |            |             |              |   |                       |                    |
| Counterparty 4  |            |             |              |   |                       |                    |
| Counterparty 5  |            |             |              |   |                       |                    |
| <b>18 Direct clearing through central clearing counterparties (CCPs)</b>  |            |             |              |   |                       |                    |
| <b>a) During the reporting period, did the AIF clear any transactions directly through a CCP?</b>   |            |             |              | Yes<br>No (if no, skip remainder of the question and go to question 21) |                       |                    |
| <b>b) If you answered 'yes' in 18(a), identify the top three central clearing counterparties (CCPs) in terms of net credit exposure</b>   |            |             |              | <i>Name</i>   | <i>Value held</i>     |                    |
| CCP 1 (leave blank if not applicable)   |            |             |              |   |                       |                    |
| CCP 2 (leave blank if not applicable)   |            |             |              |   |                       |                    |
| CCP 3 (leave blank if not applicable)   |            |             |              |   |                       |                    |
| <b>3. LIQUIDITY PROFILE</b>   |            |             |              |   |                       |                    |
| Portfolio Liquidity Profile   |            |             |              |   |                       |                    |
| <b>19 Investor Liquidity Profile</b>  |            |             |              |   |                       |                    |
| Percentage of portfolio capable of being liquidated within:   |            |             |              |   |                       |                    |
| 1 day or less   | 2 - 7 days | 8 - 30 days | 31 - 90 days | 91 - 180 days   | 181 - 365 days        | more than 365 days |
|   |            |             |              |   |                       |                    |
| <b>20 Value of unencumbered cash</b>  |            |             |              |   |                       |                    |
| Investor Liquidity Profile  |            |             |              |   |                       |                    |
| <b>21 Investor Liquidity Profile</b>  |            |             |              |   |                       |                    |
| Percentage of investor equity that can be redeemed within (as % of AIF's NAV)   |            |             |              |   |                       |                    |
| 1 day or less   | 2 - 7 days | 8 - 30 days | 31 - 90 days | 91 - 180 days   | 181 - 365 days        | more than 365 days |
|   |            |             |              |   |                       |                    |

| AIF-SPECIFIC INFORMATION TO BE PROVIDED TO COMPETENT AUTHORITIES<br>(Article 24(2) of Directive 2011/61/EU)   |  |  |  |   |     |  |
|---|--|--|--|---|-----|--|
| Data Type   |  |  |  | Reported Data   |     |  |
| <b>22 Investor redemptions</b>  |  |  |  |   |     |  |
| <b>a) Does the AIF provide investors with withdrawal / redemption rights in the ordinary course?</b>  |  |  |  | Yes      No   |     |  |
| <b>b) What is the frequency of investor redemptions (if multiple classes of shares or units, report for the largest share class by NAV)</b>   |  |  |  | [Select one]<br>Daily<br>Weekly<br>Fortnightly<br>Monthly<br>Quarterly<br>Half-yearly<br>Annual<br>Other<br>N/A |     |  |
| <b>c) What is the notice period required by investors for redemptions in days (report asset weighted notice period if multiple classes or shares or units)</b>  |  |  |  |   |     |  |
| <b>d) What is the investor 'lock-up' period in days (report asset weighted notice period if multiple classes or shares or units)</b>  |  |  |  |   |     |  |
| <b>23 Special arrangements and preferential treatment</b>   |  |  |  |   |     |  |
| <b>a) As at the reporting date, what percentage of the AIFs NAV is subject to the following arrangements :</b>  |  |  |  | <i>% of NAV</i>   |     |  |
| Side pockets  |  |  |  |   |     |  |
| Gates   |  |  |  |   |     |  |
| Suspension of dealing   |  |  |  |   |     |  |
| Other arrangements for managing illiquid assets (please specify)  |  |  |  | [Type]  | [%] |  |
| <b>b) Indicate the percentage of net asset value of AIF's assets that are currently subject to the special arrangements arising from their illiquid nature under Article 23 (4) (a) of the AIFMD including those in question 25(a)?</b>                       |  |  |  |   |     |  |
| Special arrangements as a % of NAV  |  |  |  |   |     |  |
| <b>c) Are there any investors who obtain preferential treatment or the right to preferential treatment (e.g. through a side letter) and therefore are subject to disclosure to the investors in the AIF in accordance with Article 23(1)(j) of the AIFMD?</b> |  |  |  | (Yes or no)   |     |  |
| <b>d) If 'yes' to letter c) then please indicate all relevant preferential treatment:</b>   |  |  |  |   |     |  |
| Concerning different disclosure/reporting to investors  |  |  |  |   |     |  |
| Concerning different investor liquidity terms   |  |  |  |   |     |  |

| AIF-SPECIFIC INFORMATION TO BE PROVIDED TO COMPETENT AUTHORITIES<br>(Article 24(2) of Directive 2011/61/EU) |   |            |             |              |               |                      |  |
|---|---|------------|-------------|--------------|---------------|----------------------|--|
| Data Type   |   |            |             |              | Reported Data |                      |  |
| Concerning different fee terms for investors  |   |            |             |              |               |                      |  |
| Preferential treatment other than that specified above  |   |            |             |              |               |                      |  |
| 24  | Provide the breakdown of the ownership of units in the AIF by investor group (as % of NAV of AIF assets; look-through to the beneficial owners where known or possible)                         |            |             |              |               |                      |  |
| 25  | Financing liquidity   |            |             |              |               |                      |  |
| a)  | Provide the aggregate amount of borrowing by and cash financing available to the AIF (including all drawn and undrawn, committed and uncommitted lines of credit as well as any term financing) |            |             |              |               |                      |  |
| b)  | Divide the amount reported in letter a) among the periods specified below depending on the longest period for which the creditor is contractually committed to provide such financing:          |            |             |              |               |                      |  |
|   | 1 day or less   | 2 - 7 days | 8 - 30 days | 31 - 90 days | 91 - 180 days | 181 - 365 days       |  |
|   |   |            |             |              |               | longer than 365 days |  |
| <b>4. BORROWING AND EXPOSURE RISK</b>   |   |            |             |              |               |                      |  |
| 26  | Value of borrowings of cash or securities represented by:   |            |             |              |               |                      |  |
|   | Unsecured cash borrowing:   |            |             |              |               |                      |  |
|   | Collateralised/secured cash borrowing — Via Prime Broker:   |            |             |              |               |                      |  |
|   | Collateralised/secured cash borrowing — Via (reverse) repo:   |            |             |              |               |                      |  |
|   | Collateralised/secured cash borrowing — Via Other:  |            |             |              |               |                      |  |
| 27  | Value of borrowing embedded in financial instruments  |            |             |              |               |                      |  |
|   | Exchange-traded Derivatives: Gross Exposure less margin posted  |            |             |              |               |                      |  |
|   | OTC Derivatives: Gross Exposure less margin posted  |            |             |              |               |                      |  |
| 28  | Value of securities borrowed for short positions  |            |             |              |               |                      |  |
| 29  | Gross exposure of financial and, as the case may be, or legal structures controlled by the AIF as defined in Recital 78 of the AIFMD  |            |             |              |               |                      |  |
|   | <i>Financial and, as the case may be, or legal structure</i>  |            |             |              |               |                      |  |
|   | <i>Financial and, as the case may be, or legal structure</i>  |            |             |              |               |                      |  |
|   | <i>Financial and, as the case may be, or legal structure</i>  |            |             |              |               |                      |  |
|   | .....   |            |             |              |               |                      |  |
| 30  | Leverage of the AIF   |            |             |              |               |                      |  |
| a)  | as calculated under the Gross Method  |            |             |              |               |                      |  |
| b)  | as calculated under the Commitment Method   |            |             |              |               |                      |  |
| <b>5. OPERATIONAL AND OTHER RISK ASPECTS</b>  |   |            |             |              |               |                      |  |
| 31  | Total number of open positions  |            |             |              |               |                      |  |

| AIF-SPECIFIC INFORMATION TO BE PROVIDED TO COMPETENT AUTHORITIES<br>(Article 24(2) of Directive 2011/61/EU) |  |  |  |  |               |  |  |
|---|--|--|--|--|---------------|--|--|
| Data Type   |  |  |  |  | Reported Data |  |  |
| 32  | Historical risk profile  |  |  |  |               |  |  |
| a)  | Gross Investment returns or IRR of the AIF over the reporting period (in %, gross of management and performance fees)        |  |  |  |               |  |  |
|   | 1st Month of Reporting Period  |  |  |  |               |  |  |
|   | 2nd Month of Reporting Period  |  |  |  |               |  |  |
|   | .  |  |  |  |               |  |  |
|   | .  |  |  |  |               |  |  |
|   | Last Month of Reporting Period   |  |  |  |               |  |  |
| b)  | Net Investment returns or IRR of the AIF over the reporting period (in %, net of management and performance fees)            |  |  |  |               |  |  |
|   | 1st Month of Reporting Period  |  |  |  |               |  |  |
|   | 2nd Month of Reporting Period  |  |  |  |               |  |  |
|   | .  |  |  |  |               |  |  |
|   | .  |  |  |  |               |  |  |
|   | Last Month of Reporting Period   |  |  |  |               |  |  |
| c)  | Change in Net Asset Value of the AIF over the reporting period (in %, including the impact of subscriptions and redemptions) |  |  |  |               |  |  |
|   | 1st Month of Reporting Period  |  |  |  |               |  |  |
|   | 2nd Month of Reporting Period  |  |  |  |               |  |  |
|   | .  |  |  |  |               |  |  |
|   | .  |  |  |  |               |  |  |
|   | Last Month of Reporting Period   |  |  |  |               |  |  |
| d)  | Subscriptions over the reporting period  |  |  |  |               |  |  |
|   | 1st Month of Reporting Period  |  |  |  |               |  |  |
|   | 2nd Month of Reporting Period  |  |  |  |               |  |  |
|   | .  |  |  |  |               |  |  |
|   | .  |  |  |  |               |  |  |
|   | Last Month of Reporting Period   |  |  |  |               |  |  |
| e)  | Redemptions over the reported period   |  |  |  |               |  |  |
|   | 1st Month of Reporting Period  |  |  |  |               |  |  |
|   | 2nd Month of Reporting Period  |  |  |  |               |  |  |
|   | .  |  |  |  |               |  |  |
|   | .  |  |  |  |               |  |  |
|   | Last Month of Reporting Period   |  |  |  |               |  |  |

Monetary values should be reported in the base currency of the AIF.

**RESULTS OF STRESS TESTS**

Please provide the **results of the stress tests** performed in accordance with point (b) of **Article 15(3) of Directive 2011/61/EU** [risks associated with each investment position of the AIF and their overall effect on the AIF's portfolio can be properly identified, measured, managed and monitored on an on-going basis, including through the use of appropriate stress testing procedures;] (free text)

Monetary values should be reported in the base currency of the AIF.

Please provide the **results of the stress tests** performed in accordance with the **second subparagraph of Article 16(1) of Directive 2011/61/EU**. [AIFMs shall regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable them to assess the liquidity risk of the AIFs and monitor the liquidity risk of the AIFs accordingly.] (free text)

Monetary values should be reported in the base currency of the AIF.

| AIF-SPECIFIC INFORMATION TO BE MADE AVAILABLE TO THE COMPETENT AUTHORITIES<br>(Article 24(4) of Directive 2011/61/EU) |  |               |
|---|--|---------------|
|   | Data Type  | Reported Data |
| <b>1</b>  | <b>Of the amount of collateral and other credit support that the reporting AIF has posted to counterparties: what percentage has been re-hypothecated by counterparties?</b> |               |
|   | <b>Borrowing and Exposure Risk</b>   |               |
| <b>2</b>  | <b>Value of borrowings of cash or securities represented by:</b>   |               |
|   | Unsecured cash borrowing:  |               |
|   | Collateralised/secured cash borrowing — Via Prime Broker:  |               |
|   | Collateralised/secured cash borrowing — Via (reverse) repo:  |               |
|   | Collateralised/secured cash borrowing — Via Other:   |               |
| <b>3</b>  | <b>Value of borrowing embedded in financial instruments</b>  |               |
|   | Exchange-traded Derivatives: Gross Exposure less margin posted   |               |
|   | OTC Derivatives: Gross Exposure less margin posted   |               |
| <b>4</b>  | <b>Five largest sources of borrowed cash or securities (short positions):</b>  |               |
|   | Largest:   |               |
|   | 2 <sup>nd</sup> largest:   |               |
|   | 3 <sup>rd</sup> largest:   |               |
|   | 4 <sup>th</sup> largest:   |               |
|   | 5 <sup>th</sup> largest:   |               |
| <b>5</b>  | <b>Value of securities borrowed for short positions</b>  |               |
| <b>6</b>  | <b>Gross exposure of financial and, as the case may be, or legal structures controlled by the AIF as defined in Recital 78 of the AIFMD</b>                                  |               |
|   | Financial and, as the case may be, or legal structure  |               |
|   | Financial and, as the case may be, or legal structure  |               |
|   | Financial and, as the case may be, or legal structure  |               |
|   | ...  |               |
| <b>7</b>  | <b>Leverage of the AIF:</b>  |               |
|   | a) <b>Gross Method</b>   |               |
|   | b) <b>Commitment Method</b>  |               |

Monetary values should be reported in the base currency of the AIF.

## Appendix VII: Guidelines on sound remuneration policies under the AIFMD

### 🔗 Art. 13 AIFMD

- **Q&A published by ESMA (Appendix XIV) Section I Remuneration**

(ESMA Guidelines on sound remuneration policies under the AIFMD dated 3 July 2013 – [ESMA/2013/232](#), as amended by ESMA Guidelines on sound remuneration policies under the AIFMD dated 14 October 2016 – [ESMA/2016/579](#))

#### I. Scope

##### Who?

1. These guidelines apply to AIFMs and competent authorities.

As long as the national regimes referred to in Article 42 of the AIFMD will continue to be in force, non-EU AIFMs which market to professional investors units or shares of AIFs in Member States without a passport will only be subject to Section XIII (Guidelines on disclosure) of these guidelines. These non-EU AIFMs will be subject to the full set of remuneration provisions in these guidelines as from the date when the national regimes referred to in Article 42 of the AIFMD will be terminated and the passport regime provided for in Articles 37 to 41 of the AIFMD will become the sole and mandatory regime applicable in all Member States, as determined by the Commission's delegated act referred to in Article 68(6) of the AIFMD.

2. In accordance with Article 5 of the AIFMD, for the purposes of these guidelines, the AIFMs to which the remuneration principles apply shall be either an external manager or, where the legal form of the AIF permits internal management and where the AIF's *governing body* chooses not to appoint an external AIFM, the AIF itself. AIFs which are not internally managed and have appointed an external AIFM are not subject to the remuneration principles established in the AIFMD as well as these guidelines. However, the remuneration principles set out in the *Recommendation* are relevant to those AIFs, as well as the AIFMs which can benefit from the exclusions and exemptions foreseen in Articles 2 or 3 of the AIFMD, to the extent that they fall within the definition of "financial undertaking" provided in paragraph 2.1 of the *Recommendation*. Annex I<sup>79</sup> of these guidelines provides for a correlation table highlighting those principles of the *Recommendation* which are reflected in the AIFMD.

##### What?

3. These guidelines apply in relation to the remuneration policies and practices for AIFMs and their *identified staff*. Annex II of these guidelines provides details on which guidelines apply to AIFMs as a whole and which apply to their *identified staff* only.

##### When?

4. These guidelines apply from 22 July 2013, subject to the transitional provisions of the AIFMD.

- **Q&A published by ESMA (Appendix XIV) Section I Remuneration Question 1, Question 2**

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<sup>79</sup> Annex IV of the ESMA Guidelines on Remuneration Policies ([https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-232\\_aifmd\\_guidelines\\_on\\_remuneration\\_-\\_en.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-232_aifmd_guidelines_on_remuneration_-_en.pdf)).

## II. Definitions

Unless otherwise specified, terms used in the Directive 2011/61/EC of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010<sup>80</sup> (AIFMD) and in the delegated acts adopted by the Commission according to the provisions of the AIFMD have the same meaning in these guidelines. In addition, the following definitions apply for the purposes of these guidelines:

|                             |   |
|-----------------------------|---|
| <i>Recommendation</i>       | Commission Recommendation 2009/384/EC of 30 April 2009 on remuneration policies in the financial services sector. <sup>81</sup>   |
| <i>identified staff</i>     | categories of staff, including <i>senior management</i> , risk takers, <i>control functions</i> and any employee receiving total remuneration that takes them into the same <i>remuneration bracket</i> as <i>senior management</i> and risk takers, whose professional activities have a material impact on the AIFM's risk profile or the risk profiles of the AIF that it manages and categories of staff of the entity(ies) to which portfolio management or risk management activities have been delegated by the AIFM, whose professional activities have a material impact on the risk profiles of the AIF that the AIFM manages.                                    |
| <i>control functions</i>    | staff (other than <i>senior management</i> ) responsible for risk management, compliance, internal audit and similar functions within an AIFM (e.g. the CFO to the extent that he/she is responsible for the preparation of the financial statements).  |
| <i>remuneration bracket</i> | the range of the total remuneration of each of the staff members in the senior manager and risk taker categories – from the highest paid to the lowest paid in these categories.  |
| <i>instruments</i>          | units or shares of the AIFs managed by the AIFM or equivalent ownership interests (including – for AIFs issuing only units – unit-linked instruments), subject to the legal structure of the AIFs concerned and their rules or instruments of incorporation, or share-linked instruments or equivalent non-cash instruments.  |
| <i>malus</i>                | arrangement that permits the AIFM to prevent vesting of all or part of the amount of a deferred remuneration award in relation to risk outcomes or performances of the AIFM as a whole, the business unit, the AIF and, where possible, the staff member. Malus is a form of ex-post risk adjustment.   |
| <i>clawback</i>             | contractual agreement in which the staff member agrees to return ownership of an amount of remuneration to the AIFM under certain circumstances. This can be applied to both upfront and deferred variable remuneration. When related to risk outcomes, clawback is a form of ex-post risk adjustment.  |
| <i>supervisory function</i> | the relevant persons or body or bodies responsible for the supervision of the AIFM's <i>senior management</i> and for the assessment and periodical review of the adequacy and effectiveness of the risk management process and of the policies, arrangements and procedures put in place to comply with the obligations under the AIFMD. For those AIFMs that given their size, internal organisation and the nature, scope and complexity of their activities or their legal structure do not have a separate supervisory function, the supervisory function should be understood as the member or members of the <i>management body</i> responsible for these functions. |

<sup>80</sup> <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF>.

<sup>81</sup> <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:120:0022:0027:EN:PDF>.

|                         |  |
|-------------------------|--|
| <i>management body</i>  | the governing body of an AIFM.   |
| <i>retention period</i> | period of time during which variable remuneration that has been already vested and paid out in the form of <i>instruments</i> cannot be sold.  |
| <i>accrual period</i>   | period during which the performance of the staff member is assessed and measured for the purposes of determining its remuneration.   |
| <i>deferral period</i>  | the deferral period is the period during which variable remuneration is withheld following the end of the <i>accrual period</i> .  |
| <i>vesting point</i>    | an amount of remuneration vests when the staff member receives payment and becomes the legal owner of the remuneration. Once the remuneration vests, no explicit ex-post adjustments can occur apart from <i>clawback</i> clauses. |

### III. Purpose

5. The purpose of these guidelines is to ensure common, uniform and consistent application of the provisions on remuneration in Articles 13 and 22(2)(e) and (f) of, and Annex II to, the AIFMD.

### IV. Compliance and reporting obligations

#### Status of the guidelines

6. This document contains guidelines issued under Article 16 of the ESMA Regulation<sup>82</sup>. In accordance with Article 16(3) of the ESMA Regulation competent authorities and financial market participants must make every effort to comply with guidelines and recommendations.
7. Competent authorities to whom the guidelines apply should comply by incorporating them into their supervisory practices, including where particular guidelines within the document are directed primarily at financial market participants.

#### Reporting requirements

8. Competent authorities to which these guidelines apply must notify ESMA whether they comply or intend to comply with the guidelines, with reasons for non-compliance, within two months of the date of publication of the translations by ESMA. In the absence of a response by this deadline, competent authorities will be considered as non-compliant. A template for notifications is available from the ESMA website.
9. AIFMs are not required to report whether they comply with these guidelines.

### V. Guidelines on which remuneration is covered by these guidelines

10. Solely for the purposes of the guidelines and Annex II to the AIFMD, remuneration consists of
  - (i) all forms of payments or benefits paid by the AIFM,
  - (ii) any amount paid by the AIF itself, including carried interest, and
  - (iii) any transfer of units or shares of the AIF, in exchange for professional services rendered by the AIFM *identified staff*.

For the purpose of item (ii) of this paragraph, whenever payments, excluding reimbursements of costs and expenses, are made directly by the AIF to the AIFM for the benefit of the relevant categories of staff of the AIFM for professional services rendered, which may otherwise result in a circumvention of the

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<sup>82</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

relevant remuneration rules, they should be considered remuneration for the purpose of the guidelines and Annex II to the AIFMD.

11. All remuneration can be divided into either fixed remuneration (payments or benefits without consideration of any performance criteria) or variable remuneration (additional payments or benefits depending on performance or, in certain cases, other contractual criteria). Both components of remuneration (fixed and variable) may include monetary payments or benefits (such as cash, shares, options, cancellation of loans to staff members at dismissal, pension contributions, remuneration by AIFs e.g. through carried interest models) or non (directly) monetary benefits (such as, discounts, fringe benefits or special allowances for car, mobile phone, etc.). Ancillary payments or benefits that are part of a general, non-discretionary, AIFM-wide policy and pose no incentive effects in terms of risk assumption can be excluded from this definition of remuneration for the purposes of the AIFMD specific risk alignment remuneration requirements.
12. Any payment made directly by the AIF to the benefit of those categories of staff mentioned under Annex II, paragraph (2) of the AIFMD which consists of a pro-rata return on any investment made by those staff members into the AIF should not be subject to any of the remuneration provisions set out in these guidelines. In order for a return on an investment made by the staff member into the AIF to be considered as exempted from the remuneration provisions, the investment needs to consist in an actual disbursement made by the staff member (i.e. loans granted by the AIFM to the staff member in order to allow a co-investment into the AIF should not be considered as an investment for the purposes of the exemption if the loan has not been reimbursed by the staff member by the time the return is paid).
13. AIFMs should be able to clearly identify and make the relevant distinctions in the treatment of:
  - (i) the portion of the payment made by the AIF to the above mentioned categories of staff members which exceeds the pro-rata investment return for the investment made by the relevant staff members and represents carried interest, i.e. a share in the profits of the AIF accrued to the staff members as compensation for the management of the AIF (which is subject to the remuneration provisions of these guidelines)<sup>83</sup>; and
  - (ii) the portion of the payment made by the AIF to the same categories of staff members which represents a share in the profits of the AIF accrued to the staff members as a pro-rata return on any investment by the staff members into the AIF (which is not subject to the remuneration provisions of these guidelines).
14. A "retention bonus" is a form of variable remuneration and can only be allowed to the extent that risk alignment provisions are properly applied.
15. AIFMs should ensure that variable remuneration is not paid through vehicles or that methods are employed which aim at artificially evading the provisions of the AIFMD and these guidelines. The *governing body* of each AIFM has the primary responsibility for ensuring that the ultimate goal of having sound and prudent remuneration policies and structures is not improperly circumvented. Circumstances and situations that may pose a greater risk under this perspective may be: the conversion of parts of the variable remuneration into benefits that normally pose no incentive effect in respect of risk positions; the outsourcing of professional services to firms that fall outside the scope of the AIFMD; the use of tied agents or other persons not considered "employees" from a legal point of view; transactions between the AIFMs and third parties in which the risk takers have material interests; the setting up of structures or methods through which remuneration is paid in the form of dividends or similar pay outs (e.g. improper use of performance fees) and non-monetary material benefits awarded as incentive mechanisms linked to the performance.
16. The so called "carried interest vehicles" are typically limited partnerships (or other kinds of vehicle) being themselves limited partners in the AIF together with third party investors and are used by senior executives of an AIF either to regulate the executives' entitlements to carried interest among

<sup>83</sup> See however Section XII (Guidelines on the specific requirements on risk alignment) for some specific provisions which may apply to certain remuneration structures

themselves as a consequence of a modest capital contribution or to commit capital which is more than merely nominal – i.e. co-investments – in transactions along with the AIF. If payments made by the AIF to the relevant staff members through these carried interest vehicles fall under the definition of carried interest, they should be subject to the remuneration provisions of these guidelines, whereas if they represent a pro-rata return on any investment by the staff members (through the carried interest vehicle) into the AIF, they should not be subject to such provisions.

17. Consideration should also be given to the position of partnerships and similar structures. Dividends or similar distributions that partners receive as owners of an AIFM are not covered by these guidelines, unless the material outcome of the payment of such dividends results in a circumvention of the relevant remuneration rules, any intention to circumvent such rules being irrelevant for such purpose.
18. When delegating portfolio management or risk management activities according to Article 20 of the AIFMD and its implementing measures, AIFM should ensure that:
  - a) the entities to which portfolio management or risk management activities have been delegated are subject to regulatory requirements on remuneration that are equally as effective as those applicable under these guidelines; or
  - b) appropriate contractual arrangements are put in place with entities to which portfolio management or risk management activities have been delegated in order to ensure that there is no circumvention of the remuneration rules set out in the present guidelines; these contractual arrangements should cover any payments made to the delegates' *identified staff* as compensation for the performance of portfolio or risk management activities on behalf of the AIFM.

- **Q&A published by ESMA (Appendix XIV) Section I Remuneration Question 3, Question 4, Question 6**

#### VI. Guidelines on how to identify the categories of staff covered by these guidelines

19. AIFMs should identify the *identified staff*, according to these guidelines and any other guidance or criteria provided by competent authorities. AIFMs should be able to demonstrate to competent authorities how they have assessed and selected *identified staff*.
20. The following categories of staff, unless it is demonstrated that they have no material impact on the AIFM's risk profile or on an AIF it manages, should be included as the *identified staff*:
  - Executive and non-executive members of the *governing body* of the AIFM, depending on the local legal structure of the AIFM, such as: directors, the chief executive officer and executive and non-executive partners.
  - *Senior management*
  - *Control functions*
  - Staff responsible for heading the portfolio management, administration, marketing, human resources.
  - Other risk takers such as: staff members, whose professional activities – either individually or collectively, as members of a group (e.g. a unit or part of a department) – can exert material influence on the AIFM's risk profile or on an AIF it manages, including persons capable of entering into contracts/positions and taking decisions that materially affect the risk positions of the AIFM or of an AIF it manages. Such staff can include, for instance, sales persons, individual traders and specific trading desks.

When assessing the materiality of influence on an AIFM's risk profile or on an AIF it manages, AIFMs should define what constitutes materiality within the context of their AIFMs and the AIFs they

manage. Criteria that AIFMs may follow to check whether they are capturing the correct staff members include an assessment of staff members or a group, whose activities could potentially have a significant impact on the AIFM's results and/or balance sheet and/or on the performance of the AIFs they manage.

An analysis of job functions and responsibilities at the AIFM should be undertaken for a proper assessment of those roles that could materially affect the risk profile of the AIFM or of the AIFs it manages. There could be cases where a staff member does not earn a high amount of total remuneration but could have a material impact on the risk profile of the AIFM or of the AIFs it manages given the individual's particular job function or responsibilities.

Staff members such as administrative or logistical support staff that, given the nature of their job functions, clearly do not have any connection with the risk profile of the AIFM or the AIF, should not be considered risk takers. However, such exclusion only applies to support staff whereas, as mentioned in the fourth bullet point in the present paragraph, staff heading the administration should be included as the *identified staff*.

▪ **Q&A published by ESMA (Appendix XIV) Section I Remuneration Question 5**

21. Additionally, if they have a material impact on the risk profile of the AIFM or of the AIFs it manages, other employees/persons, whose total remuneration takes them into the same *remuneration bracket* as senior managers and risk takers should be included as the *identified staff*, such as: high-earning staff members who are not already in the above categories and who have a material impact on the risk profile of the AIFM or of the AIFs it manages. It is likely that in some cases, those staff members whose remuneration is as high as or higher than senior executives and risk takers will be exerting material influence in some way on the risk profile of the AIFM or of the AIFs it manages. In other AIFMs, this may not be the case.
22. The examples mentioned in paragraphs 20 and 21 above are not definitive. The greater the assumption that there may be risk-takers in certain business units, the more in-depth the risk analysis must be to assess whether a person is to be considered a material risk-taker or not.

**VII. Guidelines on proportionality**

**VII.I. Proportionality in general**

23. According to the *Recommendation*, when taking measures to implement remuneration principles Member States should take account of the size nature and scope of financial undertakings' activities. In taking measures to comply with the remuneration principles AIFMs should comply in a way and to the extent that is appropriate to their size, internal organisation and the nature scope and complexity of their activities. In this way the Annex II to the AIFMD and the *Recommendation* envisage that provisions should operate in a way to enable an AIFM to take a proportionate approach to compliance with a remuneration principle.
24. Not all AIFMs should have to give substance to the remuneration requirements in the same way and to the same extent. Proportionality should operate both ways: some AIFMs will need to apply more sophisticated policies or practices in fulfilling the requirements; other AIFMs can meet the requirements of the AIFMD in a simpler or less burdensome way.
25. Although the remuneration principles in Annex II of the AIFMD are applicable to all AIFMs, proportionality may lead, on an exceptional basis and taking into account specific facts, to the disapplication of some requirements if this is reconcilable with the risk profile, risk appetite and the strategy of the AIFM and the AIFs it manages and within the limits set by the present guidelines. If AIFMs deem a disapplication for these requirements appropriate for their type of AIFM or *identified staff*, they should be able to explain to competent authorities, if requested, the rationale for every single requirement that is disapplied. Disapplication should never be automatically triggered on the basis of these guidelines alone: AIFMs should perform an assessment for each of the remuneration requirements that may be disapplied according to the following paragraph and determine whether

proportionality allows them not to apply each individual requirement; if AIFMs come to the conclusion that no disapplication is possible for any of the disapplicable requirements, there should be no variation to the general application of such requirements to them.

26. The following are the only requirements that may be disapplied and then only if it is proportionate to do so:

- the requirements on the pay-out process for which guidelines are given below under Section XII.IV (Payout process). This means that some AIFMs, either for the total of their *identified staff* or for some categories within their *identified staff*, may decide not to apply the requirements on:
  - variable remuneration in *instruments*;
  - retention;
  - deferral;
  - ex post incorporation of risk for variable remuneration;
- the requirement to establish a remuneration committee for which guidelines are given below in Section X.II (Remuneration committee).

27. The specific numerical criteria set out in Annex II of the AIFMD – the minimum *deferral period* of three to five years, the minimum portion of 40 to 60% of variable remuneration that should be deferred (Annex II, paragraph 1(n) of the AIFMD) and the minimum portion of 50% of variable remuneration that should be paid in *instruments* (Annex II, paragraph 1(m) of the AIFMD) – if disapplied, may only be disapplied in their entirety. It should not be possible to apply, within an AIFM, lower thresholds based on proportionality. For instance, when justified by its size, internal organisation and nature, scope and complexity of its activities, an AIFM may decide not to defer any of the variable remuneration component, but may not decide to apply a 20% deferral of variable remuneration i.e. if the AIFM does not pass the proportionality test for the disapplication of the requirement, it has to apply at least a 40% deferral, or a 60% deferral in the case of a variable remuneration component of a particularly high amount.

28. It is primarily the responsibility of the AIFM to assess its own characteristics and to develop and implement remuneration policies and practices which appropriately align the risks faced and provide adequate and effective incentives to its staff. Competent authorities should review the ways AIFMs actually implement proportionality, taking into account the achievement of regulatory objectives and the need to preserve a level playing field among different AIFMs and jurisdictions.

#### VII.II. Proportionality with respect to the different characteristics of AIFMs

29. The different risk profiles and characteristics among AIFMs justify a proportionate implementation of the remuneration principles. Criteria relevant to the application of proportionality are the size of the AIFM and of the AIFs it manages, its internal organization and the nature, scope and complexity of its activities.

- a) Size: the size criterion can relate to the value of the AIFM capital and to the value of the assets under management (including any assets acquired through the use of leverage) of the AIFs that the AIFM manages; liabilities or risks exposure of the AIFM and of the AIFs that it manages; as well as the number of staff, branches or subsidiaries of an AIFM. The size of an AIFM and of the AIFs it manages should not be considered in isolation when applying proportionality. An AIFM might be considered "small" in terms of number of staff or subsidiaries, but be engaged in a high level of risk taking. An AIFM should adhere strictly to the remuneration principles where the aggregate set of AIFs that it manages - each of them considered "small" - becomes a potentially systemically important (e.g. in terms of total assets under management) or leads to complex investment management activities.

The general obligation to have sound remuneration policies and practices applies to all AIFMs, regardless of their size or systemic importance.

- b) Internal organization: this can relate to the legal structure of the AIFM or the AIFs it manages, the complexity of the internal governance structure of the AIFM, the listing on regulated markets of the AIFM or the AIFs it manages.

This criterion should be assessed having regard to the entire organisation of the AIFM including all the AIFs it manages, meaning that for instance the listing of one AIF should not by itself be sufficient for considering the AIFM as having a complex internal organisation.

- c) Nature, scope and complexity of the activities: in considering this criterion, the underlying risk profiles of the business activities that are carried out, should be taken into account. Relevant elements can be:
- the type of authorized activity (investment management functions listed in point 1 of Annex I of the AIFMD only or also the additional functions listed in point 2 of Annex I of the AIFMD and/or the additional services listed in Article 6(4) of the AIFMD);
  - the type of investment policies and strategies of the AIFs the AIFM manages;
  - the national or cross-border nature of the business activities (AIFM managing and/or marketing AIFs in one or more EU or non-EU jurisdictions); and
  - the additional management of UCITS.

30. In assessing what is proportionate, the focus should be on the combination of all the mentioned criteria (size, internal organization and the nature, scope and complexity of the activities) and, as this is not an exhaustive list, of any other relevant criteria. For instance, an AIFM's business may well be small-scale but could still include complex risk-profiles because of the nature of its activities or the complexity of the managed AIFs.

### VII.III. Proportionality with respect of the different categories of staff

31. Proportionality should also operate within an AIFM for some of the specific requirements. The categories of staff whose professional activities have a material impact on their risk profile should comply with specific requirements which aim to manage the risks their activities entail. The same criteria of size, internal organisation and the nature, scope and complexity of the activities should apply. In addition, the following non-exhaustive elements should be taken into account, where relevant:
- The size of the obligations into which a risk taker may enter on behalf of the AIFM;
  - The size of the group of persons, who have only collectively a material impact on the risk profile of the AIFM;
  - The structure of the remuneration of the staff members (e.g. fixed salary with a variable remuneration vs. profit sharing arrangements) , in particular, the following elements:
    - the amount of variable remuneration perceived;
    - the percentage of variable remuneration over the fixed remuneration.

### VIII. Guidelines for AIFMs being part of a group

32. These guidelines apply in any case to any AIFM. In particular, there should be no exception to the application to any of the AIFMs which are subsidiaries of a credit institution of the sector-specific remuneration principles set out in the AIFMD and in the present guidelines.
33. It may be the case that in a group context, non-AIFM sectoral prudential rules applying to group entities may lead certain staff of the AIFM which is part of that group to be 'identified staff' for the purpose of those sectoral remuneration rules.

**IX. Guidelines on the financial situation of the AIFM**

34. In order to guarantee ongoing compliance with the requirements of Article 9(1) to (3), 9(5) and 9(7) of the AIFMD, AIFMs should ensure that they maintain a prudent balance between sound financial situation and the award, pay out or vesting of variable remuneration.
35. The AIFM should ensure that its financial situation will not be adversely affected by:
- 1) the overall pool of variable remuneration that will be awarded for that year; and
  - 2) the amount of variable remuneration that will be paid or vested in that year.
36. The fact that an AIFM is or risks becoming unable to maintain a sound financial situation, should be a trigger for, inter alia: a) reducing the variable remuneration pool for that year and b) the application of performance adjustment measures (i.e. *malus* or *clawback*) in that financial year<sup>84</sup>. Instead of awarding, paying out the variable remuneration or allowing it to vest, the net profit of the AIFM for that year and potentially for subsequent years should be used to strengthen its financial situation. The AIFM should not compensate for this at a later date by awarding, paying out or vesting a greater amount of variable remuneration than it otherwise would have done, unless it becomes evident in subsequent years that the AIFM's financial results justify such actions.

**X. Guidelines on governance of remuneration**

37. The general requirements on governance of remuneration should apply to the AIFM as a whole.

**X.I. Management body**

**X.I.I Design, approval and oversight of the remuneration policy**

38. An AIFM's remuneration policy should encourage the alignment of the risks taken by its staff with those of the AIFs it manages, the investors of such AIFs and the AIFM itself; in particular, the remuneration policy should duly take into consideration the need to align risks in terms of risk management and exposure to risk.
39. The *supervisory function* should be responsible for approving and maintaining the remuneration policy of the AIFM, and overseeing its implementation. The remuneration policy should not primarily be controlled by executive members of the *supervisory function*. The *supervisory function* should also approve any subsequent material exemptions or changes to the remuneration policy and carefully consider and monitor their effects. Procedures to determine remuneration should be clear, well-documented and internally transparent. For example, proper documentation should be provided on the decision-making process, the determination of the *identified staff*, the measures used to avoid conflicts of interest, the risk-adjustment mechanisms used etc.
40. In the design and oversight of the AIFM's remuneration policies, the *supervisory function* should take into account the inputs provided by all competent corporate functions (i.e. risk management, compliance, human resources, strategic planning, etc.). As a result, those functions should be properly involved in the design of the remuneration policy of the AIFM.
41. Ultimately, the *supervisory function* should ensure that an AIFM's remuneration policy is consistent with and promotes sound and effective risk management. The remuneration policy should:
- be in line with the business strategy, objectives, values and interests of the AIFM,
  - not encourage excessive risk taking as compared to the investment policy of the AIFs the AIFM manages, and

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<sup>84</sup> See also Section XII (Guidelines on the specific requirements on risk alignment).

- enable the AIFM to align the interests of the AIFs and their investors with those of the *identified staff* that manages such AIFs, and to achieve and maintain a sound financial situation.

42. The *supervisory function* should ensure that the AIFM's overall corporate governance principles and structures, as well as their interactions with the remuneration system are considered within the design and implementation of an AIFM's remuneration policies and practices. The *supervisory function* should ensure that the following elements are taken into account: the clear distinction between operating and *control functions*, the skills and independence requirements of members of the *management body*, the role performed by internal committees, including the remuneration committee, the safeguards for preventing conflicts of interests and the internal reporting system and the related parties' transactions rules.

#### **X.I.II Remuneration of members of the management body and supervisory function**

43. The remuneration of the members of the *management body* should be consistent with their powers, tasks, expertise and responsibilities.

44. Where appropriate considering the size of the AIFM, its internal organisation and the nature, scope and complexity of its activities, the *management body* should not determine its own remuneration. The *supervisory function* should determine and oversee the remuneration of the members of the *management body*. To the extent compatible with national law, the *supervisory function* should also specifically approve and oversee the remuneration of senior executives and staff members who receive the highest amounts of total remuneration within the AIFM.

45. For AIFMs which have a separate *supervisory function*, in order to properly address conflicts of interests, it may be more appropriate for members of the *supervisory function* to be compensated only with fixed remuneration. When incentive-based mechanisms are in place, they should be strictly tailored to the assigned monitoring and control tasks, reflecting the individual's capabilities and the achieved results. If *instruments* are granted, appropriate measures should be taken, such as *retention periods* until the end of the mandate, in order to preserve the independence of judgment of those members of the *management body*. For those AIFMs that given their size, internal organisation and the nature, scope and complexity of their activities do not have a separate *supervisory function*, the principle according to which members of the *supervisory function* may more appropriately be compensated only with fixed remuneration should apply only to the non-executive members of the *management body* that perform the tasks of the *supervisory function*.

#### **X.I.III Shareholders' involvement**

46. The approval of an AIFM's remuneration policy and decisions relating to the remuneration of members of the *management body*, may be assigned to the meeting of the shareholders of the AIFM, depending on the AIFM's characteristics or on the national rules in the jurisdiction in which the AIFM is established. The shareholders' vote may be either consultative or binding. To this end, shareholders should be provided with adequate information in order that they can make informed decisions.

47. The *supervisory function* remains responsible for the proposals submitted to the meeting of the shareholders of the AIFM, as well as for the actual implementation and oversight of any changes to the remuneration policies and practices.

#### **X.I.IV Review of the implementation of the remuneration policy**

48. The *supervisory function* should ensure that the implementation of the remuneration policy of the AIFM will be reviewed on an annual basis at a minimum. Such central and independent reviews should assess whether the overall remuneration system:

- operates as intended (in particular, that all agreed plans/programs are being covered; that the remuneration payouts are appropriate, and that the risk profile, long-term objectives and goals of the AIFM are adequately reflected); and

- is compliant with national and international regulations, principles and standards.
49. The relevant internal *control functions* (i.e. internal audit, risk management, compliance functions, etc.) as well as other key *supervisory function* committees (i.e. audit, risk, and nominations committees) should be closely involved in reviewing the remuneration system of the AIFM.
50. Where periodic reviews reveal that the remuneration system does not operate as intended or prescribed, the *supervisory function* should ensure that a timely remedial plan is put in place.
51. The periodic review of the implementation of the remuneration policies and practices may be, partially or totally, externally commissioned when appropriate according to proportionality. Larger and more complex AIFMs should have sufficient resources to conduct the review internally, though external consultants may complement and support the AIFM in carrying out such tasks where appropriate. In line with proportionality, smaller and less complex AIFMs may decide to outsource the entire review, by performing the review less frequently than annually or carrying out at least annually an internal assessment not amounting to a full independent review. In all cases, the *supervisory function* should remain responsible for the review of remuneration policies and practices and for ensuring that the results of the review are followed up; moreover, the relevant *control functions* should be closely involved.

## **X.II. Remuneration committee**

### **X.II.I Setting up a remuneration committee**

52. The setting up of a remuneration committee should be considered, as a matter of good practice, even by those AIFMs that are not obliged to set up such a committee under paragraph (3) of Annex II to the AIFMD.
53. In order to identify whether a remuneration committee is expected to be set up, the factors mentioned in Section VII (Guidelines on proportionality) need to be considered. When assessing whether or not an AIFM is significant, an AIFM should consider the cumulative presence of all the three factors (i.e. its size or the size of the AIFs it manages, its internal organisation and the nature, scope and complexity of its activities). An AIFM which is significant only with respect to one or two of the three above factors should not be required to set up a remuneration committee.
54. Without prejudice to the previous paragraph, specific (non-exhaustive) elements to be taken into account when determining whether or not to establish a remuneration committee are:
- whether the AIFM is listed or not;
  - the legal structure of the AIFM;
  - the number of employees of the AIFM;
  - the AIFM's assets under management;
  - whether the AIFM is also a UCITS management company;
  - the provision of the services mentioned under Article 6(4) of the AIFMD.
55. Taking into account the above principles and having regard to all circumstances, the following are examples of AIFMs which may not need to establish a remuneration committee:
- AIFMs for which the value of the portfolios of AIFs that they manage does not exceed EUR 1.25 billion and not having more than 50 employees, including those dedicated to the management of UCITS and the provision of the services mentioned under Article 6(4) of the AIFMD;
  - AIFMs which are part of banking, insurance, investment groups or financial conglomerates within which an entity is obliged to set up a remuneration committee which performs its tasks and duties for the whole group provided that the rules governing such remuneration committee's composition, role and competences are equivalent to the ones set out in these

guidelines and the existing remuneration committee takes responsibility for checking the compliance of the AIFM with the rules set out in these guidelines.

56. It should also be understood as mentioned above under paragraph 52 that AIFMs falling within the examples set out above may choose to set up a remuneration committee at their own initiative as a matter of good practice.
57. AIFMs that fall outside the above examples should not be automatically required to set up a remuneration committee. For this purpose, AIFMs that are above the thresholds set out in paragraph 55 should be considered significant in terms of their size or the size of the AIFs they manage; in order to decide whether or not they need to set up a remuneration committee, however, such AIFMs should still assess whether or not they are significant in terms of their internal organisation and the nature, the scope and the complexity of their activities.

#### **X.II.II Composition of the remuneration committee**

58. In order to operate independently from senior executives, the remuneration committee should comprise members of the *supervisory function* who do not perform executive functions, at least the majority of whom qualify as independent.
59. The chairperson of the remuneration committee should be an independent, non-executive member.
60. An appropriate number of the members of the remuneration committee should have sufficient expertise and professional experience concerning risk management and control activities, namely with regard to the mechanism for aligning the remuneration structure to AIFMs' risk and capital profiles.
61. The remuneration committee should be encouraged to seek expert advice internally (e.g. from risk management) and externally. The chief executive officer should not take part in the remuneration committee meetings which discuss and decide on his/her remuneration.

#### **X.II.III Role of the remuneration committee**

62. The remuneration committee should:
  - be responsible for the preparation of recommendations to the *supervisory function*, regarding the remuneration of the members of the *management body* as well as of the highest paid staff members in the AIFM;
  - provide its support and advice to the *supervisory function* on the design of the AIFM's overall remuneration policy;
  - have access to advice, internal and external, that is independent of advice provided by or to *senior management*;
  - review the appointment of external remuneration consultants that the *supervisory function*, may decide to engage for advice or support;
  - support the *supervisory function* in overseeing the remuneration system's design and operation on behalf of the *supervisory function*;
  - devote specific attention to the assessment of the mechanisms adopted to ensure that:
    - the remuneration system properly takes into account all types of risks and liquidity and assets under management levels, and
    - the overall remuneration policy is consistent with the business strategy, objectives values and interests of the AIFM and the AIFs it manages and the investors of such AIFs; and

- formally review a number of possible scenarios to test how the remuneration system will react to future external and internal events, and back test it as well.

63. The remuneration committee itself may be in charge of overseeing the central and independent review of the implementation of the remuneration policies and practices.

#### **X.II.IV Process and reporting lines of the remuneration committee**

64. The remuneration committee should:

- have unfettered access to all data and information concerning the decision-making process of the *supervisory function*, on the remuneration system's design and implementation;
- have unfettered access to all information and data from risk management and *control functions*. Such access should not hinder the AIFM's ordinary activities;
- ensure the proper involvement of the internal control and other competent functions (e.g. human resources and strategic planning). The remuneration committee should collaborate with other board committees whose activities may have an impact on the design and proper functioning of remuneration policy and practices (e.g. risk audit, and nomination committees); and
- provide adequate information to the *supervisory function*, and, where appropriate, to the AIFM's shareholders' meeting about the activities performed.

#### **X.III. Control functions**

##### **X.III.I Roles of control functions**

65. AIFMs should ensure that *control functions* have an active role in the design, ongoing oversight and review of the remuneration policies for other business areas.

66. Working closely with the remuneration committee and the *supervisory function* and *management body*, the *control functions* should assist in determining the overall remuneration strategy applicable to the AIFM, having regard to the promotion of effective risk management.

67. The risk management function should assess how the variable remuneration structure affects the risk profile of the AIFM. It is good practice for the risk management function to validate and assess risk adjustment data, and to attend a meeting of the remuneration committee for this purpose.

68. The compliance function should analyse how the remuneration structure affects the AIFM's compliance with legislation, regulations and internal policies.

69. The internal audit function should periodically carry out an independent audit of the design, implementation and effects of the AIFM's remuneration policies.

##### **X.III.II Remuneration of control functions**

70. The remuneration level of staff in the *control functions* should allow the AIFM to employ qualified and experienced personnel in these functions.

71. If staff in *control functions* receives variable remuneration, it should be based on function-specific objectives and should not be determined solely by the AIFM-wide performance criteria.

72. The remuneration structure of *control functions* personnel should not compromise their independence or create conflicts of interest in their advisory role to the remuneration committee, *supervisory function* and/or *management body*. If remuneration of the *control functions* includes a component based on

AIFM-wide performance criteria, the risk of conflicts of interest increases and, therefore, should be properly addressed.

73. For AIFMs which are required to have a remuneration committee, the remuneration of the senior staff responsible for heading the *control functions* should not be solely left to the *supervisory function*, but should be directly overseen by the remuneration committee. The remuneration of those staff members in compliance and risk management functions must be designed in a way that avoids conflict of interests related to the business unit they are overseeing and, therefore, should be appraised and determined independently. The remuneration committee should make recommendations to the *management body* on the remuneration to be paid to the senior officers in the risk management and compliance functions.
74. For AIFMs which are not required to have a remuneration committee, the remuneration of the senior staff responsible for heading the *control functions* should be overseen by the *supervisory function*.
75. Conflicts of interest which might arise if other business areas had undue influence over the remuneration of staff within *control functions* should be adequately managed. The need to avoid undue influence is particularly important where staff members from the *control functions* are embedded in other business areas. However, the views of other business areas should be sought as an appropriate part of the assessment process.
76. *Control functions* should not be placed in a position where, for example, approving a transaction, making decisions or giving advice on risk and financial control matters could be directly linked to an increase or decrease in their performance-based remuneration.

#### XI. Guidelines on the general requirements on risk alignment

▪ **Q&A published by ESMA (Appendix XIV) Section I Remuneration Question 1, Question 2**

77. The general requirements on risk alignment should be applied by AIFMs only to the individual remuneration packages of the *identified staff*, but a voluntary AIFM-wide application is strongly recommended as indicated in Annex II. AIFMs should make an assessment on whether these requirements should be applied to the AIFM as a whole and, if required, be able to demonstrate to competent authorities why they have applied these requirements to the *identified staff* only.

##### XI.1. The general remuneration policy, including the pension policy

78. The long-term strategy of the AIFM should include the overall business strategy and quantified risk tolerance levels with a multi-year horizon, as well as other corporate values such as compliance culture, ethics, behaviour towards investors of the AIFs it manages, measures to mitigate conflicts of interest etc. The design of the remuneration systems should be consistent with the risk profiles, rules or instruments of incorporation of the AIFs the AIFM manages and with the objectives set out in the strategies of the AIFM and the AIFs it manages and changes that could be decided in the strategies must be taken into account. AIFMs should, therefore, ensure that their remuneration systems are well designed and implemented. This includes, in particular, a proper balance of variable to fixed remuneration, the measurement of performance as well as the structure and, where appropriate, the risk adjustment of the variable remuneration. Even a smaller or less sophisticated AIFM should ensure it makes the best possible attempt to align its remuneration policy with its interests and the interests of the AIFs it manages and their investors.
79. When developing their remuneration policy, AIFMs should give due consideration to how remuneration contributes to the prevention of excessive risk-taking, the efficiency of the AIFM and the AIFs it manages and the consistency of the remuneration policy with effective risk management.
80. Managers should consider conservative valuation policies and should not ignore concentration risks and risk factors, such as liquidity risk and concentration risk that could place the AIFs that the AIFM manages under stress at some point in the future. There are strong incentives not to follow such obligations if the variable part of the remuneration consists predominantly of *instruments* that are paid out immediately, without any deferral or ex post risk adjustment mechanisms (*malus* or *clawback*), and/or

are based on a formula that links variable remuneration to current year revenues rather than risk-adjusted profit.

81. In order to counterbalance the dangers mentioned, risk management elements should be connected to the remuneration policy. When properly structured and implemented, variable remuneration can be an efficient tool to align the staff's interests with the interests of the AIFs that the AIFM manages. Having regard to the nature, scale and complexity of an AIFM, alternative approaches exist for connecting risk management elements to a remuneration policy.

#### **XI.II. Discretionary pension benefits**

82. Remuneration policy should cover all aspects of remuneration including fixed components, variable components, pension terms and other similar specific benefits. The pension policy (the fixed as well as the variable pension payments) should be aligned with the long term interests of the AIFM and the AIFs it manages.
83. In case of discretionary pension benefits, as part of the variable remuneration, a staff member should not retire or leave the AIFM with such benefits vested, with no consideration of the economic situation of the AIFs that the AIFM manages or risks that have been taken by the staff member in the long term.
84. In order to align this specific kind of pension benefits with the economic situation of the AIFs that the AIFM manages, discretionary pension benefits, where legally possible according to the relevant pension legislation, should be paid in the form of *instruments*.
85. In the context of a retirement, the discretionary pension benefits vested to the staff member should be subject to a five years retention period.
86. Where a staff member leaves the AIFM before retirement, the discretionary pension benefits should not be vested before a period of five years and should be subject to performance assessment and ex post risk adjustment before pay out.

#### **XI.III. Severance pay**

87. "Golden parachute" arrangements for staff members who are leaving the AIFM and which generate large payouts without any performance and risk adjustment should be considered inconsistent with the principle in Annex II, paragraph (1)(k) of the AIFMD. Any such payments should be related to performance achieved over time and designed in a way that does not reward failure. This should not preclude termination payments in situations such as early termination of the contract due to changes in the strategy of the AIFM or of the AIFs it manages, or in merger and/or takeover situations.
88. AIFMs should set up a framework in which severance pay is determined and approved, in line with the AIFM's general governance structures for employment. The framework should ensure that there is no reward for failure.
89. AIFMs should be able to explain to competent authorities the criteria they use to determine the amount of severance pay. It is good practice to defer any outstanding variable payments or long-term incentive plans and for these to mirror the original deferral schemes.

#### **XI.IV. Personal hedging**

90. Staff could be considered to have hedged away the risk of a downward adjustment in remuneration if the staff member enters into a contract with a third party which requires the third party to make payments directly or indirectly to the staff member that are linked to or commensurate with the amounts by which the staff member's variable remuneration has been reduced. The contract could for instance take the form of an option or any other derivative contract or other form of contract which provides any type of hedging for the staff member's variable remuneration.
91. In order to ensure the effectiveness of risk alignment, staff members should not buy an insurance contract which compensates them in the event of a downward adjustment in remuneration. As a

general rule, however, this would not prohibit insurance designed to cover personal payments such as healthcare and mortgage instalments (provided that the mortgage coverage concerns health-related circumstances that would render the staff member unable to work in an equivalent position), although each case should be judged on its merits.

92. The requirement not to use personal hedging strategies or insurance to undermine the risk alignment effects embedded in their remuneration arrangements should apply to deferred and retained variable remuneration. AIFMs should maintain effective arrangements to ensure that the staff member complies with this requirement.

**XII. Guidelines on the specific requirements on risk alignment**

▪ **Q&A published by ESMA (Appendix XIV) Section I Remuneration Question 1, Question 2**

93. The specific requirements on risk alignment should be applied by AIFMs only to the individual remuneration packages of the *identified staff*, but AIFMs may always consider an AIFM-wide application (or, at least, a "broader than strictly necessary" application) of all or some of the specific requirements. Annex II<sup>85</sup> indicates the specific requirements for which this voluntary AIFM-wide application is strongly recommended.

**XII.I. Fully flexible policy on variable remuneration**

94. Having a fully flexible policy on variable remuneration implies not only that variable remuneration should decrease as a result of negative performance but also, that it can go down to zero in some cases. For its practical implementation, it also implies that the fixed remuneration should be sufficiently high to remunerate the professional services rendered, in line with the level of education, the degree of seniority, the level of expertise and skills required, the constraints and job experience, the relevant business sector and region. Individual levels of fixed remuneration should be indirectly impacted by the basic principle on risk alignment.

**XII.II. Risk alignment of variable remuneration**

**XII.II.I Risk alignment process**

95. To limit excessive risk taking, variable remuneration should be performance-based and risk adjusted. To achieve this aim, an AIFM should ensure that incentives to take risks are constrained by incentives to manage risk. A remuneration system should be consistent with effective risk management and governance processes within the AIFM.

**XII.II.I.I Performance and risk measurement process**

96. Setting up a remuneration system should start by defining the objectives of the AIFM, the unit, as well as the staff and the investment strategy of the AIFs concerned. These objectives should be derived from the business plan of the AIFM, if any, and should be in line with the risk appetite of the AIFM and the investment strategy of the AIFs concerned. The performance criteria, which should be used to assess the staff member's achievement of his/her objectives during the accrual period, can be directly derived from these objectives. The right to receive the variable remuneration is earned ("awarded") at the end of the accrual period or during the accrual period, which should be at least one year, but it may be longer. In some cases different accrual periods may overlap. If properly designed, the performance assessment links the remuneration with the achievement of the investment strategy of the AIFs concerned and the business plan, if any, or the objectives of the AIFM. On the contrary, performance criteria which are badly designed can be an incentive for taking too much risk. When assessing performance, only the effective results should be taken into account. Risk alignment during performance measurement can be achieved by using risk adjusted performance criteria or by adjusting

<sup>85</sup> See annex II of the ESMA Guidelines on Remuneration Policies ([https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-232\\_aifmd\\_guidelines\\_on\\_remuneration\\_-\\_en.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-232_aifmd_guidelines_on_remuneration_-_en.pdf)).

performance measures for risk afterwards. The risk adjustment may differ according to the activity of the staff member and the business line or AIF concerned.

#### **XII.II.I.II Award process**

97. After the accrual period, the AIFM should use a specified award process in order to translate performance assessment into the variable remuneration component for each staff member. This should usually be carried out through so-called "pools" of variable remuneration that are first determined and later on allocated. As not all performance and risk measures are suitable to be applied at the level of the AIFM, the business unit and the staff member, the AIFM should identify the risks at each level and ensure that a risk correction adequately captures the magnitude and the duration of the risk at each level. This so-called "ex-ante risk adjustment" should adjust remuneration for potential adverse developments in the future.

#### **XII.II.I.III Payout process**

98. In order to align the actual payment of remuneration to the life-cycle and redemption policy of the AIFs managed by the AIFM and their investment risks, the variable remuneration should partly be paid upfront (short-term) and partly deferred (long-term). The short-term component should be paid directly after the award and rewards staff for performance delivered in the accrual period. The long-term component should be awarded to staff during and after the deferral period. It should reward staff for the sustainability of the performance in the long term, which is the result of decisions taken in the past. Before paying out the deferred part, a reassessment of the performance and, if necessary, a risk adjustment should be required in order to align variable remuneration to risks and errors in the performance and risk assessments that have appeared since the staff members were awarded their variable remuneration component. This so-called ex post risk adjustment should always be necessary, because at the time remuneration is awarded, the ultimate performance cannot be assessed with certainty.

### **XII.II.II Common requirements for the risk alignment process**

#### **XII.II.II.I Time horizon**

99. AIFMs, when assessing risk and performance, should take into account both current and future risks that are taken by the staff member, the business unit, the AIF concerned or the AIFM as a whole. For this exercise, AIFMs should examine what the impact of the staff member's activities could be on the AIFs they manage and AIFM's short and long term success. To be able to do so, the AIFM should align the horizon of risk and performance measurement with the life-cycle and redemption policy of the AIFs managed by the AIFM and their investment risks. The requirement of an AIFM to assess the performance of its staff in a multi-year framework appropriate to the life-cycle of the AIFs managed by the AIFM implies the *accrual period* and the *payout period* for short-term and long-term remuneration covering an appropriate period in total.
100. The right balance between accrual and payout periods should depend on the type of AIFs managed by the AIFM and on the type of business and activity developed by the staff member. However, the use of multi-year *accrual periods* is more prudent since the assessment of the performance can take into account with certainty more risks that have materialized since the beginning of the *accrual period*.

#### **XII.II.II.III Levels of risk and performance measurement**

101. Performance-related remuneration should include parameters linked to the risks and performance of the AIF concerned and of the business unit of the AIFM in addition to the risks and performance of the individual activities. Thus, the amount of variable remuneration a staff member is eligible for should be determined by his/her individual performance, the performance of his/her business line or the AIF concerned and the performance of the AIFM. The relative importance of each level of the performance criteria should be determined beforehand and adequately balanced to take into account the position or responsibilities held by the staff member.

102. To have the greatest impact on staff behaviour, the variables used to measure risk and performance should be linked as closely as possible to the level of the decisions made by the staff member that is subject to the risk adjustment. Performance criteria should include achievable objectives and measures on which the staff member has some direct influence. For example, for senior executives, AIFMs may design the remuneration policies to include financial measures based on the performance of all the AIFs managed by the AIFM or the entire AIFM, or for performance and risks of units, or decisions that were determined by senior executive strategy. In contrast, variables for the manager of a business unit ideally would be for performance and risk of that unit.

#### **XII.II.III Quantitative and qualitative measures**

103. The risk alignment process should use a mix of quantitative and qualitative approaches (e.g. measurement of performance or risk; setting of the pool and adjustment to risks).
104. Quantitative measures may have some advantages in terms of transparency if they are pre-defined. They can, therefore, influence the behaviour of staff more directly. However, quantitative measures or criteria are not sufficient to measure all risk or performance or to risk adjust remuneration. To complete the measurement and adjustment of risk or performance, AIFMs should also rely on qualitative approaches.

#### **XII.II.IV Judgemental measures**

105. Whenever judgement is used for a risk and performance measurement or risk adjustment, there should be:
- a clearly written policy outlining parameters and key considerations on which the judgement will be based;
  - clear and complete documentation of the final decision regarding risk and performance measurement or risk adjustment;
  - involvement of relevant *control functions* experts;
  - appropriate levels of approval obtained, e.g. of the *management body* or *supervisory function*, or of the remuneration committee; and
  - consideration of the personal incentives of the manager making the judgement, e.g. by using scorecards.
106. For both quantitative and qualitative measures, AIFMs should be prepared to disclose and reproduce any judgmental elements incorporated into their risk alignment process. AIFMs should also provide detailed information to the competent authority if the final outcome after applying judgmental measures is significantly different from the initial outcome using pre-defined measures.

#### **XII.II.III Risk measurement**

107. AIFMs should take into account all risks, whether on or off balance sheet, differentiating amongst risks affecting the AIFM, the AIFs it manages, business units and individuals. Risk identification and quantification at the AIF level can be found in the risk management policy that the AIFM is required to establish, implement and maintain and which identifies all the relevant risks to which the AIFs they manage are or might be exposed to. AIFMs should also determine whether measures they are using for risk adjustment include "difficult-to-measure" risks, such as reputational and operational risk.
108. In order to take into account all material risks, AIFMs should use the same risk measurement methods as used in the risk management policy established for the AIFs managed by the AIFM. Furthermore, AIFMs should also take into account (i) the risks arising from the additional management of UCITS and from the services provided under Article 6(4) of the AIFMD and (ii) the potential professional liability

risks that AIFMs have to cover through either additional own funds or professional indemnity insurance according to Article 9(7) of the AIFMD.

109. Taking proportionality into account, the risk management calculations should be transparent and the AIFMs should be able to demonstrate how the risk calculations can be broken down by AIFs and related to the AIFM's business units and different types of risk positions throughout the organisation. The quality of methods and models used should influence the extent to which an AIFM should implement a more sophisticated variable remuneration policy based on performance measurements.

#### **XII.II.IV Performance measurement**

##### **XII.II.IV.I Qualitative/Quantitative measures**

110. AIFMs should use both quantitative (financial) as well as qualitative (non-financial) criteria for assessing individual performance.
111. The appropriate mix of quantitative and qualitative criteria should depend on the tasks and responsibilities of the staff member. In all cases, the quantitative and qualitative criteria and the balance between them should be specified and clearly documented for each level and category of staff.
112. Quantitative measures should cover a period which is long enough to properly capture the risk of the staff member's actions. Examples of quantitative performance measures used in the asset management sector which fulfil the abovementioned provisions are the internal rate of return (IRR), earnings before interest, taxes, depreciation and amortization (EBITDA), Alpha Ratio, absolute and relative returns, Sharpe Ratio and assets raised.
113. In addition to quantitative performance measures, variable remuneration awards should also be sensitive to the staff's performance with respect to qualitative (non-financial) measures. Examples are the achievement of strategic targets, investor satisfaction, adherence to risk management policy, compliance with internal and external rules, leadership, management, team work, creativity, motivation and cooperation with others business units and with *control functions*. Such determined qualitative criteria could rely on compliance with risk control measures such as limits and audit results. Negative non-financial performance, in particular unethical or non-compliant behaviour, should override any good financial performance generated by a staff member and should diminish the staff member's variable remuneration.

##### **XII.II.IV.II Relative/absolute and internal/external measures**

114. Absolute performance measures are measures set by the AIFM on the basis of its own strategy, which includes the risk profile and risk appetite of the AIFM and of the AIFs it manages, as further developed down through the chain of business levels. Such measures help to minimize the risk that remuneration is awarded that is not justifiable by the AIFM's or AIFs' performance. They also tend to create long term incentives. However, it may be difficult to calibrate absolute performance measures, especially for new entrants or for new kinds of financial activities (with difficult-to-measure risks) linked to the management of AIFs.
115. Relative performance measures are measures that compare performance with peers, either "internal" peers (i.e. within the organization) or "external" (similar AIFMs). Relative performance measures are easier to set because the benchmark is readily available. However, such measures pose the risk that variable remuneration that is not supported by long-term success of the business unit or the AIFM or the AIFs it manages will be paid out anyway. In a period of sector wide positive financial performances, it could lead to "raising the bid" and/or "herd" mentality, providing incentives to take on excessive risk. In a downturn economic cycle where most AIFMs and AIFs may perform poorly, relative measures may nonetheless lead to positive outcomes (and thus to an insufficient contraction of the AIFM's total variable remuneration) even if absolute performance has deteriorated compared to previous periods.
116. Internal (e.g. profits) and external (e.g. share price) variables come with both advantages and disadvantages that should be balanced carefully. Internal performance measures are able to generate more involvement of the staff members if they can influence the outcome by their own behaviour. This

is especially true if the performance measures are fixed at the level of the business unit (rather than on the AIFM-wide level). Furthermore, it is easier to introduce risk adjustment features for internal measures, because the link with in-house risk management techniques is more readily available. On the other hand, such measures can be manipulated and can create distorted outcomes on a short-term basis. External performance measures are less subject to this danger of manipulation, although attempts to artificially increase the stock price (probably only relevant for top executives) may still occur.

### **XII.III. Award process**

#### **XII.III.I Setting and allocation of pools**

117. AIFMs should adopt a documented policy for the award process and ensure that records of the determination of the overall variable remuneration pool are maintained.

#### **XII.III.II The risk adjustment in the award process**

118. In determining remuneration pools or individual awards, AIFMs should consider the full range of current and potential (unexpected) risks associated with the activities undertaken. Performance measures used in setting the remuneration pool may not fully or adequately capture risks undertaken, thus, ex-ante adjustments should be applied to ensure that the variable remuneration is fully aligned with the risks undertaken. AIFMs should establish whether the risk adjustment criteria they are using take into consideration severe risks or stressed conditions.

119. AIFMs should determine to what level they are able to risk adjust their variable remuneration calculations quantitatively – whether to the business unit level or further down the line such as to a trading desk level, if any, or even to an individual level. AIFMs should determine the level of granularity that is suitable for each level.

#### **XII.III.II.I Quantitative ex ante risk adjustment**

120. In order to have a sound and effective remuneration scheme, AIFMs should use a number of different quantitative measures for their risk adjustment process. Normally, these measures should be based on an overarching risk adjustment framework.

121. When measuring the profitability of the AIFM and its business units as well as the AIFs it manages, the measurement should be based on net revenue where all direct and indirect costs related to the activity are included. AIFMs should not exclude IT costs, research costs, legal fees, marketing costs, and costs for outsourced activities. AIFMs should make sure that remuneration pools are not being "back-fitted" to meet remuneration demands.

122. The quantitative ex-ante risk adjustments made by AIFMs should largely rely on existing measures within the AIFMs, generally used for other risk management purposes. As a result, the limitations and potential issues related to these measures should also be relevant for the remuneration process. The risk adjustments used should benefit from the experience gained when dealing with these risks in other contexts and should be challenged like any other component of the risk management process.

#### **XII.III.II.II Qualitative measures for ex-ante risk adjustment**

123. Qualitative risk elements should be considered by AIFMs. Qualitative ex-ante adjustments could take place while setting AIFM-wide and business unit remuneration pools or when determining or allocating individuals' remuneration. Qualitative ex-ante risk adjustments are common at pool and individual levels, contrary to quantitative adjustments which tend to be mostly observed only at the pool level.

124. AIFMs make qualitative risk adjustments when allocating/determining individuals' remuneration through assessments that may explicitly include risk and control considerations such as compliance breaches, risk limit breaches and internal control breakdowns (e.g. based on internal audit results).

### **XII.IV. Pay-out process**

#### **XII.IV.I Non-deferred and deferred remuneration**

125. Although remuneration is aligned through ex-ante risk adjustments, due to uncertainty, ex-post risk adjustments should be put in place to keep incentives fully aligned. This can only be done if part of the remuneration has been deferred.
126. A deferral schedule is defined by different components: (a) the time horizon of the deferral, (b) the proportion of the variable remuneration that is being deferred, (c) the speed at which the deferred remuneration vests (*vesting point*), (d) the time span from accrual until the payment of the first deferred amount and (e) the form of the deferred variable remuneration. AIFMs can differentiate their deferral schedules by varying these five components. A stricter than necessary application for one component may influence the supervisory scrutiny for another component. In any case, the way in which an AIFM combines these components should lead to a meaningful deferral schedule, in which the long-term risk alignment incentives are clear.

##### **XII.IV.I.I Time horizon and vesting**

127. The *deferral period* always starts at the moment the upfront part of the variable remuneration is paid out and can be coupled either to cash variable remuneration or variable remuneration in *instruments*. It ends when the last variable remuneration has vested. The minimum *deferral period* is three to five years, unless the AIFM can demonstrate that the life cycle of the AIF concerned is shorter; this means that if the life cycle of the AIF concerned is, for instance, one year, the minimum *deferral period* may be one year. AIFMs should set the *deferral period* which should be calculated on the basis of the life cycle and redemption policy of the AIF concerned and depending on the potential impact of the staff on the risk profile of the AIF. The actual *deferral period* should be further tailored to the responsibilities and tasks performed by the staff and expected fluctuations in the value of the assets of the AIF, which in many cases will imply longer time horizons. The AIFM should consider longer *deferral periods* for at least members of the *management body*.

##### **XII.IV.I.II Vesting point**

128. Pro rata vesting (or payment) means that for a *deferral period* of, for example, three years one-third of the deferred remuneration vests at the end of each of the years  $n+1$ ,  $n+2$  and  $n+3$ , where "n" is the moment at which performance is measured to determine the variable remuneration. Annex III<sup>86</sup> includes a diagram showing an example of a pro rata spreading for a deferral scheme in which 60% of the variable remuneration is deferred (first diagram).
129. In any case, vesting should not take place more frequently than on a yearly basis (e.g. not every six months).

##### **XII.IV.I.III Proportion to be deferred**

130. The proportion of the variable remuneration that should be deferred ranges from 40 to 60 %, depending on the impact the staff member (or category of staff) can have on the risk profile of the AIFs managed by the AIFM and the responsibilities and tasks performed, and depending on the amount of variable remuneration. If AIFMs decide to determine the proportion that is being deferred by a cascade of absolute amounts (rather than percentages of the total variable remuneration - e.g. part between 0 and 100: 100% upfront, part between 100 and 200: 50% upfront and rest is deferred, part above 200: 25% upfront and rest is deferred ...), on an average weighted basis, such AIFMs should respect the 40 to 60 % threshold.

##### **XII.IV.I.IV Time span between end of accrual and vesting of deferred amount**

131. In order to ensure a proper assessment of the performance outcome and, thus, to undertake a proper ex-post risk adjustment, the first deferred portion should not be paid out too soon after the *accrual*

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<sup>86</sup> See annex III of the ESMA Guidelines on Remuneration Policies ([https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-232\\_aifmd\\_guidelines\\_on\\_remuneration\\_-\\_en.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-232_aifmd_guidelines_on_remuneration_-_en.pdf)).

*period*. For the deferral to be really effective with regard to the staff's incentives, the first amount should not vest sooner than 12 months after the accrual.

#### XII.IV.II Cash vs. instruments

##### XII.IV.II.I Types of instruments

132. Staff should only be remunerated using *instruments* if it does not trigger interest misalignment or encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the relevant AIF(s). A misalignment of interests might arise in relation to *identified staff* that are not directly involved in portfolio management. Rewarding those individuals with *instruments* of AIFs might represent a conflict of interest with their duty to perform independently their functions relating to those AIFs.
133. For AIFMs managing several AIFs, in order to align the interests of the *identified staff* with those of the relevant AIF(s), when possible according to the organisation of the AIFM and the legal structure of the managed AIF(s), the *identified staff* should receive *instruments* related mainly to the AIF(s) in relation to which they perform their activities, provided that no excessive concentration in the holding of the *instruments* – facilitating an excessive risk-taking by the *identified staff* – is created. E.g. if one member of the staff of an AIFM which manages three AIFs (x, y and z) performs his/her activities for AIF x only, in principle that member of the staff should receive *instruments* related mainly to AIF x; however, should the application of such principle lead to a situation where the *identified staff* has too strong an interest in the AIF for which they perform their activities, the AIFM should consider enlarging the spectrum of *instruments* paid in order to prevent an excessive risk-taking from the *identified staff* in relation to the relevant AIF(s).
134. The availability of *instruments* is dependent on the legal structure of the AIFs concerned and their rules or instruments of incorporation. For AIFs in the legal form of a corporate fund, shares or share-linked instruments should be able to align the interests of the shareholders and staff. Share-linked instruments are those whose value is based on a market value appreciation of the stock and that have the share price as a reference point, e.g. stock appreciation rights, types of synthetic shares.
135. For many AIFs which are common funds, *instruments* should consist of units of the AIF concerned, or equivalent ownership interests; for many of these AIFs, share-linked instruments are not an option due to their legal form. Even for unlisted corporate funds it may be difficult to determine a share price that represents the AIF's net asset value between two (at least annual) net asset value calculations. In these cases alternative instruments, may be used that reflect the AIF's value and have the same intended effect as share-linked instruments.
136. Neither dividends nor interest should be paid on *instruments* before vesting.

##### XII.IV.II.II Retention policy

137. A retention policy should be determined by the AIFM in the remuneration policy. The AIFM should be able to explain how the retention policy relates to other risk alignment measures in the total remuneration policy and should explain whether and how they differentiate between *instruments* paid upfront and deferred *instruments*.
138. *Retention periods*, as the most important element of the retention policy, should be coupled with the vesting of *instruments*. The *retention period* is independent from the *deferral period*. This means that, in order to meet the requirement of a minimum *deferral period* of three to five years (where applicable), the *retention period* counts for nothing. The *retention period* can last for a shorter or longer period than the *deferral period* applied to the instruments that are not paid upfront.
139. In the case of upfront *instruments*, *retention periods* are the only mechanism available to emphasize the difference between cash paid upfront and *instruments* awarded upfront in order to align incentives with the longer-term interests of the AIFM and the AIFs it manages and the investors of such AIFs.

140. In the case of deferred *instruments*, the *retention periods* come after every vested portion (the second diagram in Annex III<sup>87</sup> illustrates these concepts). Competent authorities may determine whether the *retention periods* proposed by the AIFM are sufficient and appropriate.
141. The minimum *retention period* should be sufficient to align incentives with the longer term interests of the AIFM, of the AIFs it manages and of their investors. Different factors may tend to suggest that this period could be longer or shorter. Longer *retention periods* should be applied for staff with the most material impact on the risk profile of the AIFM and the AIFs it manages.
142. It is possible that a *retention period* lasts for a shorter period than the *deferral period* applied to the *instruments* that are not paid up front. However, as an example of proportionality, for their most senior staff, large and complex AIFMs should consider the use of a *retention period* for upfront paid *instruments* that goes beyond the *deferral period* for the deferred *instruments*.
143. *Instruments* should be valued on the date of the award (at the end of the *accrual period*) of these *instruments*. This value is the basis for the determination of the initial number of *instruments* and for later ex-post adjustments to the number of *instruments*.
144. The upfront payment of *instruments*, even with a minimum *retention period* of, for example, three years, is not equivalent to deferred *instruments*. Deferred *instruments* are subject to an ex-post risk adjustment due to the back-testing of the underlying performance, possibly leading to a reduction in the number of *instruments* that will eventually be paid out (second diagram in Annex III<sup>88</sup>).

#### XII.IV.II.III Minimum portion of instruments and their distribution over time

145. The requirement in paragraph (1)(m) of Annex II to the AIFMD to apply the minimum of 50% (where applicable) to both the portion of the variable remuneration component that is deferred and the portion of the variable remuneration component not deferred means that the 50% minimum threshold for *instruments* should be applied equally to the non-deferred and the deferred part; in other words, AIFMs should apply the same chosen ratio between *instruments* and cash for their total variable remuneration to both the upfront and deferred part.

Examples:

- Good practice: For a certain category within its *identified staff*, an AIFM establishes a 50 *instruments* / 50 cash ratio for the variable remuneration, combined with a 60% deferral schedule (that is, 40% is non-deferred variable remuneration). This results in an upfront payment in *instruments* of 20 (i.e. 50% of 40) and 20 in cash. The deferred part consists of 30 in *instruments* and 30 in cash.
- Good practice: For a certain category within its *identified staff*, an AIFM establishes a 70 *instruments* / 30 cash ratio for the variable remuneration, combined with a 40% deferral schedule (that is, 60% is non-deferred variable remuneration). This results in an upfront payment in *instruments* of 42 (i.e. 70% of 60) and 18 in cash. The deferred part consists of 28 in *instruments* and 12 in cash.
- Poor practice: If for a certain category within its *identified staff*, an AIFM were to establish a 50 *instruments* / 50 cash ratio for the variable remuneration, combined with a 40 % deferral scheme, the AIFM cannot decide to pay 50 in cash upfront and 10 in *instruments*, leading to a deferred pay out of 40 in *instruments*.
- Poor practice: If for a certain category within its *identified staff*, an AIFM were to establish a 70 *instruments* / 30 cash ratio for the variable remuneration, combined with a 50% deferral

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<sup>87</sup> See footnote 53.

<sup>88</sup> See footnote 53.

scheme, the AIFM cannot decide to pay 50 upfront in *instruments* and 0 in cash, leading to a deferred pay out of 20 in *instruments* and 30 in cash.

146. The second diagram in Annex III<sup>89</sup> provides an example of this equal distribution of *instruments* over the non-deferred and deferred parts of remuneration.
147. For the purposes of the requirement to pay at least 50% of variable remuneration in *instruments* unless the management of AIFs accounts for less than 50% of the total portfolio managed by the AIFM, the 50% threshold should be based on the net asset value of the AIFs.

### XII.IV.III Ex post incorporation of risk for variable remuneration

#### XII.IV.III.I Explicit ex-post risk adjustments

148. An "ex-post risk adjustment" should imply that once an initial variable remuneration component has been awarded to the staff member, and an upfront part has already been paid, the AIFM is still able to adjust, by way of a reduction, the variable remuneration as time goes by and the outcomes of the staff member's actions materialize.
149. An ex-post risk adjustment is an explicit risk alignment mechanism through which the AIFM itself adjusts remuneration of the staff member by means of *malus* or *clawback* clauses (e.g. by lowering cash remuneration or by awarding a lower number of *instruments*). Ex-post risk adjustment should always be performance-related: techniques that are, for example, based on the amount of dividends or the evolution of the share price are not sufficient because the link to the performance of a staff member is not sufficiently direct. Therefore, ex-post risk adjustments are frequently also called "performance adjustments" because they are a response to the actual risk outcomes of the staff member's actions. Performance measures taken at this stage should allow the AIFM to perform an analysis (similar to back testing) as to whether its initial ex-ante risk adjustment was correct. AIFMs should ensure there is a link between the initial performance measurement and the back-testing. Thus, the extent to which an ex-post risk adjustment is needed depends on the quality (accuracy) of the ex-ante risk adjustment.
150. The effect of *maluses* should not be inflated by paying out artificially high interest (above market rates) on the cash deferred parts to the staff member. *Maluses* operate by affecting the *vesting point* and cannot operate after the end of the *deferral period*. Furthermore, *clawback* can be a method for achieving an ex-post risk adjustment on variable remuneration.
151. AIFMs may utilize specific criteria whereby *malus* (to both the cash portion and the *instruments* portion of deferred remuneration) and *clawbacks* would apply. Such criteria should, for example, include:
- (a) evidence of misbehaviour or serious error by the staff member (e.g. breach of code of conduct, if any, and other internal rules, especially concerning risks);
  - (b) whether the AIF and/or the AIFM and/or the business unit subsequently suffers a significant downturn in its financial performance (specific indicators should be used);
  - (c) whether the AIF and/or the AIFM and/or the business unit in which the staff member works suffers a significant failure of risk management;
  - (d) significant changes in the AIFM's overall financial situation.
152. A *clawback* should typically operate in the case of established fraud or misleading information. Where applicable, AIFMs should include *clawback* clauses in addition to these cases e.g. for remuneration received in breach of the AIFMD and/or these guidelines.
153. Ex-post risk adjustment could be based on both quantitative measures and informed judgment.

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<sup>89</sup> See footnote 53.

154. To have the greatest impact on staff's incentives, the variables should measure outcomes as close as possible to the level of the decisions made by the staff member that is subject to the ex-post explicit adjustment. For example, variables for senior executives probably should be for outcomes for the AIFM as a whole, or for outcomes of units or decisions that were determined by senior executive strategy. In contrast, variables for the head responsible for a business unit ideally would reflect outcomes of that unit.

#### **XII.IV.III.II Implicit adjustments**

155. When the variable remuneration takes the form of *instruments*, the final payout to the staff member will depend partly on market prices due to fluctuations during the deferral or *retention period*. This implicit adjustment of remuneration is not related to any explicit decision of the AIFM, but is inherent to the form that is used for paying out. Under no circumstances should the evolution of the net asset value of the AIF or, for listed AIF, the evolution of the share price be considered sufficient as a form of ex-post risk adjustment. There should always be a form of explicit risk adjustment on the initiative of the AIFM. For non-senior staff in particular, there may be no direct relation between their decisions and the value of the AIF.
156. A *retention period* on its own can never be sufficient to design an ex-post risk adjustment for *instruments* and should not be a substitute for a longer *deferral period*.

#### **XII.IV.III.III Possibility of upward revisions**

157. The market price of *instruments* can go up, so implicitly they are subject to movements in their value in both directions.
158. Under no circumstances should the explicit ex-post risk adjustment (both for cash and *instruments*) lead to an increase of the deferred part.

#### **XII.V. Compliance of certain remuneration structures with the requirements on risk alignment of variable remuneration, award and pay-out process**

159. While it is necessary to have regard to all the relevant circumstances case-by-case, the guidelines under Sections XII.II (Risk alignment of variable remuneration), XII.III (Award process) and XII.IV (Pay-out process) may be met where:
- (a) an AIFM must first return all capital contributed by the investors of the AIF it manages and an amount of profits at a previously agreed hurdle rate (if any) to the investors of the AIF, before the *identified staff* of the AIFM may receive any variable compensation for the management of the relevant AIF; and
  - (b) the compensation received by the *identified staff* of the AIFM is subject to *clawbacks* until the liquidation of the relevant AIF.

### **XIII. Guidelines on disclosure**

#### **XIII.I. External disclosure**

##### **XIII.I.I Specific and general requirements on disclosure**

160. AIFMs should consider the additional disclosure on remuneration required under paragraph (8) of the *Recommendation*, to the extent that the latter may also be relevant to them. AIFMs should have the flexibility to disclose the information mentioned in the *Recommendation* through an independent remuneration policy statement, a periodic disclosure in the annual report or any other form. In all cases, however, the AIFM should ensure that the disclosure is clear and easily understandable and accessible.
161. Without prejudice to confidentiality and applicable data protection legislation, AIFMs should disclose detailed information regarding their remuneration policies and practices for members of staff whose professional activities have a material impact on the risk profile of the AIFs the AIFM manages. AIFMs

should also provide general information about the basic characteristics of their AIFM-wide remuneration policies and practices.

162. The *Recommendation's* remuneration disclosures may be made on a proportionate basis and the overall remuneration proportionality principle will apply to the type and amount of information disclosed. Small or non-complex AIFMs/AIFs should only be expected to provide some qualitative information and very basic quantitative information where appropriate. In practice, this could mean that such AIFMs/AIFs are not expected to provide all the information under paragraph (8) of the *Recommendation*. AIFMs should disclose how they have applied proportionality.
163. The disclosure should be published on at least an annual basis and as soon as practicable after the information becomes available.
164. The disclosure made in accordance with this Section should be without prejudice to the disclosure obligations vis-à-vis prospective investors under Article 23 of the AIFMD.

### **XIII.I.II Policy and practices**

165. The disclosure report should set out the decision-making process used to determine the remuneration policy for the individuals to which it applies. This may include the governance procedure relating to the development of the remuneration policy and should include information about the bodies (including their composition and mandate), such as the remuneration committee or external consultants, which played a significant role in the development of the remuneration policy. AIFMs should outline the role of all relevant stakeholders involved in the determination of the remuneration policy. Additionally, the disclosure should include a description of the regional scope of the AIFM's remuneration policy, the types of staff considered as material risk takers and the criteria used to determine such staff.
166. The report should include information on how pay and performance are linked. Such information should include a description of the main performance metrics used for: the AIFM, top-level business lines, and for individuals (i.e. scorecards). AIFMs should disclose information relating to the design and structure of remuneration processes, such as the key features and objectives of the remuneration policy and how the AIFM ensures that staff members in *control functions* are remunerated independently of the businesses they oversee. The report should also include a description of the different forms of variable remuneration used (i.e. cash, equity, options, other capital instruments, and longterm incentive plans) and should include the rationale for using these different forms and for allocating them to different categories of staff. Additionally, the report should include a discussion of the parameters used to allocate deferred and non-deferred remuneration for different staff categories.
167. Disclosure reports should describe how the AIFM takes into account current and future risks to which they are exposed when implementing remuneration methodologies and what these risks are. Also, AIFMs should describe the measures used to take account of these risks and the ways in which these measures affect remuneration. In addition, AIFMs should disclose the ways in which they seek to adjust remuneration to take account of longer-term performance - as in the AIFM's policy on deferral, vesting and performance adjustment.
168. The quantitative (financial) as well as qualitative (non-financial) criteria used by AIFMs for assessing individual performance which are relevant for determining the remuneration policies and practices and are described under Section XII.IV.I (Qualitative/Quantitative measures) should also be disclosed in the disclosure reports.
169. The disclosure should be produced and owned by the *management body* that has the ultimate sign-off on remuneration decisions.

### **XIII.II. Internal disclosure**

170. The remuneration policy of an AIFM should be accessible to all staff members of that AIFM. AIFMs should ensure that the information regarding the remuneration policy disclosed internally reveals at least the details which are disclosed externally. Therefore, according to the size, internal organisation and the nature, scope and complexity of the activities of the AIFM, the information provided to staff

members might contain some of the elements listed in Section III (Disclosure) of the *Recommendation*. The staff members should know in advance the criteria that will be used to determine their remuneration. The appraisal process should be properly documented and should be transparent to the member of staff concerned. Confidential quantitative aspects of the remuneration of staff members should not be subject to internal disclosure.

## Appendix VIII: Commission Regulation with regard to technical standards on types of AIFMs

[↶ Art. 16 AIFMD](#) | [↶ Art. 19 AIFMD](#) | [↶ Art. 23 AIFMD](#) | [↶ Art. 61 AIFMD](#)

### COMMISSION DELEGATED REGULATION (EU) No 694/2014 of 17 December 2013

#### supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to regulatory technical standards determining types of alternative investment fund managers

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010<sup>90</sup>, and in particular Article 4(4) thereof,

Whereas:

- 1) It is important that regulatory technical standards determining types of AIFMs supplement the rules in Directive 2011/61/EU so that certain requirements of the Directive are applied to AIFMs in a uniform manner.
- 2) It is desirable to distinguish whether an AIFM is managing AIFs of the open-ended or closed-ended type or both in order to apply correctly the rules on liquidity management and the valuation procedures of Directive 2011/61/EU to AIFMs.
- 3) The distinguishing factor in determining whether an AIFM is managing AIFs of the open-ended or closed-ended type should be the fact that an open-ended AIF repurchases or redeems its shares or units with its investors, at the request of any of its shareholders or unitholders, prior to the commencement of its liquidation phase or wind-down and does so according to the procedures and frequency set out in its rules or instruments of incorporation, prospectus or offering documents. A decrease in the capital of the AIF in connection with distributions according to the rules or instruments of incorporation of the AIF, its prospectus or offering documents, including one that has been authorised by a resolution of the shareholders or unitholders passed in accordance with those rules or instruments of incorporation, prospectus or offering documents of the AIF, should not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type.
- 4) The repurchases or redemptions which should be relevant for determining whether an AIFM is managing AIFs of the open-ended or closed-ended type should only be the ones made out of the assets of the AIF. Therefore, whether an AIF's shares or units can be negotiated on the secondary market and are not repurchased or redeemed by the AIF should not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type.
- 5) An AIFM that manages one or more open-ended AIFs and one or more closed-ended AIFs at the same time should apply to each AIF the specific rules relating to the relevant type of AIF.
- 6) Any change in the redemption policy of an AIF implying that the AIF may be considered no longer as being an AIF of the open-ended type or an AIF of the closed-ended type, should lead the AIFM to cease to apply the rules relating to the old redemption policy of the AIF it manages and to apply the rules relating to the new redemption policy of such AIF.
- 7) For the purposes of Article 61 (3) and (4) of Directive 2011/61/EU account should be taken of the legal structures under which closed-ended AIFs were established before 22 July 2013. When the Directive was

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<sup>90</sup> OJ L 174, 1.7.2011, p. 1.

adopted no harmonised definition existed in the Union regarding the legal structure of closed-ended AIFs, which varied between Member States. This reality is reflected in the text of the Directive, which qualifies as closed-ended AIFs certain existing legal structures that have no redemption rights exercisable during the period of 5 years from the date of the initial investment. Article 61(3) and (4) of Directive 2011/61/EU provides for transitional periods during which existing AIFMs, in so far as they manage closed-ended AIFs that are in an advanced or final stage of their investment cycle, as evidenced by their expiring date or by their impossibility to make any additional investment after 22 July 2013, can continue to manage such AIFs without authorisation or without having to comply with a significant part of the Directive. Consequently, in order to preserve the scope of those provisions as intended in light of this objective and the above mentioned background, it should be also considered to be an AIFM of a closed-ended AIF for the purposes of Article 61(3) and (4) of Directive 2011/61/EU, each AIFM in so far it manages AIFs whose shares or units are repurchased or redeemed after an initial period of at least 5 years during which redemption rights are not exercisable.

- 8) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- 9) ESMA has conducted open public consultations in relation to the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010,

HAS ADOPTED THIS REGULATION:

*Article 1*  
**Types of AIFMs**

1. An AIFM may be either or both of the following:
  - an AIFM of open-ended AIF(s);
  - an AIFM of closed-ended AIF(s).
2. An AIFM of an open-ended AIF shall be considered to be an AIFM which manages an AIF the shares or units of which are, at the request of any of its shareholders or unitholders, repurchased or redeemed prior to the commencement of its liquidation phase or wind-down, directly or indirectly, out of the assets of the AIF and in accordance with the procedures and frequency set out in its rules or instruments of incorporation, prospectus or offering documents.
3. A decrease in the capital of the AIF in connection with distributions according to the rules or instruments of incorporation of the AIF, its prospectus or offering documents, including one that has been authorised by a resolution of the shareholders or unitholders passed in accordance with those rules or instruments of incorporation, prospectus or offering documents, shall not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type.
4. Whether an AIF's shares or units can be negotiated on the secondary market and are not repurchased or redeemed by the AIF shall not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type.
5. An AIFM of a closed-ended AIF shall be an AIFM which manages an AIF other than of the type described in paragraph 2.
6. Where a change in the redemption policy of the AIF has the effect of changing the type of AIF(s) an AIFM manages, the rules relevant to the new type of AIF shall be applied to that AIF by the AIFM.

7. For the purposes of Article 61(3) and (4) of Directive 2011/61/EU, an AIFM in so far as it manages AIFs whose shares or units are, at the request of any of its shareholders or unitholders, repurchased or redeemed prior to the commencement of its liquidation phase or wind-down, directly or indirectly, out of the assets of the AIFs after an initial period of at least 5 years during which redemption rights are not exercisable shall also be considered to be an AIFM of a closed-ended AIF.

*Article 2*

**Entry into force**

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 17.12.2013

For the Commission

The President

José Manuel BARROSO

## Appendix IX: Guidelines on key concepts of the AIFMD

(ESMA Guidelines on key concepts of the AIFMD dated 13 August 2013, [ESMA/2013/611](#))

### 🔗 Art. 4 AIFMD

#### I. Scope

##### Who?

1. These guidelines apply to AIFMs and competent authorities.

##### What?

2. These guidelines apply in relation to Article 4(1)(a) of the AIFMD.

##### When?

3. These guidelines apply from two months after the date of publication by ESMA.

#### II. Definitions

Unless otherwise specified, terms used in the Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010<sup>91</sup> (AIFMD) and in the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision<sup>92</sup>, have the same meaning in these guidelines. In addition, the following definitions apply for the purposes of these guidelines:

*general commercial or industrial purpose*

the purpose of pursuing a business strategy which includes characteristics such as running predominantly

- i) a commercial activity, involving the purchase, sale, and/or exchange of goods or commodities and/or the supply of non-financial services, or
- ii) an industrial activity, involving the production of goods or construction of properties, or
- iii) a combination thereof.

*pooled return*

the return generated by the pooled risk arising from acquiring, holding or selling investment assets – including the activities to optimise or increase the value of these assets – irrespective of whether different returns to investors, such as under a tailored dividend policy, are generated.

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<sup>91</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF>.

<sup>92</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:083:0001:0095:EN:PDF>.

*day-to-day discretion or control*

a form of direct and on-going power of decision – whether exercised or not – over operational matters relating to the daily management of the undertakings' assets and which extends substantially further than the ordinary exercise of decision or control through voting at shareholder meetings on matters such as mergers or liquidation, the election of shareholder representatives, the appointment of directors or auditors or the approval of annual accounts.

*pre-existing group*

a group of family members, irrespective of the type of legal structure that may be put in place by them to invest in an undertaking and provided that the sole ultimate beneficiaries of such legal structure are family members, where the existence of the group pre-dates the establishment of the undertaking. This shall not prevent family members' joining the group after the undertaking has been established. For the purpose of this definition, 'family members' means the spouse of an individual, the person who is living with an individual in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings, uncles, aunts, first cousins and the dependants of an individual.

**III. Purpose**

4. The purpose of these guidelines is to ensure common, uniform and consistent application of the concepts that comprise the definition of 'AIF' in Article 4(1)(a) of the AIFMD by clarifying each of these concepts. Appropriate consideration should be given to the interaction between the individual concepts of the definition of an AIF and an entity should not be considered an AIF unless all the elements included in the definition of 'AIFs' under Article 4(1)(a) of the AIFMD are present. By way of example, undertakings which do raise capital from a number of investors, but do not do so with a view to investing it in accordance with a defined investment policy, should not be considered AIFs for the purposes of the AIFMD.
5. Nevertheless, competent authorities and market participants should not consider that the absence of all or any one of the characteristics under each of the concepts in the definition of 'AIF' in Article 4(1)(a) of the AIFMD (i.e. 'collective investment undertaking', 'raising capital', 'number of investors' and 'defined investment policy'), as set out in these guidelines, conclusively demonstrates that an undertaking does not fall under the relevant concept. Competent authorities and market participants should consider an undertaking to be an 'AIF' if the presence of all the concepts in the definition under Article 4(1)(a) of the AIFMD is otherwise established. For the avoidance of doubt, these guidelines illustrate and explain in more detail the characteristics likely to lead to an undertaking being considered an AIF, but they in no way alter the provisions of the AIFMD.
6. The additional details provided by these guidelines should be relevant for the purposes of the AIFMD only and are not intended to affect the meaning of any similar concepts used in any other European legislation, including Directive 2009/65/EC and Directive 2010/73/EU.

#### IV. Compliance and reporting obligations

##### Status of the guidelines

7. This document contains guidelines issued under Article 16 of the ESMA Regulation<sup>93</sup>. In accordance with Article 16(3) of the ESMA Regulation, competent authorities and financial market participants must make every effort to comply with guidelines and recommendations.
8. Competent authorities to whom the guidelines apply should comply by incorporating them into their supervisory practices, including where particular guidelines within the document are directed primarily at financial market participants.

##### Reporting requirements

9. Competent authorities to which these guidelines apply must notify ESMA whether they comply or intend to comply with the guidelines, with reasons for non-compliance, within two months of the date of publication by ESMA. In the absence of a response by this deadline, competent authorities will be considered as non-compliant. A template for notifications is available from the ESMA website.
10. AIFMs are not required to report whether they comply with these guidelines.

#### V. Guidelines on the treatment of investment compartments of an undertaking

11. Where an investment compartment of an undertaking exhibits all the elements in the definition of 'AIF' in Article 4(1)(a) of the AIFMD (i.e. 'collective investment undertaking', 'raising capital', 'number of investors' and 'defined investment policy') this should be sufficient to determine that the undertaking as a whole is an 'AIF' under Article 4(1)(a) of the AIFMD.

#### VI. Guidelines on 'collective investment undertaking'

12. The following characteristics, if all of them are exhibited by an undertaking, should show that the undertaking is a collective investment undertaking mentioned in Article 4(1)(a) of the AIFMD. The characteristics are that:
  - (a) the undertaking does not have a *general commercial or industrial purpose*;
  - (b) the undertaking pools together capital raised from its investors for the purpose of investment with a view to generating a *pooled return* for those investors; and
  - (c) the unitholders or shareholders of the undertaking – as a collective group – have no *day-to-day discretion or control*. The fact that one or more but not all of the aforementioned unitholders or shareholders are granted *day-to-day discretion or control* should not be taken to show that the undertaking is not a collective investment undertaking.

#### VII. Guidelines on 'raising capital'

##### Rec. 7

13. The commercial activity of taking direct or indirect steps by an undertaking or a person or entity acting on its behalf (typically, the AIFM) to procure the transfer or commitment of capital by one or

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<sup>93</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

more investors to the undertaking for the purpose of investing it in accordance with a defined investment policy should amount to the activity of raising capital mentioned in Article 4(1)(a)(i) of the AIFMD.

14. For the purpose of the previous paragraph, it should be immaterial whether:
  - (a) the activity takes place only once, on several occasions or on an ongoing basis;
  - (b) the transfer or commitment of capital takes the form of subscriptions in cash or in kind.
15. Without prejudice to paragraph 16, when capital is invested in an undertaking by a member of a *pre-existing group*, for the investment of whose private wealth the undertaking has been exclusively established, this is not likely to be within the scope of raising capital.
16. The fact that a member of a *pre-existing group* invests alongside investors not being members of a *pre-existing group* should not have the consequence that the criterion 'raising capital' is not fulfilled. Whenever such a situation does arise, all the investors should enjoy full rights under the AIFMD.

### **VIII. Guidelines on 'number of investors'**

17. An undertaking which is not prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors in accordance with Article 4(1)(a)(i) of the AIFMD. This should be the case even if it has in fact only one investor.
18. An undertaking which is prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors in accordance with Article 4(1)(a)(i) of the AIFMD if the sole investor:
  - (a) invests capital which it has raised from more than one legal or natural person with a view to investing it for the benefit of those persons; and
  - (b) consists of an arrangement or structure which in total has more than one investor for the purposes of the AIFMD.
19. Examples of arrangements or structures within paragraph 18 include master/feeder structures where a single feeder fund invests in a master undertaking, fund of funds structures where the fund of funds is the sole investor in the underlying undertaking, and arrangements where the sole investor is a nominee acting as agent for more than one investor and aggregating their interests for administrative purposes.

### **IX. Guidelines on 'defined investment policy'**

20. An undertaking which has a policy about how the pooled capital in the undertaking is to be managed to generate a *pooled return* for the investors from whom it has been raised should be considered to have a defined investment policy in accordance with Article 4(1)(a)(i) of the AIFMD. The factors that would, singly or cumulatively, tend to indicate the existence of such a policy are the following:
  - (a) the investment policy is determined and fixed, at the latest by the time that investors' commitments to the undertaking become binding on them;

- (b) the investment policy is set out in a document which becomes part of or is referenced in the rules or instruments of incorporation of the undertaking;
  - (c) the undertaking or the legal person managing the undertaking has an obligation (however arising) to investors, which is legally enforceable by them, to follow the investment policy, including all changes to it;
  - (d) the investment policy specifies investment guidelines, with reference to criteria including any or all of the following:
    - (i) to invest in certain categories of assets, or conform to restrictions on asset allocation;
    - (ii) to pursue certain strategies;
    - (iii) to invest in particular geographical regions;
    - (iv) to conform to restrictions on leverage;
    - (v) to conform to minimum holding periods; or
    - (vi) to conform to other restrictions designed to provide risk diversification.
21. In paragraph 20(d), any guidelines given for the management of an undertaking that determine investment criteria other than those set out in the business strategy followed by an undertaking having a *general commercial or industrial purpose* should be regarded as 'investment guidelines'.
22. Leaving full discretion to make investment decisions to the legal person managing an undertaking should not be used as a mean to circumvent the provisions of the AIFMD.

## Appendix X: Q&A published by EU Commission

### Introductory note

This Q&A was published by the EU Commission on its website in March 2013 (link: [https://finance.ec.europa.eu/system/files/2017-05/aifmd-commission-questions-answers\\_en.pdf](https://finance.ec.europa.eu/system/files/2017-05/aifmd-commission-questions-answers_en.pdf)).

It is included in a specific section which is dedicated to receive questions from all stakeholders (e.g. private persons, entities, federations, etc.) in relation to a number of legislative acts which have been recently finalised in the area of the Single Market.

The proposed answers in the Q&A reflect the view of the EU Commission on the various issues raised on the application of the AIFMD provisions. The EU Commission itself states on its website that the analysis is not final, that it does not cover the interpretation by Member States<sup>94</sup> and that the final interpretation of the European law falls under the jurisdiction of the EU Court of Justice.

We believe that other readings of the relevant AIFMD provisions are possible and although we very much commend the work done on these questions, we do not always share the views and the analyses made by the EU Commission. We therefore invite our readers to consider the answers given by the EU Commission on each AIFMD provision concerned but we also suggest keeping in mind that it is not excluded that Member States may adopt a different approach.

### Q&A (questions submitted on 25 March 2013)

#### **ID 1142. MiFID firms and MiFID activities**

#### Relevant provisions

|                                      |                                |
|--------------------------------------|--------------------------------|
| Article 6(2) of Directive 2011/61/EU | <a href="#">↻ Art. 6 AIFMD</a> |
| Article 6(8) of Directive 2011/61/EU | <a href="#">↻ Art. 6 AIFMD</a> |
| Article 6(4) of Directive 2011/61/EU | <a href="#">↻ Art. 6 AIFMD</a> |

#### Question

May credit institutions and Mifid firms apply for authorisation as an AIFMD? Does the Directive stipulate that (1) they are not required to obtain an authorisation but that they could do so on a voluntary basis or (2) that the Directive effectively prohibits credit institutions and Mifid firms from applying for authorisation as an AIFM?

#### Answer

AIFMD does not allow AIFMs to engage in banking or MiFID activities except for the ones listed in Article 6(4). Hence, an AIFM authorization would be incompatible with an authorization for a credit institution or for the MiFID firm.

#### **ID 1143. MiFID firms and MiFID activities**

#### Relevant provisions

|                                      |                                |
|--------------------------------------|--------------------------------|
| Article 6(4) of Directive 2011/61/EU | <a href="#">↻ Art. 6 AIFMD</a> |
|--------------------------------------|--------------------------------|

#### Question

<sup>94</sup>European Commission, ([https://finance.ec.europa.eu/system/files/2017-05/aifmd-commission-questions-answers\\_en.pdf](https://finance.ec.europa.eu/system/files/2017-05/aifmd-commission-questions-answers_en.pdf)), Questions on Single Market Legislation (Scope) and Guidelines (What is the status of answers to the questions?).

Can an AIFM provide the services listed in Article 6(4) via a separate restricted MiFID license?

**Answer**

No, the services listed in Article 6(4) have to be part of the AIFM's authorisation to be obtained according to Article 6 AIFMD. Article 6(2) AIFMD specifies that the only additional authorisation that an AIFM can obtain is an authorisation to act as a UCITS management company.

**ID 1144. MiFID firms and MiFID activities**

[deleted by the EU Commission]

**ID 1145. Scope and exemptions**

**Relevant provisions**

Article 2(3) of Directive 2011/61/EU [↻ Art. 2 AIFMD](#)

**Question**

Are the entities listed in Article 2 not in the scope of the AIFMD because they are exempted, or because they are not alternative investment funds? If they are AIFs, could it be possible to consider these entities as financial counterparties regarding other regulations (such as EMIR)?

**Answer**

The entities listed in Article 2(3), provided they fulfil the requirements laid down therein, are by law not considered to be AIFMs for the purposes of the AIFMD, which excludes them from its scope. It is for EMIR provisions and other regulation to decide whether they may be considered as financial counterparties for the purposes of those regulations.

**ID 1146. Scope and exemptions**

**Relevant provisions**

Article 2(3)(a) of Directive 2011/61/EU [↻ Art. 2 AIFMD](#)  
Article 4(1)(o) of Directive 2011/61/EU [↻ Art. 4 AIFMD](#)

**Question**

What is to be understood by "holding companies", (for example, clarification is desirable regarding the distinction with financial holding companies).

The proper reading of Article 4(1)(o) and its relation to Recital 8 is sought. It is not clear to us, how the words "operating on its own account" in Article 4(1)(o)(i) should be understood. Article 4(1)(o)(ii) seems to address venture capital and private equity. However, venture capital and private equity are not explicitly mentioned unlike in Recital 8, 3rd sentence, which appears to imply that private equity should not be excluded from the scope. A clarification would be welcomed.

**Answer**

The definition of holding companies given in the AIFMD is not related to the definition of financial holding companies in other EU legal acts. It is not possible to introduce additional elements into the definition laid down in the Directive.

Article 4(1)(o) has to be read as a whole and jointly with recital 8. Consequently private equity as such should not be deemed to be a "holding company" in the sense of Article 4(1)(o). "Operating on its own account" should be interpreted also in the context of the requirement that the shares of such holding company are admitted to trading on a EU regulated market. Hence this means that the holding company is a separate legal entity that

carries out the business of owning and holding equity shares of other companies without the intent to dispose of such shares. Such business is done on the own account of the holding company and not on behalf of a third party. It is inherent in the concept of a holding company that all other operations apart from those related to the ownership of shares and assets are done via its subsidiaries, associated companies or participations. The exclusion of a holding company in Art 2(3)(a) was meant to exclude from the AIFMD large corporates such as Siemens or Shell. The criterion of being listed is not in itself sufficient.

#### ID 1147. Own funds

##### Relevant provisions

Article 9(3) of Directive 2011/61/EU

[Art. 9 AIFMD](#)

##### Question

Article 9 provides that the 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. Which are the portfolios to be taken into account? Does that include the portfolios under individual management (mandate)? If the AIFM also acts as a management company for UCITS the mandates are already taken into account, but what if the management company only acts as an AIFM?

##### Answer

No, portfolios under individual/discretionary management should not be included when calculating the additional own funds. Article 9(2) refers to value of portfolios of AIFs managed by AIFMs. Hence, individually managed portfolios are excluded.

#### ID 1148. Scope and exemptions

##### Relevant provisions

Article 2(3)(b) of Directive 2011/61/EU

[Art. 2 AIFMD](#)

Recital 8 of Directive 2011/61/EU

[Rec. \(8\)](#)

Article 2(3)(e) of Directive 2011/61/EU

[Art. 2 AIFMD](#)

##### Question

What is the intention of the Directive with respect to managers which manage AIFs wherein only pension funds invest, are they in or out of scope of the AIFMD? Adequate implementation requires clarification on the following points:

- Regarding Article 2(3)(b): not clear is what is meant with the phrase "in so far they do not manage AIFs". An exception is only relevant when a manager is in scope of the AIFMD. But, in order to be in-scope of the AIFMD a manager has to manage AIFs. In a nutshell, the phrase "in so far they do not manage AIFs" implies that the Article 2(3)(b) exception can never be used when relevant (i.e. when a manager is in-scope of the AIFMD). It is a necessity that it is clarified how "in so far they do not manage AIFs" in this context should be interpreted. (Note: perhaps a logical interpretation of "in so far they do not manage AIFs" seems to be: "in so far they do not manage AIFs which (also) raise capital from parties other than pension funds").
- Regarding to Article 2(3)(e): it is unclear how the phrase "institutions which manage funds supporting social security and pension systems" should be interpreted. Is this an one-to-one elaboration of the sentence "this Directive should not apply to the management of pension funds" as included in recital 8?
- Regarding to recital 8 ("this Directive should not apply to the management of pension funds"): it is unclear whether the management of pension funds should (also) be interpreted as the management of AIFs in which only pension funds invest.

##### Answer

According to the wording of Article 3(3) the exclusion depends on whether an AIFM in addition to managing pension funds also manages AIFs. Thus "in so far as they do not manage AIFs" should be interpreted to mean that a pension fund manager would fall within the scope of the AIFMD if, apart from a pension fund it also manages at least an AIF.

An AIFM can be exempted from the AIFMD only if it manages exclusively pension funds.

An AIF does not become a pension fund, merely because pension funds invest into it. So managers managing such AIFs are covered by the AIFMD.

Under the AIFMD the individual portfolio management of a pension fund by an AIFM can be done only under the conditions laid down in Article 6. In any case one has to consider the rationale for the exclusion of the management of pension funds: namely the fact that pension funds are subject to specific regulation. Also being an exemption, it has to be interpreted narrowly, and in no way provide managers of AIFs with possibilities for circumventing the AIFMD.

### **ID 1149. Own funds**

#### **Relevant provisions**

Article 9(3-6) of Directive 2011/61/EU [↻ Art. 9 AIFMD](#)

#### **Question**

To what extent should the own fund requirements in Article 9(3) - (6) of the Directive be applied to internally managed AIFMs? The applicability of point (1) to internally managed AIFs and of point (2) to externally managed AIFs is clearly indicated whereas this is not the case for the following points (3) to (6) of Article 9.

#### **Answer**

The definition of an AIFM includes both internally managed AIFs and external AIFMs. Whenever the AIFMD uses the term AIFM without making any differentiation between the two categories, it comprises both categories. When it intends to only cover one category, the AIFMD is explicit in mentioning the target category only. In consequence, the neutral term "AIFM" in Article 9(3) comprises both categories.

The definition of an AIFM is independent of the dichotomy that exists between management companies and investment companies in UCITS. UCITS investment companies are not considered as UCITS management companies within the scope of Article 2(1)(b) UCITS but follow a distinct set of rules set out in Chapter IV UCITS. The differences between UCITS investment companies and UCITS management companies are therefore more fundamental than those between internally managed AIFs and external AIFMs.

### **ID 1150. Own funds**

#### **Relevant provisions**

Article 9(7) of Directive 2011/61/EU [↻ Art. 9 AIFMD](#)

#### **Question**

Article 9(7) requires additional own funds to cover professional liability risks resulting from "activities AIFMs may carry out pursuant to this Directive". Permitted activities include the management of UCITS – although this is subject to authorization under the UCITS Directive. However, should the management of UCITS activity be covered by the additional funds or professional indemnity insurance specified in Article 9(7)?

#### **Answer**

No, for the purpose of determining additional own funds to cover professional liability risks the management of UCITS is excluded because Article 9(7) refers to activities that AIFMs may carry out pursuant to the AIFMD. The

draft level 2 Regulation, in line with the ESMA advice, specifies that only the assets of AIFs managed have to be taken into account when calculating own funds.

#### **ID 1151. Own funds**

##### **Relevant provisions**

Article 9(7) of Directive 2011/61/EU [↻ Art. 9 AIFMD](#)

##### **Question**

An AIFM which is also authorized under the UCITS Directive is permitted under both Directives to carry out management of portfolios of investments (individual portfolio management). Could an AIFM with dual authorization as a UCITS management company indicate that the individual portfolio management activity was carried out under the UCITS authorization and accordingly not subject to Article 9(7)?

##### **Answer**

There should be no free riding, it has to be always clear from the beginning under which license an activity is performed.

#### **ID 1152. Own funds**

##### **Relevant provisions**

Article 3 of Directive 2011/61/EU [↻ Art. 3 AIFMD](#)

##### **Question**

AIFMD Article 3(3) stipulates that AIFM under the threshold are subject to registration with the competent authorities of their home MS but are not required to comply with requirements set out in Article 9. AIFMD is the minimum harmonization Directive and it is our understanding that setting the initial capital and own funds for registered AIFM is fully up to the MS. Could you please confirm that?

##### **Answer**

Indeed, it is for Member States to determine the capital requirements for sub-threshold AIFMs. The AIFMD does not contain such requirements.

#### **ID 1153. Own funds**

##### **Relevant provisions**

Article 9(8) of Directive 2011/61/EU [↻ Art. 9.8 AIFMD](#)

##### **Question**

Article 9(8) requires that own funds of AIFM, including any additional own funds, shall be invested in liquid assets or assets readily convertible to cash in the short term and shall not include speculative positions. This is a new requirement, which also applies to UCITS management companies. We would appreciate the clarification of this paragraph. What kinds of assets shall be treated as liquid assets or assets readily convertible to cash in the short term and without including speculative positions?

### Answer

The provision in Article 9(8) is designed to apply in the interest of investors. Compliance with it shall be assured by the AIFM on a continuous basis and throughout the life of an AIF.

Consequently, it is not possible to indicate a limitative list of specific types of assets that shall be treated as liquid, as the "liquidity" of a specific asset may change over time. The emphasis should be not on types of assets but on specific features that warrant the liquid nature of assets.

Member States may develop principle based criteria to specify what should be considered as liquid or readily convertible to cash. To achieve a common approach ESMA is encouraged to fuel convergence between Member States' positions on this issue.

### ID 1154. Remuneration

#### Relevant provisions

Article 13 of Directive 2011/61/EU [↻ Art. 13 AIFMD](#)

#### Question

The AIFMD does not specify the threshold from which the remuneration committee must be established. The AIFMD only states that the creation of a remuneration committee is compulsory for AIFM's that are significant in terms of their size or the size of the AIF's they manage, their internal organisation, and the nature, the scope and the complexity of their activities (cf Annex II, § 3). How does the Commission interpret this provision?

### Answer

ESMA is currently developing guidelines on remuneration, a consultation paper was published that proposed an approach to the determining what should be considered as "significant in size".

### ID 1155. Scope and exemptions

#### Relevant provisions

Article 2(3)(f) of Directive 2011/61/EU [↻ Art. 2 AIFMD](#)

#### Question

Can employee savings funds be considered as AIFs, as Article 6(4)(a) provides that Member States may authorize an external AIFM to provide management of portfolios of investments, including those owned by pension funds?

### Answer

Employee savings funds may be considered as AIFs according to the definition of Article 4(1)(a). As there is no clear definition of employee participation schemes and employee savings schemes, but there is a large variety of such schemes in the Member States, we suggest that each form of such a scheme be assessed on its own merits in order to conclude whether it fulfils or not the elements of the definition of an AIF as laid down in Article 4(1)(a) of the AIFMD.

Article 6(4)(a) is about individual portfolio management and therefore it is not relevant for the legal determination of an entity as being an AIF.

**ID 1156. Valuation****Relevant provisions**

Article 19 of Directive 2011/61/EU

[🔄 Art. 19 AIFMD](#)**Question**

According to Article 19(5)(c) the AIFM shall demonstrate that the appointment of the external valuer complies with the requirements of Article 20(1) and 20(2). According to Article 20(1)(e) the AIFM must be able to demonstrate, inter alia, that the AIFM is in a position to give at any time further instructions to the delegate [i.e. external valuer]. Is the understanding correct that the instructions of the AIFM may not refer to the valuation results? Otherwise, Article 20(1)(e) would contradict the requirement of an independent external valuer.

**Answer**

Yes, the understanding is correct.

**ID 1157. Scope and exemptions****Relevant provisions**

Article 2(3)(g) of Directive 2011/61/EU

[🔄 Art. 2 AIFMD](#)**Question**

Need for guidance on securitisation and the use of SPEs.

On one's hand, the AIFMD defines "securitisation special purpose entities" with a cross-reference to Regulation (EC) No 24/2009 of the European Central Bank concerning statistics on this category of investment products. On the other hand, the AIFMD defines "investment in securitisation positions" with a cross-reference to the Directive 2006/48/EC concerning capital requirements.

Hence, this lack of consistency regarding the definition of securitisation in the AIFMD might offer opportunities for managers willing to circumvent the directive and deciding to manage a hedge fund through a SPE issuing shares whose performance could be 100% correlated to the hedge fund's performance itself.

In order to avoid this risk, a solution would consist in the introduction of an anti-circumvention provision describing the characteristics of all types of SPEs that could be used to circumvent the AIFMD.

**Answer**

The AIFMD has a definition of a securitization SPE in Article 4(1)(an) referring to the ECB Regulation 24/2009.

The Commission cannot interpret this definition as referring to the CRD.

However, it should be emphasized that the reference to a securitization SPE should be interpreted narrowly and should not be used in order to circumvent the application of the AIFMD.

Given the potentially high risk of misuse of this exemption for circumventing the AIFMD, the Commission supports the idea of the development of guidelines by ESMA against circumvention of the AIFMD.

**ID 1158. Delegation****Relevant provisions**

Article 20 of Directive 2011/61/EU

[🔄 Art. 20 AIFMD](#)

### Question

According to ESMA's Discussion Paper on technical standards on the one hand i) in order to be appointed as the AIFM for an AIF, it is not necessary for the AIFM to perform the additional functions set out in Annex I, and on the other hand ii) if the AIFM may choose not to perform itself the additional functions set out in Annex I of the AIFMD, ESMA believes that in such a case these functions should be considered as having been delegated by the AIFM to a third party (retaining the responsibility).

One authority is of the opinion that to delegate any function, first, it has to be provided by the AIFM. For instance to delegate the administration (an addition function according to Annex I) the AIFM has to provide this function because one cannot delegate a function for which it has not been authorised. In this sense, in the case of an AIF that lacks legal personality, a single AIFM has to be appointed to perform the functions of portfolio management, risk management, administration and marketing (even if some function are further delegated). In the case of an AIF with legal personality, it would be possible to appoint an AIFM to perform the portfolio management and risk management (even if one of these is delegated) and also to appoint other entities to carry out the remaining functions (such as the administration).

### Answer

There is no clear cut answer. The fund structure appears to be mostly relevant when considering which functions have been attributed to the AIFM and therefore can be also subject to delegation by the AIFM.

In any case, the AIFM is responsible for ensuring compliance with the AIFMD, even if it is the AIF or another entity on its behalf that is responsible for performing that activity (see Article 5, recital 11).

### ID 1159. Delegation

#### Relevant provisions

Article 20(3) of Directive 2011/61/EU [↻ Art. 20.3 AIFMD](#)

### Question

What are the views on whether an AIFM retains responsibility for administrative functions? This responsibility is clearly stipulated in Article 19 of level 1 for the valuation tasks, but much less clearly in the case of a delegation of administrative tasks for example under Article 20(3) of level 1.

### Answer

It depends on the fund structure – see answer above. In any case the AIFM is responsible for ensuring compliance with the Directive, even if it is the AIF or another entity on its behalf that performs an activity (see Article 5, recital 11).

### ID 1160. Scope and exemptions

#### Relevant provisions

Article 2(3) of Directive 2011/61/EU [↻ Art. 2 AIFMD](#)

Recital 8 of Directive 2011/61/EU [↻ Rec \(8\)](#)

### Question

Please clarify the notion of "joint ventures" (recital 8). Are joint ventures excluded and if so, under which conditions?

One authority would like to clarify the notion of joint venture, and suggests using the criterion of who exercises control over the portfolio.

Can the definition of a joint venture be based on the definition of an AIF in Article 4(1)(a), namely on the part referring to "raising capital"?

The directive does not provide a definition of joint ventures. This term is commonly used to denote a number of contractual relations formed to carry out one project and generally define a business agreement in which parties agree to develop a new entity and new assets by contributing equity. The parties exercise control over the enterprise and consequently share revenues, expenses and assets.

The term "Club deals" generally refers to a LBO or other private equity investment that involves several different private equity investment firms. This group of firms pools its assets together and makes the acquisition collectively. Unlike JVs, Club deals do not provide all investors with control over the management of the assets.

The control over the management and strategic decisions is one of the criteria that could be taken into account to consider whether JVs and Club deals should be qualified as AIFs. Inrev also supported this approach in their response to the discussion paper on AIFMD key concepts: they suggested distinguishing joint ventures where all shareholders exercise full control over the strategic decision (veto power) from club deals where some investors may have a say on the strategic orientations but do not have a veto power.

Further to this criterion pointing out the difference between JVs and club deals, there is a need for clarifications regarding the definition of all types of joint ventures that provide investors with different levels of control over the management of assets.

#### **Answer**

Joint ventures are not listed as exemptions in Article 2(3). Therefore recital 8 is a "floating" recital which cannot alter or amend the list of exemptions given in the core legal text.

A joint-venture could be excluded only if it falls under the exemptions listed in Article 2(3) or if the specific structure of that joint venture does not fall within the definition of an AIF in Article 4(1)(a), which is the core provision defining the features of an AIF.

In any event, each situation should be assessed on its own merits in order to determine whether the criteria listed in Article 4(1)(a) are fulfilled or not, whereby substance should prevail over the formal denomination of the specific structure.

As a general rule, where there is no definition or common understanding at EU level, national definitions should be used for further specification.

A common understanding of the detailed features of an AIF is also currently being discussed by ESMA.

#### **ID 1161. Delegation**

##### **Relevant provisions**

Article 20 of Directive 2011/61/EU

[Art. 20 AIFMD](#)

##### **Question**

Should the requirements set out in Article 20 of the AIFMD and Articles 76 to 83 of the draft Commission regulation apply to all functions referred to in Annex I of the AIFMD?

##### **Answer**

Yes; the provisions apply to any delegation by an AIFM, within the limits described in the Level 2 Regulation.

### **ID 1163. Delegation**

#### **Relevant provisions**

Article 20 of Directive 2011/61/EU

[↻ Art. 20 AIFMD](#)

#### **Question**

One MS remains concerned about the article on the letter-box entity in Level II, which results in serious difficulties for the sector and cannot be complied with by most AIFM at this time. It is common for portfolio management or risk management to be delegated to a specialist MiFID-authorized entity.

We are concerned this article remains overly burdensome.

In our opinion delegation of portfolio and risk management within the group should be possible without resulting in a letterbox entity.

#### **Answer**

This is a matter of application of Level 2 where we listed the criteria for determining whether an entity is a letter box.

### **ID 1164. Scope and exemptions**

#### **Relevant provisions**

Article 2 of Directive 2011/61/EU

[↻ Art. 2 AIFMD](#)

Article 4 of Directive 2011/61/EU

[↻ Art. 4 AIFMD](#)

#### **Question**

Please clarify the scope of the Directive with regard to listed real estate investment companies. We've been contacted by stakeholders that it is unclear whether these companies fall inside or outside the scope.

The European listed property companies sector is wide and includes a variety of entities such as European listed property companies, REITs' (market brand present in 7 EU countries), SIICs, G-REITs, FBIs, structured within different legal structures, under different regulations and characterized by diverse business models.

#### **Answer**

The question whether or not a listed real estate investment company is excluded from the scope of the AIFMD depends on whether or not it falls under the definition of an "AIF" in Article 4(1)(a).

Real estate companies cannot be excluded as such a priori, each situation needs to be valued on its own merits, based on substance, not on form.

### **ID 1165. Scope and exemptions**

#### **Relevant provisions**

Article 3(3) of Directive 2011/61/EU

[↻ Art. 3 AIFMD](#)

Article 3(4) of Directive 2011/61/EU

[↻ Art. 3 AIFMD](#)

#### **Question**

AIFMs below the threshold are, subject to national law, required to comply only with Articles 3(3) and 3(4). Can such AIFMs retain an existing MiFID authorization?

Is it possible for a MiFID firm to manage portfolios of AIFs whose AUM in total do not exceed the thresholds?

**Answer**

Sub-threshold AIFMs are not hindered to retain an existing MiFID authorization according to the AIFMD provisions.

It is mainly national law that applies to sub-threshold AIFMs.

**ID 1166. Scope and exemptions****Relevant provisions**

Article 3(3) of Directive 2011/61/EU [↻ Art. 3 AIFMD](#)

**Question**

AIFMD rules do not apply to AIFMs whose assets under management are less than € 100 mln (if leveraged) or € 500 mln (if unleveraged). For these AIFMs the regime of registration is provided for. Is it possible granting to all AIFMs the authorization and avoiding the regime of registration?

**Answer**

According to Article 3(3) second subparagraph, Member States may adopt stricter rules with respect to the sub-threshold AIFMs. Hence, it seems to be possible to replace the registration regime by an authorization regime, because this is stricter than the registration regime. However, should Member States decide to apply a regime which is stricter than the registration but lighter than the AIFMD authorization regime the entities will not benefit from the rights granted under the AIFMD.

The future interaction with the VC and EuSEF regulations may be taken into account by Member States when deciding to impose stricter rules on the sub-threshold AIFMs. However the minimum registration regime laid down in Articles 3(3) and (4) of the AIFMD and also Article 46 cannot be departed from.

**ID 1167. Scope and exemptions****Relevant provisions**

Article 3 of Directive 2011/61/EU [↻ Art. 3 AIFMD](#)  
Article 5 of Directive 2011/61/EU [↻ Art. 5 AIFMD](#)

**Question**

According to Article 5 par.1 of the 2011/61 (AIFMD) all AIFs falling into the scope of the AIFMD shall designate an alternative investment fund manager (AIFM). Taking into account that the AIFMD (except for par. 3 and 4 of Article 3) does not apply to AIFMs managing portfolios of AIFs whose assets are below certain AUM thresholds (small AIFMs), is it possible that an investment firm, a credit institution or a UCITS management company acts as an AIFM for the said AIFs?

**Answer**

Only Articles 46, 3(3) and (4) apply to AIFMs below the thresholds. Therefore it is for the Member States to decide in their national laws and in accordance with the relevant EU sectoral legislation, i.e. MiFID rules, UCITS rules and CRD rules, if an investment firm, a credit institution or a UCITS manager may be the AIFM of a sub-threshold fund.

**ID 1168. Scope and exemptions****Relevant provisions**

Article 3(3) of Directive 2011/61/EU [↻ Art. 3 AIFMD](#)  
Article 3(4) of Directive 2011/61/EU [↻ Art. 3 AIFMD](#)

### Question

Shall an internally managed AIF whose portfolio includes assets below the thresholds referred to in Article 3 par. 2 of AIFMD be considered as AIFM for the application of Article 3 par. 3 and 4 of AIFMD?

### Answer

Yes, for the purposes of Article 3(2) it is not relevant whether a fund is managed internally or externally. Internally managed AIFs should also be considered.

### ID 1169. Scope and exemptions

#### Relevant provisions

General question on Directive 2011/61/EU

[↻ Art. 2 AIFMD](#)

### Question

The AIFMD constantly refers to "units or shares."

In order to cover AIF's issuing securities other than units, would it not be more appropriate to use the general term "securities" in some specific articles of the AIFMD (e.g. in articles (i) regarding the marketing of units or shares of AIF's or (ii) concerning the supervisory tasks of the depositary)?

### Answer

As a matter of principle, the Commission considers the term "units and shares" to be generic and inclusive of other forms of equity of the fund, i.e. a stock or any other security representing an ownership interest in the fund.

### ID 1170. Definition of an AIF

#### Relevant provisions

Article 4(1)(a) of Directive 2011/61/EU

[↻ Art. 4 AIFMD](#)

### Question

The Directive seems unclear whether and in what circumstances a set of arrangements between several legal or natural persons should be considered to be a single AIF or multiple AIF. According to the Directive a criteria of an AIF is that it must be an "undertaking": even if this term is not defined in Community law, it is likely to encompass certain pooled investment vehicles, but mere parallel investment arrangements and ordinary corporate and joint venture arrangements should not be caught by the definition, even if one of the participants is a fund. For instance, in a private equity fund where there are several "parallel" limited partnerships having a common general partner and a common AIFM, each undertaking (limited partnership) should be properly regarded as a separate and distinct AIF. Also a private equity AIF structured as a limited partnership may have amongst its limited partners another limited partnership and these limited partnerships may have a common AIFM: if the second limited partnership has the features of an AIF, then there will be two separate AIFs, one a feeder fund into the other, whereas if it is not the case, there will be one AIF, which is the main fund limited partnership.

### Answer

The definition of an AIF has been intentionally drafted broadly by the legislators in order to capture the variety of fund structures in all Member States (hence the broad formulation "collective investment undertakings"). The intention behind such wording was to include investment funds in one of the two categories: AIFs or UCITS and to avoid any gaps. Whether a structure falls within this definition can be determined only on a case-by-case basis, taking into account its specific features. ESMA is currently discussing these aspects in more detail.

**ID 1171. Definition of an AIF****Relevant provisions**

Article 4(1)(a) of Directive 2011/61/EU [↻ Art. 4 AIFMD](#)

**Question**

Does the definition of AIF in Article 4(1)(a) include REITs or real estate companies?

**Answer**

The question whether or not a REIT or real estate company is excluded from the scope of the AIFMD depends on whether or not it falls under the definition of an "AIF" in Article 4(1)(a). Each structure should be considered on its own merits based on substance, not on form.

**ID 1172. Definition of an AIF****Relevant provisions**

Article 4(1)(a) of Directive 2011/61/EU [↻ Art. 4 AIFMD](#)

**Question**

It would be worth considering an alternative definition to the one proposed in the ESMA discussion paper on technical standards. In this sense, an open ended fund should be the one with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets (as stated in the UCITS Directive), regardless of the frequency of redemption intervals. In this sense the liquidity management (art 16) should be in line with that frequency. For instance a hedge fund with a three-year lock up period should be considered an open ended fund and its NAV calculation should be carried out at least on an annual basis and in any case according to the redemption facilities.

**Answer**

The question relates to the definition of open-ended funds as discussed by ESMA. Such debate should continue within the framework of the discussions led by ESMA concerning draft regulatory technical standards according to Article 4(4).

**ID 1173. Depositary****Relevant provisions**

Article 21 of Directive 2011/61/EU [↻ Art. 21 AIFMD](#)

**Question**

The new classification of assets to be held in custody by the depositary according to article 21(8) can result in major restructurings in certain member states depending on the outcome on further level 2 provisions on article 21(8). In order to prepare for the new requirements there is a need for transitional provisions also in this respect.

**Answer**

No specific transitional requirements are foreseen for the requirements related to the depositary, except for the ones in Article 61(5). The basic rules and policy choices are already contained in Level 1, the Level 2 only specifies them.

### **ID 1174. Depositary**

#### **Relevant provisions**

Article 21(5) of Directive 2011/61/EU [↪ Art. 21 AIFMD](#)

Article 4(1)(j) of Directive 2011/61/EU [↪ Art. 4 AIFMD](#)

#### **Question**

From article 21(5) jointly read with article 4(1)(j) it follows that an appointed depositary should have its "registered office or branch" in the member state of the AIF. However, article 4 does not define the notion of "branch" in the context of the depositary. Please provide some more detail on which substance requirements these branches have to fulfil?

#### **Answer**

For depositaries which are a credit institution or a MiFID firm the definition of a branch is provided in the CRD and MiFID respectively. With respect to another category of depositary as foreseen by Article 21(3)(c) it is for the national law to define, considering the common understanding.

### **ID 1175. Reporting requirements**

#### **Relevant provisions**

Article 22 of Directive 2011/61/EU [↪ Art. 22 AIFMD](#)

Article 23 of Directive 2011/61/EU [↪ Art. 23 AIFMD](#)

Article 24 of Directive 2011/61/EU [↪ Art. 24 AIFMD](#)

#### **Question**

There is a need for a transition period for the implementation of the reporting requirements. This is important so that the AIFMs targeted could have reasonable time to prepare for such extensive reporting requirements. This would also impact on the quality of the reporting in the long run, if it can be properly planned and executed from the beginning. It should be taken into account that the detailed reporting requirements, that are crucial to the preparatory work on reporting, on level 2 have not yet been published.

#### **Answer**

No specific transitional requirements are foreseen for reporting obligations. Furthermore, certain of the reporting obligations i.e. annual report, have a later date for compliance than the entry into force of the AIFMD (annual report should be provided no later than 6 months following the financial year). In addition, some of the AIFMs may be subject to reporting obligations under the Transparency Directive in which case the burden will not be so important.

### **ID 1176. Reporting requirements**

#### **Relevant provisions**

Article 22 of Directive 2011/61/EU [↪ Art. 22 AIFMD](#)

Article 23 of Directive 2011/61/EU [↪ Art. 23 AIFMD](#)

Article 24 of Directive 2011/61/EU [↪ Art. 24 AIFMD](#)

#### **Question**

When will existing AIFMs be expected to commence reporting? Will reporting commence as and when each AIFM is approved or, for consistency of reporting, will they all start at the same time?

Do AIFMs under the respective threshold have to report as of July 2012?

**Answer**

Existing AIFMs will be expected to start reporting as of the date of the application of the AIFMD.

New AIFMs will have to report as of their authorisation.

Sub-threshold AIFMs also have to start reporting as of July 2012.

The frequency of reporting is harmonised, whereas the starting date might be different. We therefore encourage ESMA to issue guidance concerning the alignment of the dates of delivery of information if deemed necessary.

**ID 1177. Marketing to retail investors**

**Relevant provisions**

Article 43 of Directive 2011/61/EU [↻ Art. 43 AIFMD](#)

**Question**

What measures are expected to be taken by the AIFM to avoid marketing its AIFs to non-professionals? Is it possible for example to have a web page that is not password protected but clearly states that this offering is for professional investors only?

**Answer**

A simple warning on a webpage is not sufficient; more efforts are needed to ensure that the AIF is offered only to professional investors.

**ID 1178. Marketing to retail investors**

**Relevant provisions**

Article 43 of Directive 2011/61/EU [↻ Art. 43 AIFMD](#)

**Question**

What happens after July 2013 to the cross-border marketing of AIFs that could be subject also to Directive 2003/71/EC (Prospectus Directive)? Which regime prevails?

**Answer**

If the possibility for derogation provided for in Article 43 is used by Member States, it seems that there is a possible overlap between the AIFMD and the Prospectus Directive. For this purpose, Article 43 starts with the wording "Without prejudice to other instruments of Union law...". It follows that in such cases the rules of the Prospectus Directive will also apply. Therefore both regimes apply.

**ID 1179. Cooperation between Member States' competent authorities**

**Relevant provisions**

Article 54 of Directive 2011/61/EU [↻ Art. 54 AIFMD](#)

**Question**

In the view of the Commission, does article 54 of the directive apply in the context of national measures taken in application of article 43 (knowing that article 54 § 1 only refers to the "powers pursuant to this Directive")?

## Answer

Article 54 on cooperation in supervisory activities should be possible to be relied on also in case of application of Article 43. It is the AIFMD that gives the power to Member States to allow the marketing of units or shares of AIFs to retail investors and that sets the broad limits for the exercise of such power.

### **ID 1180. Transitional provisions**

#### Relevant provisions

Article 61(1) of Directive 2011/61/EU [↻ Art. 61 AIFMD](#)

- **Q&A published by ESMA (Appendix XIV) Section I Remuneration Question 1**

#### Question

Article 61(1) provides that AIFMs performing activities under this Directive before 22 July 2013 shall take all necessary measures to comply with national law stemming from this Directive and shall submit an application for authorization within 1 year of that date. Does this mean that existing AIFMs have one year to comply in full with national law and to submit an application for authorization?

#### Answer

During the one year transitional period, AIFMs are expected to comply, on a best efforts basis, with the requirements of the national law transposing the AIFMD. The AIFM's obligation to seek an authorization (Chapter II and Chapters VI, VII) is legally binding, but only needs to be complied with within a year of the entry into force of the Directive.

In respect of other requirements contained in the AIFMD (such as the general principles, operating conditions, organizational requirements, conflicts of interests, remuneration, risk management, liquidity management rules, securitization rules, valuation, delegation, depositary rules and reporting requirements), an AIFM that exists at the date of entry into force of the AIFMD, shall – already during the transitional period -- take all necessary measures (i.e., expend its best efforts) to comply with the AIFMD in respect of all relevant activities undertaken subsequent to the entry into force of the AIFMD (22 July 2013). After the transitional period, all of the obligations arising under the AIFMD are legally binding.

According to Article 5, paragraph 1, Member States shall ensure that each AIF has a single AIFM which shall be responsible for ensuring compliance with the AIFMD. Art 5 applies as of 22 July 2013. Transposition of this provision into national law should enable Member States to monitor compliance of the not-yet authorized single AIFMs. Member States may choose the means of how to achieve the above mentioned goal. The issue of enforcing compliance against unauthorized AIFMs is, however, a more general issue: even after expiry of the transitional period, the risk that certain AIFMs continue operations without seeking an authorization and without complying with the AIFMD persists.

### **ID 1181. Marketing to retail investors**

#### Relevant provisions

General question on Directive 2011/61/EU [↻ Art. 43 AIFMD](#)

#### Question

If a Member States permits marketing to retail investors under Article 43, must the AIFMD procedures for marketing to professional investors be followed?

Article 43 states that Member States may permit marketing of AIFs to retail investors, and may impose "stricter requirements" on this marketing. Does this mean that if a Member State permits marketing to retail investors, it

must comply with the procedural requirements that apply when marketing to professional investors? In other words, if Member State A allows retail marketing:

- a. must an AIFM established in State A go through the procedures in Article 31, in order to market to retail investors in State A?
- b. must an AIFM established in State B go through the procedures in Article 32, in order to market to retail investors in State A?

### Answer

If cross-border marketing of AIFs to retail investors is permitted under the laws of the home and of the host State of the AIFM, than the procedures in Articles 31 and 32 or stricter procedures should apply.

Article 43 states clearly that Member States may impose stricter rules than the ones for the marketing to professional investors. This should be interpreted as allowing a Member State to attach to marketing to retail investor stronger rules, whilst not permitting that Member State to adopt more lenient requirements in such case.

### ID 1182. Transitional provisions

#### Relevant provisions

Article 61(1) of Directive 2011/61/EU [↻ Art. 61 AIFMD](#)

#### Question

If read verbatim, Article 61(1) seems to require that necessary measures shall be taken earlier than an authorization is granted.

However, it has become clear that e.g. reporting requirements and depositary arrangements would be difficult to meet before an authorization is granted.

We would welcome a clarification.

### Answer

Compliance with the Directive has to be ensured on a best efforts basis as of the date of transposition into national law. In general, existing AIFs will be expected to start reporting as of the date of the application of the AIFMD in accordance with the reporting frequencies foreseen in Level 1 and Level 2 rules. Also, compliance with e.g. reporting obligation or other obligations does not depend on having obtained an authorization with the competent authorities.

### ID 1183. Transitional provisions

#### Relevant provisions

Article 61(3) of Directive 2011/61/EU [↻ Art. 61 AIFMD](#)  
 Article 61(4) of Directive 2011/61/EU [↻ Art. 61 AIFMD](#)

#### Question

Article 61(3) provides that AIFM that manage closed-ended AIF, that fulfil certain criteria, can continue to manage such AIF without authorisation under this Directive. Article 61(4) provides that AIFM that manage closed-ended AIF, that fulfil certain (other) criteria, can continue to manage such AIF without needing to comply with this Directive except for some Articles or to submit an application for authorisation under this Directive. Do Article 61(3) and 61(4) have the same legal consequence, i.e. that the AIFMD does not apply to these AIFM, or is there a difference? If yes, which one?

### Answer

Article 61(3) aims to avoid a regulatory burden for AIFMs that manage closed-end funds and who neither receive new money from investors nor make additional investments. AIFMs of such closed-end funds should not be subject to authorization or material compliance. However, it is very important that the concept of "additional investments" is interpreted in a way that does not create opportunities for circumvention of the AIFMD.

### ID 1184. Transitional provisions

#### Relevant provisions

Article 61(3) of Directive 2011/61/EU [↻ Art. 61 AIFMD](#)  
Article 61(4) of Directive 2011/61/EU [↻ Art. 61 AIFMD](#)

#### Question

Do Article 61(3) and 61(4) also exclude the requirement for a registration pursuant to Article 3?

### Answer

In light of the aim of Articles 61(3) and (4), as described above, managers described in Articles 61(3) and (4) who are exempt from authorization and from compliance with the AIFMD (except for certain provisions) are also exempt from registration. Articles 3(2) and (3) do not apply to such managers either. Applying the requirements of Articles 3(2) and (3) AIFMD would lead to the consequence that AIFMs below the thresholds are subject to requirements which do not apply to AIFMs which are above the threshold. This result is not intended by the sub-threshold provisions in the AIFMD.

### ID 1185. Scope and exemptions

#### Relevant provisions

Article 42 of Directive 2011/61/EU [↻ Art. 42 AIFMD](#)

#### Question

Does the requirement that there must be a single AIFM for each AIF apply to Article 42 AIFMs? The requirement for a single AIFM is in Art 5, but Art 42 says that only the transparency provisions and private equity provisions apply to Article 42 AIFMs.

### Answer

During the application of the national regime allowing the marketing without a passport of AIFs managed by a non-EU AIFM, the AIFMD requires the non-EU AIFM to comply only with the provisions listed in Article 42(1)(a). However, these are minimum requirements, and Member States national laws may impose additional requirements, including that an AIF should have a single AIFM.

However, once the passport regime will be applicable, the parallel application of the national regimes should be without prejudice to the Articles 37, 39 and 40 of the AIFMD, which require a single AIFM.

### ID 1186. Transitional provisions

#### Relevant provisions

Article 61(3) of Directive 2011/61/EU [↻ Art. 61 AIFMD](#)  
Article 61(4) of Directive 2011/61/EU [↻ Art. 61 AIFMD](#)

**Question**

When calculating the total assets under management, do also the AUM of the portfolios of article 61(3) and 61(4) have to be taken into account (in case of an AIFM which manages both regular AIFs and AIFs falling under article 61(3) and 61(4))?

**Answer**

Given the fact that the management of the funds described in Articles 61(3) and 61(4) is subject to grandfathering under the AIFMD, it can be inferred that the portfolios of such funds should not be counted for the purpose of calculating the assets under management of an AIFM managing also other types of AIFs.

**ID 1187. Passport issues****Relevant provisions**

Article 31 of Directive 2011/61/EU

[↻ Art. 31 AIFMD](#)

**Question**

What should happen if a competent authority does not decide an application for approval of marketing within 20 working days, as required by Article 31. Presumably the authority will be in breach of its obligations, but a failure to respond within 20 working days should not mean there is automatic approval for the marketing?

**Answer**

The AIFMD does not foresee the consequences of a failure by a competent authority to approve an application for marketing within 20 working days. According to Article 31 the AIFM may start marketing in case of a positive decision. This implies that an AIFM is not allowed to market without the competent authorities having taken a positive decision.

However, it depends on the national law how an AIFM could proceed against the competent authority that failed to issue a decision (e.g. administrative or judicial proceedings to failure to act).

**ID 1188. Transitional provisions****Relevant provisions**

Article 61(3) of Directive 2011/61/EU

[↻ Art. 61 AIFMD](#)

**Question**

Article 61(3): What does "which do not make any additional investments" mean? For example does it include or exclude:

- After 22 July 2013 target fund calls in capital (closing) that fund of funds has committed to before 22 July 2013.
- Fund commits to buy asset before 22 July 2013, but closing is after 22 July 2013.
- Investments in bank deposit
- Additional financing of portfolio companies that fund acquired before 22 July 2013
- Investments in acquired assets (e.g. refurbishment, reconstruction, renovation)
- Capital increases required for financial restructuring

Fund of funds acquired target fund before 22 July 2013, target funds makes additional investments after 22 July 2013.

### Answer

The interpretation of "additional investment" has to take place in the context of the specific investment strategy and in the context of the legal provisions which aim to exempt AIFMs that manage end-of-life AIFs from the application of provisions of the AIFMD. Therefore "additional investments" should be interpreted widely.

We generally understand "make additional investments" as implying a new contract, involving investment of capital for the purpose of obtaining a gain. However, the management of the portfolio falling under the provision in Article 61(3) for the sole purpose of maintaining the value of the portfolio should be possible. Hence limited amounts of financial injection should be possible provided they are arising out of existing commitments, they represent a negligible percentage of the AIF's portfolio and they aim only to maintain the value of the portfolio.

### ID 1189. Transposition

#### Relevant provisions

Article 66 of Directive 2011/61/EU [↻ Art. 66 AIFMD](#)

#### Question

According to Article 66(1) of the AIFMD, Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with the Directive by 22 July 2013. They shall communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive. According to Article 66(2), Member States shall apply these laws, regulations and administrative provisions from 22 July 2013. However, according to Article 66(3) Member States shall apply the laws, regulations and administrative provisions necessary to comply with Article 35 and Articles 37 to 41 in accordance with the delegated act adopted by the Commission pursuant to Article 67(6) and from the date specified therein.

Should Member States adopt and publish the laws, regulations and administrative provisions necessary to comply with Articles 35, 37 to 41 of the AIFMD by 22 July 2013 even if the Member States shall apply these laws, regulations and administrative provisions from a later date which will be specified in a delegated act adopted by the Commission in 2015?

#### Answer

Yes, Article 66(1) requires that Member States adopt and publish their national measures by 22 July 2013. Only application is deferred for later according to Article 66(3) and (4).

Transposition should be communicated by the Member States together with a transposition table. In case a Member State does not transpose all provisions of the AIFMD, it will have to signal partial transposition.

### ID 1190. Scope and exemptions

#### Relevant provisions

Article 8(1)(d) of Directive 2011/61/EU [↻ Art. 8 AIFMD](#)

#### Question

Article 8, § 1, d) of the directive provides that "*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*".

Although the directive does not mention this explicitly, this provision primarily seems to target external managers of AIF's. Could the Commissions confirm whether, in her opinion, this provision must also be applied to internally managed AIF's? A positive answer would in our opinion need to take the following issues into account:

- (a) the shareholders or members of an internally managed AIF are in the majority of cases the investors of the fund, who bought an investment product without any intention to intervene in the management of the fund;

- (b) in the case of an AIF with variable capital, a particular investor can have a qualifying holding by accident, as a consequence of the redemption of the participation of another investors. How should such a case be treated? Forcing an investor to sell his participation could lead to serious legal difficulties.
- (c) it can also be that no investor will have a qualifying holding in an internally managed AIF (especially in the case of an AIF with variable capital which are being marketed to the public). In such a case, should e.g. this provision be applied to the promoter of the fund, even if his participation is not "qualified"?

**Answer**

The requirement in Article 8(1)(d) refers to both external managers and internally managed AIFs. Where the AIFMD does not explicitly differentiate both are covered by the definition of an AIFM.

- a) Irrespective of the intention behind the acquisition of shares/units a qualifying holding gives certain powers. There is no reason to treat internally managed AIFs different from the externally managed ones.
- b) The requirement in Article 8(1)(d) allows the competent authority to assess the suitability of qualifying shareholders in light of the need of ensuring sound and prudent management. As long as the requirements of Article 8(1)(d) are fulfilled, i.e. the shareholders are considered as suitable taking into account the need to ensure the sound and prudent management of the AIFM, there is nothing in the AIFMD requesting an investor to sell his participations.
- c) To the extent the promoter is a shareholder or member having a qualified holding he has to be taken into account for the purposes of this provision.

**ID 1191. Definition of an AIF**

**Relevant provisions**

Article 4 of Directive 2011/61/EU

[↻ Art. 4 AIFMD](#)

**Question**

An EU AIF is defined as one which has a registered office or head office in a Member State. What if an AIF has a registered office in Member State A, but its head office in Member State B? Will the competent authority of the AIF be the one in A or B? Must the AIF have a depositary in A or B?

**Answer**

In case an AIF is not authorised or registered in a Member State, it may still be considered an EU AIF if it has the registered office and/or the head office in a Member State.

The Directive also defines the concept of "established", referring to the "registered office", and not to the "head office". Therefore, "head office" should only be used where no registered office exists.

**ID 1193. Marketing to retail investors**

**Relevant provisions**

Article 3(4) of Directive 2011/61/EU

[↻ Art. 3 AIFMD](#)

Article 43 of Directive 2011/61/EU

[↻ Art. 43 AIFMD](#)

### Question

(1) Article 3(4) provides that sub-threshold AIFMs "shall not benefit from any of the rights granted under this Directive unless they chose to opt in under this Directive". It is therefore clear that such firms cannot benefit from the right to passport under AIFMD.

However, as this regime is subject to Member State's discretion, it would appear that if permitted by the local law of the home Member State of the sub-threshold AIFM and the law of the Member State in which that AIFM wishes to market, such an AIFM would be able to market in another EEA State. This is consistent with the current pre-AIFMD position whereby AIFMs may market in other Member States subject to local law. It is also aligned with the position with respect to domestic marketing by sub-threshold AIFM, which are allowed to market in their home Member State without opting in to the Directive.

(2) If the analysis in (1) is correct, we would welcome further clarification as to whether such sub-threshold AIFMs can market to retail investors. Article 43 provides that "Member States shall not impose stricter or additional requirements on EU AIFs established in another Member State and marketed on a cross-border basis \*to retail investors+ than on AIFs marketed domestically". In our view the following interpretations are possible:

- a. where a Member State allows domestic AIFs to be marketed to retail investors it must also allow AIFs established in other Member States to be marketed to retail investors. Therefore if we allow UK sub-threshold AIFMs to market to retail investors in the UK we must also allow EU sub-threshold AIFMs to market to such investors; or
- b. article 43 is not applicable in the case of sub-threshold AIFM and the only relevant article is Article 3. We would therefore not be required by the Directive to allow retail marketing of EU AIFs managed by sub-threshold AU AIFMs if we allowed retail marketing of UK AIFs managed by sub-threshold UK AIFM. However, Member States national law would be allowed to permit such retail marketing of EU AIFs if so minded.

### Answer

(1) Indeed sub-threshold AIFMs do not benefit from the AIFMD passport unless they opt-in. However, this does not prevent them from cross-border marketing provided that both the legislation of the AIFM's home Member State and of the host Member State allow this.

(2) Indeed according to Article 3(2) sub-threshold AIFMs are subject only to Articles 46, 3(3) and 3(4). It is up to Member States to decide whether marketing to retail investors by such AIFMs should be allowed and under what conditions.

### ID 1194. Issues related to private equity

#### Relevant provisions

|                                    |                                 |
|------------------------------------|---------------------------------|
| Article 26 of Directive 2011/61/EU | <a href="#">🔗 Art. 26 AIFMD</a> |
| Article 27 of Directive 2011/61/EU | <a href="#">🔗 Art. 27 AIFMD</a> |
| Article 28 of Directive 2011/61/EU | <a href="#">🔗 Art. 28 AIFMD</a> |
| Article 29 of Directive 2011/61/EU | <a href="#">🔗 Art. 29 AIFMD</a> |

### Question

(1) Article 26(5) says that the percentage of voting requirements which determines whether control has been acquired of an issuer shall be determined in accordance with the Takeover Directive. Under the Takeover Directive, individual Member States may choose their own percentage for what constitutes control of an issuer. If an AIFM authorised by State A manages an AIF in state A which acquires an issuer in State B, the UK considers that the test for control should be the percentage adopted in State B. Otherwise an issuer in State B will have different tests of control applicable to it, one under the Takeover Directive (State B's test), and another under AIFMD (State A's test). We would welcome the Commission's views on this interpretation.

(2) Article 26(6) states that "This Section shall apply subject to the conditions and restrictions set out in Article 6 of the Employee Consultation Directive" (duty of employee to keep certain information confidential; employers

entitlement to withhold information if disclosure would seriously harm or prejudice the company). Does this mean that:

- a. If employees or their representatives receive confidential information under AIFMD, they must keep the information confidential.
- b. The duty on the AIFM to ensure that the Board of Directors of an acquired company passes on certain information to employees does not apply if passing on the information would seriously harm or prejudice the company?

### Answer

(1) Article 5(3) of Directive 2004/25/EC (Takeover Directive) states clearly that "the percentage of voting rights which confers control for the purposes of paragraph 1 and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office." Hence AIFMD requests the application of the test of the Member State where the issuer has its registered office pursuant to that Directive.

(2) The situations envisaged by Article 6 of Directive 2002/14/EC (Employee Consultation Directive) cannot be limited to the two instances described. The provision in Article 26(6) shall be understood in the sense that any information related to the application of Articles 26-30 of the AIFMD, which is susceptible of being considered as confidential should be subject to the requirements provided in Article 6 of the Employee Consultation Directive.

### ID 1195. Issues related to private equity

#### Relevant provisions

Article 30 of Directive 2011/61/EU

[↻ Art. 30 AIFMD](#)

#### Question

In Article 30, paragraph 1 refers to "distribution, capital reduction, share redemption and/or acquisition of own shares, as described in paragraph 2." However, paragraph 2 does not describe capital reduction or share redemption – paragraph 2 only describes distribution and acquisition of own shares. This raises the following questions:

- a. Should share redemption be treated the same as acquisition of own shares, on the basis that share redemption and acquisition of own shares are economically and commercially very similar? In that case, should share redemption be subject to conditions in Art 30.2.c?
- b. Should capital reduction be treated as subject to the conditions in:
  - a. Art 30.2.a?
  - b. Art 30.2.b?
  - c. Or just Art 30.3.b?
- c. Does Art 30.3.c mean
  - a. All the provisions in points (b) to (h) of Article 20(1) of the Second Company Law Directive apply;
  - b. The provisions in points (b) to (h) of Article 20(1) apply, only to the extent adopted in the Member State in which the acquired company has its registered office?
  - c. The restrictions in points (b) to (h) of Article 20(1) apply, only to the extent adopted in the home Member State of the AIFM?

### Answer

- a. The reference to distribution in paragraph 2 of article 30 should be understood as generic and covering all operations listed in paragraph 1.
- b. As regards the capital reductions, Article 30(3)(b) should be read in combination with either Article 30(2) (a) or Article 30(2)(b) depending under which letter of paragraph (2) a specific capital reduction may be subsumed.
- c. The extent to which the acquisition of own shares is permitted is a matter for the company law of the Member State where that company is incorporated.

### ID 1196. Issues related to Article 37 AIFMD

#### Relevant provisions

Article 37(13) of Directive 2011/61/EU [↻ Art. 37.13 AIFMD](#)

#### Question

According to Article 37(13) second subparagraph AIFMD any disputes between the AIFM or the AIF and EU investors of the relevant AIF shall be settled in accordance with the law of and subject to the jurisdiction of a Member State. How should this provision be adapted by the member states?

#### Answer

Member States may determine the appropriate jurisdiction taking into account the relevant legal instruments of private international law which Member States might be part of. In principle Article 37(13) requires that the relevant applicable law and jurisdiction are of an EU Member State, not necessarily of the Member State of reference. Per *a contrario*, the Member States could not allow that the applicable law and jurisdictions be the one from a non-EU country.

### ID 1197. Issues related to Article 37 AIFMD

#### Relevant provisions

Article 37 of Directive 2011/61/EU [↻ Art. 37 AIFMD](#)

#### Question

Is our understanding of the AIFMD correct, that in case the member state of reference changes, there is a new authorisation process by the competent authorities of their new Member State of reference?

#### Answer

A new authorisation is needed if the initial authorisation does not cover the new managing/marketing activity. As regards the existing authorisation a re-authorisation does not seem to be required, as the old Member State of reference has to transfer to the new Member State of reference all relevant documentation. The new Member State of reference should take over all tasks and duties incumbent as the competent authority for that AIFM, including those laid down in Article 11 of the AIFMD.

### ID 1198. Issues related to Article 37 AIFMD

#### Relevant provisions

Article 37(5) of Directive 2011/61/EU [↻ Art. 37.5 AIFMD](#)  
Article 37(9) of Directive 2011/61/EU [↻ Art. 37.9 AIFMD](#)

**Question**

Article 37(5) fourth subparagraph AIFMD as well as Article 37(9) third subparagraph AIFMD state that the term referred to in Article 8(5) shall be suspended during the ESMA review in accordance with the respective paragraph. It is unclear when exactly the suspension begins and ends.

**Answer**

The suspension starts from the moment of notification of ESMA and lasts until ESMA has issued its advice.

**ID 1199. Issues related to master AIFs and feeder AIFs****Relevant provisions**

Article 36(1) of Directive 2011/61/EU [↻ Art. 36 AIFMD](#)

**Question**

According to Article 36(1) AIFMD, Member States may allow an authorised EU-AIFM to market to professional investors, in their territory only, units or shares of non EU AIFs it manages or EU feeder AIFs that do not fulfil the requirements referred to in the second subparagraph of Article 31(1) AIFMD provided that the (minimum) requirements listed in (a), (b) and (c) are met. Consequently, there is no obligation of the Member States to allow the marketing of such funds in their territories. In contradiction thereto, Article 31(2) AIFMD provides only for a right of the Member States to impose stricter rules on the AIFM in respect to the marketing of units or shares of non-EU AIFs to investors in their territory. In any case, the requirements of Article 31(1) AIFMD and the imposition of stricter rules pursuant to Article 36(2) AIFMD should also apply to non-EU Master-AIFs and its non-EU AIFM.

**Answer**

Member States may impose stricter rules with regard to the marketing by virtue of Article 36. Such stricter rules may cover also master-feeder structures established for circumventing the provisions in Article 36 of the AIFMD.

**ID 1200. Issues related to master AIFs and feeder AIFs****Relevant provisions**

Article 35 of Directive 2011/61/EU [↻ Art. 35 AIFMD](#)

**Question**

The AIFMD mentions feeder AIF and master AIF in Article 31(1), 32(1), 35(1), 36(1), Annex III and Annex IV.

Article 35(1) AIFMD referring to EU feeder AIFs that do not fulfil the requirements referred to in the second subparagraph of Article 31(1) AIFMD only makes sense if the requirements of Article 35(2) AIFMD apply also on the non-EU master AIF and/or its non-EU AIFM. In this case Annex 3 and Annex IV e must be read in a way that not only the information on where the master is established but also all other information must be given that is required to examine whether the requirements of Article 35(2) AIFMD are met by the non-EU master AIF and/or its non-EU AIFM.

**Answer**

The proposed interpretation to the questions seems reasonable in order to ensure that all necessary information is made available.

A "feeder AIF" is defined in Article 4(1)(m) of the AIFMD.

## ID 1201. Cooperation between Member States' competent authorities

### Relevant provisions

|                                    |                                 |
|------------------------------------|---------------------------------|
| Article 31 of Directive 2011/61/EU | <a href="#">↻ Art. 31 AIFMD</a> |
| Article 39 of Directive 2011/61/EU | <a href="#">↻ Art. 39 AIFMD</a> |
| Article 40 of Directive 2011/61/EU | <a href="#">↻ Art. 40 AIFMD</a> |

### Question

The AIFMD mentions feeder AIF and master AIF in Article 31(1), 32(1), 35(1), 36(1), Annex III and Annex IV.

In order to avoid circumventions of the AIFMD, Article 39 AIFMD should only apply to EU feeder AIFs that fulfil the requirements referred to in the second subparagraph of Article 31(1) AIFMD. For EU feeder AIFs that do not fulfil the requirements referred to in the second sub-paragraph of Article 31(1) AIFMD, Article 40 AIFMD should apply.

### Answer

The proposed interpretation of the second question appears to be reasonable in order to avoid circumventions of the AIFMD.

A "feeder AIF" is defined in Article 4(1)(m) of the AIFMD.

## ID 1202. Cooperation between Member States' competent authorities

### Relevant provisions

|                                    |                                 |
|------------------------------------|---------------------------------|
| Article 45 of Directive 2011/61/EU | <a href="#">↻ Art. 45 AIFMD</a> |
|------------------------------------|---------------------------------|

### Question

Article 45 AIFMD provides for a division of responsibilities and for rules of cooperation between the competent authorities of the host Member State and the home Member State of an AIFM. According to Article 4(1)(r) AIFMD, the host Member State of an AIFM is a Member State in which the AIFM distributes or manages shares or units of an AIF. Consequently, the question arises whether Article 45 AIFMD also applies if such distribution in another Member State is made on the basis of facultative national rules based on Article 36, 42 and 43 AIFMD. And if so, to which extent Article 45 AIFMD applies in such cases.

### Answer

Article 45 specifies the responsibilities of competent authorities and their interaction. Article 45(1) foresees the general competence for the prudential supervision of the AIFM for the home country authorities of that AIFM, save where the AIFMD recognises the responsibility for supervision for the host Member State. This exception includes not only the explicit competence of the host authority for supervision of compliance with Articles 12 and 14 foreseen in Article 45(2), but also other instances. For example the AIFMD recognises the competences of a competent authority of an EU AIF, as defined in Article 4(1)(h), to supervise the compliance with the applicable rules for which that competent authority is responsible Article 45(3).

To allow a host Member State to exercise its supervisory duties without however impinging on the competences of the home Member State and without introducing obstacles to the cross-border marketing or management of AIFs, Articles 45(3)-(8) introduce provisions for the cooperation between Member States.

Hence, the provisions laid down in Article 45 are intended to apply also for supervising compliance with the stricter national rules adopted by Member States on the basis of Articles 36, 42 and 43.

**ID 1203. Cooperation between Member States' competent authorities****Relevant provisions**

|  |                                    |
|--|------------------------------------|
| Article 32(7) of Directive 2011/61/EU  | <a href="#">🔗 Art. 32 AIFMD</a>    |
| Article 35(10) of Directive 2011/61/EU | <a href="#">🔗 Art. 35.10 AIFMD</a> |
| Article 39(9) of Directive 2011/61/EU  | <a href="#">🔗 Art. 39.9 AIFMD</a>  |
| Article 40(10) of Directive 2011/61/EU | <a href="#">🔗 Art. 40.10 AIFMD</a> |

**Question**

According to Article 32(7), 35(10), 39(9) and 40(10) AIFMD, the competent authorities of the home Member State of an AIFM should inform, without delay, the competent authorities of the host Member State of the changes described therein. It seems not entirely clear who is meant by "host Member State. Pursuant to letter "r" in Article 4(1) AIFMD, host Member States are all Member States other than the home Member State where an AIFM manages or distributes AIFs. Consequently, not only the Member States where the AIF is distributed but also the Member States where the AIF is domiciled would have to be informed. However, Article 31(4) AIFMD and the second subparagraph of Article 32(4) AIFMD contradict such reading. Article 31(4) AIFMD does not provide for any information duty vis-à-vis the Member States where the AIF is domiciled. And pursuant to Article 32(4) AIFMD, the competent authorities of the AIF shall be informed that the AIFM may start marketing the units or shares of the AIF in the host Member State of the AIFM.

**Answer**

It should be assessed on a case-by-case basis how the rules of Article 4(1)(r) apply i.e. in each of the above mentioned articles an assessment should be done on the basis of the subject matter of these articles in order to identify which is the host Member State.

**ID 1204. Responsibility of Member States' competent authorities****Relevant provisions**

|                                    |                                 |
|------------------------------------|---------------------------------|
| Article 24 of Directive 2011/61/EU | <a href="#">🔗 Art. 24 AIFMD</a> |
| Article 42 of Directive 2011/61/EU | <a href="#">🔗 Art. 42 AIFMD</a> |

**Question**

Article 42 states that, where a non-EU AIFM markets AIF in the EU, the competent authority of the member state where the AIF is marketed will receive the reports with regard to Article 24. According to Article 24 para. 2 and para. 4 subpara. 3, those reports must be provided by the non-EU AIFM for each of the managed EU-AIFs and each AIF marketed in the EU. Does that imply that the competent authority of member state A (were the non-EU AIFM markets some AIF) also receives reports on AIF marketed solely in member state B? Or does it in that case just refer to AIFs managed or marketed in its jurisdiction?

**Answer**

Reporting obligations apply in respect of each AIF marketed, whereby the competent authority is deemed to be the authority of the Member States where the AIF is marketed without a passport. Hence Member State A will receive reporting for AIFs marketed in A, Member State B for those marketed in B.

**ID 1205. Responsibility of Member States' competent authorities****Relevant provisions**

|                                    |                                 |
|------------------------------------|---------------------------------|
| Article 33 of Directive 2011/61/EU | <a href="#">🔗 Art. 33 AIFMD</a> |
| Article 41 of Directive 2011/61/EU | <a href="#">🔗 Art. 41 AIFMD</a> |

### Question

Articles 33(6) provide for a written notice by the AIFM to the competent authorities of its home Member State in the event of a change to any of the information communicated in accordance with Article 33(2), and, where relevant, Article 33(3). If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with the AIFMD, or the compliance by the AIFM with the AIFMD otherwise, the competent authorities of the home Member State of the AIFM shall, without undue delay, inform the competent authorities of the host Member States of the AIFM of those changes. As Article 33(6) only refers to changes to any information communicated in accordance with Article 33 paragraph 2 or 3, there is actually no obligation to inform the competent authorities of the host Member States of the AIFM of any change in the scope of the authorisation granted to the AIFMD. As under the UCITS regime any change in the scope of the authorisation has to be communicated to the competent authorities of the host member State, and in order to achieve a level playing field, such an obligation should be discussed with respect to the transposition of Article 33 AIFMD. The same applies to Article 41(6) AIFMD.

### Answer

The second subparagraph of Article 33(4) requires the home Member State competent authorities to submit to the competent authorities of the host Member State a statement to the effect that the AIFM concerned is authorised by them.

We interpret this as meaning that a change to the authorisation in the sense of article 10 of the Directive would require a new statement by the home country competent authorities. This would also be the consequence, under article 50.4, if the information is required for the purposes of carrying out the duties of the host MS' competent authority.

### ID 1206. Passport issues

#### Relevant provisions

|                                    |                                 |
|------------------------------------|---------------------------------|
| Article 3 of Directive 2011/61/EU  | <a href="#">↻ Art. 3 AIFMD</a>  |
| Article 36 of Directive 2011/61/EU | <a href="#">↻ Art. 36 AIFMD</a> |
| Article 42 of Directive 2011/61/EU | <a href="#">↻ Art. 42 AIFMD</a> |

### Question

The interaction between (a) articles 42 and 36, and (b) article 3 – and whether the sub-threshold regime can be applied to non-EU AIFMs and EU AIFMs managing and / or marketing non-EU AIFs. We're getting questions around the apparent anomaly that sub-threshold third country managers operating under private placement regimes are subject to higher transparency requirements than domestic registration-only managers.

### Answer

The Directive has a limited applicability as regards sub-threshold AIFMs; therefore it is up to Member States how to apply the national private placement regimes to non-EU AIFMs that would qualify as sub-threshold AIFMs.

Article 3 only requires registration, but does not differentiate between EU and non-EU managers, being both within the scope of the Directive under article 2.1.

### ID 1207. Responsibility of Member States' competent authorities

#### Relevant provisions

|                                    |                                 |
|------------------------------------|---------------------------------|
| Article 49 of Directive 2011/61/EU | <a href="#">↻ Art. 45 AIFMD</a> |
|------------------------------------|---------------------------------|

### Question

The AIFMD is based on the supervision on the AIFM and not on the AIFs, however in several countries funds are also specifically regulated by law and other secondary provisions which state the working mechanism of

alternative funds (including general limits to their total borrowings, reporting obligation, valuation of assets, annual accounts and disclosure to investors, crisis resolution measures, etc.). We are wondering – in case of institution of a fund in a country other than the home country of the AIFM – what are the instruments available to the host country Authorities for checking compliance with the host applicable rules concerning the AIF and to request to the AIF for statistical information.

#### Answer

It is the Member States who remain responsible for fund regulation. Hence national law regulating funds in a certain country applies to AIFs established in that country, irrespective whether they are managed by a domestic AIFM or by an EU AIFM managing that AIF with or without passport, and insofar national law does not prevent the exercise of rights of AIFMs authorised in accordance with this Directive in other Member States. Cooperation between national authorities should be done the basis of articles 45 and 50.

Additionally, Article 45(3) explicitly allows the competent authorities of the host Member State of the AIFM to require the AIFM to provide them with information necessary for the supervision of compliance with applicable rules for which the host country is responsible.

#### ID 1209. Passport issues

##### Relevant provisions

General question on Directive 2011/61/EU [↻ Art. 7 AIFMD](#)

##### Question

Shall it be possible for an AIFM to transfer the management of an AIF to an AIFM in another Member State?

- If so, is this regardless of the AIF is subject to a fund legislation, e.g. a Special Funds Act, in its home Member State or subject only to the AIFMD (and applicable national corporate law)?
- If so, is this regardless of the AIF is a fund that is established before 22 July 2013 or a fund established that date or later?

#### Answer

Under the AIFMD the transfer, understood as appointment of a new AIFM for an AIF should be possible, provided that the new AIFM is AIFMD compliant. The new appointment is not dependent on national fund law and/or corporate law since *"the fact that a Member State may impose requirements additional to those applicable in other Member States on AIFs established in its territory should not prevent the exercise of rights of AIFMs authorised in accordance with this Directive in other Member States"* (Recital 10).

Whether the fund is being managed by an AIFM before or after 22 July 2013 is relevant only for the purposes of the transitional provisions in Article 61 that should be interpreted as indicated above.

#### ID 1210. Passport issues

##### Relevant provisions

General question on Directive 2011/61/EU [↻ Art. 43 AIFMD](#)

##### Question

Assumed that Member State A provides for the same rules applicable to the marketing of AIF to professional investors on the one hand and on the other hand to so called semi-professional investors (cf. Article 6 of EuVeCa Regulation) in Member State A: Can Member State A also provide that an EU-AIFM from Member State B holding an EU pass for the marketing to professional investors is allowed to market its EU-AIF also to semi-professional investors in Member State A. Or does the AIFMD require a notification with the competent authority of Member State A for such a cross-border marketing to semi-professional investors?

### Answer

Marketing of AIFs cross-border to professional investors has to be done under the passport and via notification. It is Member States' national law that applies to the marketing of AIFs to non-professional investors, including cross-border marketing to non-professional investors. Article 43 foresees only that no stricter or additional requirements on EU AIFs than those applicable to AIFs marketed domestically should be applied.

Hence, Member State A may allow an EU-AIFM from Member State B to market its EU-AIFs also to semi-professional investors in Member State A. This would not mean that such AIFM would be allowed to market to semi-professional in Member State B if this is not allowed in Member State B. Furthermore, to be able to check compliance with its own rules, Member State A needs to be informed of the EU-AIFs that are marketed in its territory, irrespective where they are established. Requirements on AIF's or AIFM's might be stricter under national law, therefore the notification procedure would not be automatically applicable. Member States could decide if they want to rely on the notification procedure or if they want to put in place specific national rules how to be informed.

### ID 1211. Passport issues

#### Relevant provisions

Article 43 of Directive 2011/61/EU

[🔗 Art. 43 AIFMD](#)

Article 33 of Directive 2011/61/EU

[🔗 Art. 33 AIFMD](#)

#### Question

According to Article 33(1) AIFMD, Member States shall ensure that an authorised EU AIFM may manage EU AIFs established in another Member State provided that the AIFM is authorised to manage that type of AIF. Pursuant to Article 31(6), 32(9), 35(17), 39(11) und 40(17) AIFMD, Member States shall require that the AIFs managed and marketed by the AIFM be marketed only to professional investors. According to the second subparagraph of Article 43(1) AIFMD, Member States may impose stricter requirements applicable to the AIFs marketed to retail investors in their territory. Taking this into account, the national law of the Member States may provide for a specially regulated type of retail fund which may not be managed by an AIFM established in another Member State.

#### Answer

The AIFMD does not regulate the establishment of retail funds which is a matter of national law.

The AIFMD permits the marketing of AIFs by AIFMs to retail investors only under the conditions foreseen in Article 43 which include also non-discrimination provisions (see also recital 71).

Article 43 allows Member States to impose stricter requirements than those applicable to the marketing of AIFs to professional investors. This means that in no case can an AIFM bypass the requirements for marketing to professional investors foreseen in the AIFMD by marketing to retail investors.

## **Appendix XI: Commission Regulation (EU) 447/2013 establishing the procedure for AIFMs which choose to opt in under Directive 2011/61/EU**

[Art. 3 AIFMD](#)

### **COMMISSION IMPLEMENTING REGULATION (EU) No 447/2013 of 15 May 2013**

#### **establishing the procedure for AIFMs which choose to opt in under Directive 2011/61/EU of the European Parliament and of the Council**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (1), and in particular Article 3(5) thereof,

Whereas:

- (1) Pursuant to Article 3(4) of Directive 2011/61/EU, alternative investment fund managers (AIFMs) that meet the conditions provided for in Article 3(2) of that Directive may choose to opt in under it in order to benefit from the rights granted. By opting in, an AIFM becomes subject to the application of Directive 2011/61/EU in its entirety.
- (2) Directive 2011/61/EU provides for a procedure for authorisation of AIFMs. The documents and information to be provided under that procedure offer necessary details as to the requesting AIFM and therefore the same documents and procedure should be used in the case of opting in. There are no specific reasons peculiar to opting in that would justify the use of a different procedure than the one applicable to AIFMs with assets under management above the thresholds provided for in Article 3(2) of Directive 2011/61/EU. Consequently, AIFMs choosing to opt in under Directive 2011/61/EU should follow the same procedure as that established for AIFMs that are obliged to seek authorisation under Directive 2011/61/EU.
- (3) AIFMs having the right to opt in are AIFMs which had been previously either registered in accordance with Article 3(3) of Directive 2011/61/EU or authorised as management companies of undertakings for collective investment in transferable securities in accordance with 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). It is appropriate to avoid double reporting and to account for the documents and information already submitted by AIFMs to the competent authorities under the registration and authorisation procedures, provided that those documents and information are up to date.
- (4) Competent authorities should examine the request to opt in and grant authorisation to that effect under the same conditions and following the same procedure as in the case of AIFMs with assets under management above the relevant thresholds provided in Article 3(2) of Directive 2011/61/EU.
- (5) It is important to clarify the relationship between the procedure for those AIFMs which choose to opt in and the revocation of an authorisation granted to AIFMs under Directive 2011/61/EU. An AIFM granted authorisation under Directive 2011/61/EU whose assets under management subsequently fall below the thresholds set out in Article 3(2) of Directive 2011/61/EU remains authorised and subject to the application of that Directive in its entirety as long as the authorisation is not revoked. The revocation of the authorisation should not be automatically triggered by a fall of the assets under management of an authorised AIFM below the relevant threshold, but only at the request of the AIFM. Consequently it should not be possible for an AIFM to request to opt in as long as it holds an authorisation under Directive 2011/61/EU, whereas an AIFM whose authorisation has been revoked upon its request should still be able to seek to opt in again under Directive 2011/61/EU.

- (6) Directive 2011/61/EU obliges Member States to apply the laws, regulations and administrative provisions which transpose that Directive from 22 July 2013. The application of this Regulation is therefore also deferred to the same date.
- (7) The measures provided for in this Regulation are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS REGULATION:

*Article 1*

**Procedure and conditions for opt in**

1. An alternative investment fund manager (AIFM) that meets the conditions provided for in Article 3(2) of Directive 2011/61/EU and chooses to opt in under that Directive shall submit an application for authorisation to the competent authority of its home Member State.

The application shall follow the same procedure provided for in paragraphs 1 to 5 of Article 7 of Directive 2011/61/EU and in the measures adopted in implementation thereof.

2. The competent authority of the home Member State may exempt an AIFM referred to in paragraph 1 from submitting all information and documents required under Article 7 of that Directive, provided that the exempted information or documents have been already submitted to the competent authority for registration purposes in accordance with Article 3(3) of that Directive or as part of the authorisation procedure pursuant to Article 5 of Directive 2009/65/EC and provided that such information and documents are still up to date, which is confirmed in writing by the AIFM.
3. The competent authority of the home Member State shall grant an authorisation following the same procedure as provided for in paragraphs 1 to 5 of Article 8 of Directive 2011/61/EU.

*Article 2*

**Entry into force and application**

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

This Regulation shall apply from 22 July 2013.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 15 May 2013.

For the Commission

The President

José Manuel BARROSO

## Appendix XII: Commission Regulation (EU) 448/2013 establishing a procedure for determining the Member State of reference of a non-EU AIFM

[↪ Art. 37.4 AIFMD](#)

### COMMISSION IMPLEMENTING REGULATION (EU) No 448/2013 of 15 May 2013

establishing a procedure for determining the Member State of reference of a non-EU AIFM pursuant to Directive 2011/61/EU of the European Parliament and of the Council

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010<sup>(95)</sup>, and in particular Article 37(14) thereof,

Whereas:

- (1) In the situations referred to in point (b), point (c)(i), points (e) and (f) and point (g)(i) of Article 37(4) of Directive 2011/61/EU, more than one Member State could be considered as a possible Member State of reference of a non-EU manager of alternative investment funds (AIFMs) intending to manage EU alternative investment funds (AIFs) and, as the case may be, or market AIFs managed by it in the Union. In those cases the non-EU AIFM has to submit a request to the competent authorities of those Member States to determine its Member State of reference. The request should be accompanied by all the relevant information and documentation necessary for determining the Member State of reference for this AIFM. A joint decision should be adopted by the competent authorities concerned to determine the Member State of reference. A procedure to be followed by the relevant competent authorities when determining the Member State of reference needs to be established. Whilst the appointment of the Member State of reference is the joint responsibility of the competent authorities of the Member States concerned, the European Securities and Markets Authority (ESMA) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>(96)</sup> should ensure that all possible Member States of reference are duly involved in such decision-making and should assist in reaching an agreement.
- (2) The procedure for determining the Member State of reference is different from the procedure for applying for a passport under Directive 2011/61/EU. Once the Member State of reference has been determined the non-EU AIFM concerned has to apply for authorisation to the competent authority of that Member State, following the same procedure and subject to the same conditions as applicable to AIFMs under Articles 7 and 8 of Directive 2011/61/EU.
- (3) Directive 2011/61/EU obliges Member States to apply the laws, regulations and administrative provisions which transpose that Directive from 22 July 2013. Without prejudice to the delegated act required in Article 67(6) of Directive 2011/61/EU, the application of this Regulation is therefore also deferred to the same date.
- (4) The measures provided for in this Regulation are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS REGULATION:

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<sup>95</sup> OJ L 174, 1.7.2011, p. 1.

<sup>96</sup> OJ L 331, 15.12.2010, p. 84.

*Article 1*

**Procedure for determining the Member State of reference from among several possible Member States of reference**

1. Where a non-EU alternative investment fund manager (AIFM) intending to manage EU alternative investment funds (AIFs) without marketing them or intending to market AIFs managed by it in the Union submits a request to determine its Member State of reference pursuant to the second subparagraph of Article 37(4) of Directive 2011/61/EU, that request shall be in writing and shall be addressed to each of the competent authorities of the Member States that are possible Member States of reference. The request shall list all the possible Member States of reference.
2. The request by the non-EU AIFM shall include the information and documentation necessary for determining the Member State of reference.
3. In the situation referred to in Article 37(4)(b) of Directive 2011/61/EU, such information and documentation shall include:
  - a) indication of the Member States where the AIFs managed by the non-EU AIFM are established;
  - b) indication of the Member States where assets are managed by the non-EU AIFM;
  - c) the amounts of assets under management of the non-EU AIFM in the different Member States.
4. In the situation referred to in point (c)(i) of Article 37(4) of Directive 2011/61/EU, such information and documentation shall include:
  - a) indication of the Member State where the AIF managed by the non-EU AIFM is established;
  - b) indication of the Member States where the non-EU AIFM intends to market the AIF.
5. In the situations referred to in point (e) and point (g)(i) of Article 37(4) of Directive 2011/61/EU, such information and documentation shall include:
  - a) indication of the Member States where AIFs managed by a non-EU AIFM are established;
  - b) a description of the marketing strategy capable of proving the intention of the non-EU AIFM to market a certain AIF or several AIFs in a particular Member State or in several Member States, and to develop effective marketing in particular Member States, indicating at least:
    - (i) the Member States where the distributors (and the AIFM in case of self-distribution) are going to promote units or shares of AIFs, which are managed by the AIFM, including the expected share, in terms of assets under management, in the overall promotion in the Union;
    - (ii) an estimate of the expected number of investors targeted having their domicile in the Member States where the AIFM intends to market its AIFs;
    - (iii) the official languages of Member States into which the offering and promotional documents have been or are to be translated;
    - (iv) the distribution of marketing activities across the Member States where the AIFM intends to market its AIFs taking into account in particular the prominence and frequency of advertisements and road shows.
6. In the situation referred to in Article 37(4)(f) of Directive 2011/61/EU, such information and documentation shall include information stipulated in paragraph 5(b) of this Article.
7. The competent authorities addressed by a non-EU AIFM as competent authorities of possible Member States of reference shall immediately upon receipt of the request referred to in paragraph 1 of this Article, and no later than three business days following the receipt of the request, contact each other and the European Securities and Markets Authority (ESMA) in order to decide whether any other competent authorities in the Union are potentially involved pursuant to Article 37(4) of Directive 2011/61/EU.

Upon ESMA's request, the competent authorities shall immediately provide ESMA with the complete request made by the non-EU AIFM.

8. Where it is decided that other competent authorities in the Union could be involved, ESMA shall immediately inform them and ensure that the complete request made by the non-EU AIFM is transmitted to them.
9. Each competent authority involved in the procedure and ESMA may request from the non-EU AIFM relevant additional information and documentation necessary for determining the Member State of reference.

Such request of additional information or documentation shall be in writing, shall include reasons and shall be simultaneously communicated to all other competent authorities concerned and to ESMA.

Once the requesting competent authority or ESMA receives the additional information or documentation, the requesting authority shall transmit that information or documentation immediately to all other authorities concerned and ESMA, as the case may be.

10. Within one week from the receipt of the request referred to in paragraph 1 by the competent authorities addressed by the AIFM or, where applicable, by any other competent authorities in the Union pursuant to paragraph 8, all competent authorities concerned shall submit an opinion to each other and to ESMA with regard to the determination of the appropriate Member State of reference.
11. Subsequently, all competent authorities shall jointly determine the Member State of reference. The determination shall be made at the latest one month after the receipt of the request by the competent authorities identified by the non-EU AIFM or, where applicable, by the other competent authorities in the Union pursuant to paragraph 8.

Where additional information is requested, the time limit referred to in the first subparagraph shall be extended to include the period between the request for additional information and documentation referred to in paragraph 9 and the receipt of such information or documentation.

12. ESMA shall assist the relevant competent authorities and, where necessary, facilitate the determination of the Member State of reference pursuant to Article 31 of Regulation (EU) No 1095/2010.
13. The competent authority of the Member State that is determined as the Member State of reference shall inform in writing and without undue delay the non-EU AIFM about that determination.
14. In the event that the requesting non-EU AIFM is not informed in writing within seven days of the determination or the relevant competent authorities have not determined the Member State of reference within the time limit referred to in the first subparagraph of paragraph 11 of this Article, the requesting non-EU AIFM may choose itself its Member State of reference in accordance with the criteria set out in the second subparagraph of Article 37(4) of Directive 2011/61/EU.

The non-EU AIFM shall immediately inform in writing all the competent authorities originally addressed and ESMA about its choice of the Member State of reference.

15. Where the Member State of reference chosen by the non-EU AIFM and the Member State of reference determined by the competent authorities, are different, the competent authorities concerned shall inform the non-EU AIFM about the determination as soon as possible, but no later than two business days after being informed about the choice of the AIFM according to paragraph 14. In this case, the determination shall prevail.

*Article 2*

**Entry into force**

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

This Regulation shall apply from 22 July 2013.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 15 May 2013.

For the Commission

The President

José Manuel BARROSO

## Appendix XIII: Guidelines on reporting obligations under AIFMD

(ESMA Guidelines dated 8 August 2014 on reporting obligations under Article 3(3)(d) and Article 24 (1), (2) and (4) of the AIFMD, [ESMA/2014/869](#))

(See also ESMA consolidated AIFMD reporting template [ESMA/2013/1359](#), AIFMD - Reporting - XML documents [ESMA/2013/1361](#), AIFMD reporting IT technical guidance [ESMA/2013/1358](#))

(See also ESMA Opinion - Collection of information for the effective monitoring of systemic risk under Art. 24 (5), first sub-paragraph of the Level 1 AIFM Directive, ref. [ESMA/2013/1340](#) on ESMA website)

[↪ Art. 3 AIFMD](#) | [↪ Art. 24 AIFMD](#) | [↪ Appendix XIV \(Q&A published by ESMA section III Reporting\)](#) | [↪ Appendix XV \(FAQ AIFM published by CSSF\) Section 14 Reporting Questions 14a\) to Question 14.r\)](#)

### I. Scope

#### Who?

1. These guidelines apply to competent authorities.

#### What?

2. These guidelines apply in relation to Article 3(3)(d) and Article 24(1), (2) and (4) of Directive 2011/61/EU (the AIFMD) and Article 110 of Regulation 231/2013 (the Regulation) implementing the AIFMD.

#### When?

3. These guidelines apply from 2 months after publication of translations.

### II. Definitions

|                           |  |
|---------------------------|--|
| Interim Entity Identifier | The interim code used to identify counterparties defined in Article 3 of Commission Regulation 1247/2012.  |
| Legal Entity Identifier   | The identifier referred to in the Financial Stability Board's (FSB) recommendations on "A Global Legal Entity Identifier for Financial Markets".               |
| Acquisition capital       | Capital provided to operating companies intended for growth via acquisitions. This capital is normally provided for a specific, identified acquisition target. |
| Buyouts                   | The practice whereby a private equity firm typically acquires a majority stake (if not 100%) in an operating company and retains a control position.           |
| Consolidation             | The practice whereby private equity firms acquire multiple companies to consolidate into a larger entity.  |
| Corporate Divestitures    | Investment in a non-core division of a larger corporate entity. In this case, the corporation is spinning off a division to a private equity firm.             |
| ESOP                      | Employee Stock Ownership Plans are mechanisms to transfer corporate ownership to its employees in whole or in part. Private                                    |

|                       |  |
|-----------------------|--|
|                       | equity firms sometimes contribute equity capital to finance this ownership transfer.   |
| Growth Capital        | The equity investment by a private equity firm specifically to facilitate specific growth initiatives.   |
| Recapitalisation      | A strategic change in a company's capital structure usually involving a partial transfer of ownership. A recapitalization often occurs when an owner wishes to cash out of a partial interest in the business (the proverbial "take some chips off the table"). In this case, a private equity firm would provide the equity to pay the owner in exchange for a percentage of ownership. |
| Shareholder Liquidity | Similar to a recapitalisation, in that it involves a strategic change in capital structure, but usually with a different intent. With this strategy, a private equity firm provides the company with enough equity to completely "cash out" an owner, typically for family succession planning purposes.   |
| Turnarounds           | Private equity firms may provide equity with the intent of turning a distressed or special situation company into a financially stable company. Often, distressed or special situation companies are in default (i.e. bankruptcy) or close to it.  |
| Value of Instruments  | Unless otherwise specified, this means valuation of instruments in accordance with Articles 2 and 10 of Regulation.  |
| Aggregated value      | Means the aggregated value of instruments without netting.   |
| Net Asset Value       | The net value of the assets of the AIF (as opposed to the Net Asset Value per unit or share of the AIF).   |
| Net Equity Delta      | The portfolio's sensitivity to movements in equity prices.   |
| CS 01                 | The portfolio's sensitivity to a change in credit spreads.   |
| DV 01                 | The portfolio's sensitivity to a change in the yield curve.  |

### III. Purpose

4. The purpose of these guidelines is to ensure common, uniform and consistent application of the reporting obligations to national competent authorities (NCAs) stemming from Articles 3(3)(d) and 24(1), (2) and (4) of the AIFMD and Article 110 of the Regulation. These guidelines achieve this goal by providing clarifications on the information that alternative investment fund managers (AIFMs) must report to NCAs, the timing of such reporting together with the procedures to be followed when AIFMs move from one reporting obligation to another.

### IV. Compliance and reporting obligations

#### Status of the guidelines

5. This document contains guidelines issued under Article 16 of the ESMA Regulation<sup>97</sup>. In accordance with Article 16(3) of the ESMA Regulation competent authorities must make every effort to comply with the guidelines.

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<sup>97</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

6. Competent authorities to whom the guidelines apply should comply by incorporating them into their supervisory practices.

### Reporting requirements

7. Competent authorities to which these guidelines apply must notify ESMA whether they comply or intend to comply with the guidelines, with reasons for non-compliance, within two months of the date of publication of these guidelines by ESMA. In the absence of a response by this deadline, competent authorities will be considered as non-compliant. A template for notifications is available from the ESMA website.

### V. Reporting periods

8. The reporting periods are aligned with the Trans-European Automated Real-time gross settlement Express Transfer (TARGET) calendar and reporting periods end on the last business day of March, June, September and December of each year. This means that AIFMs subject to yearly reporting obligations will report once a year as of the last business day of December. AIFMs subject to half-yearly reporting obligations will report twice a year as of the last business day of June and December and AIFMs reporting on a quarterly basis as of the last business day of March, June, September and December.

- **FAQ AIFM published by CSSF (Appendix XV) Section 14 Reporting Question 14.a)**

9. If the last business day of a reporting period in a jurisdiction of a reporting AIFM is a bank holiday and no data is available for that date, the AIFM should use information from the immediately previous business day, but the reporting date should remain the last business day of the reporting period according to the TARGET calendar.

### VI. Transitional arrangements (Article 61 of the AIFMD)

10. In order to determine the nature and timing of their reporting obligations for the period starting 22 July 2013, existing AIFMs should take into account: i) the transitional provisions of Article 61(1) of the AIFMD; ii) the European Commission's interpretation of Article 61(1) as set out in its Q&A<sup>98</sup>; and iii) their authorisation status. When existing AIFMs become subject to the reporting obligations, they should report the information required under Article 24 of the AIFMD in accordance with the procedure set out under paragraph 12 below. After the first cycle of reporting to NCAs, existing AIFMs should report according to the reporting frequency specified in paragraph 8 of the guidelines above.

### VII. Procedure for first reporting

11. There may be cases in which AIFMs do not have any information to report on AIFs, such as where there is a delay between the authorisation or registration being granted to a new AIFM and the actual start of activity or between the creation of an AIF and the first investments. In such a scenario, AIFMs should still provide a report to their NCAs by indicating that no information is available by using a specific field.

12. AIFMs should start reporting as from the first day of the following quarter after they have information to report until the end of the first reporting period. For example, an AIFM subject to halfyearly reporting obligations that has information to report as from 15 February would start reporting information as from 1 April to 30 June.

- **Q&A published by ESMA (Appendix XIV) Section III Reporting Question 64**
- **FAQ AIFM published by CSSF (Appendix XV) Section 14 Reporting Question 14.b), Question 14.d)**

13. AIFMs should report information under Articles 3 and 24 to their national competent authorities only once per reporting period covering all the reporting period. For example, AIFMs subject to halfyearly reporting obligations should only provide one report to their NCAs for each half-year period.

<sup>98</sup> <http://ec.europa.eu/ycol/index.cfm?fuseaction=legislation.show&lid=9>

### VIII. Procedures when the AIFM of an AIF changes or an AIF is liquidated

#### - Change of AIFM

14. When the AIFM of an AIF changes between two reporting dates, the former AIFM should not report any information under Articles 3(3)(d) or 24 to its NCA at the end of the reporting period. Rather, the information under Articles 3(3)(d) or 24 should be reported by the new AIFM at the end of the reporting period covering the whole period based on information provided by the former AIFM. The same procedure should be followed when an AIFM is merged into another AIFM and no longer exists.

#### - Liquidated or merged AIF

15. AIFMs should provide the last report of the AIF to their NCA immediately after the AIF has been liquidated or merged.

▪ **Q&A published by ESMA (Appendix XIV) Section III Reporting Question 7**

16. Liquidation processes may vary according to the type of AIFs managed and the jurisdiction of the AIF. Depending on the situations, the last report might not contain any information (where all the positions of the AIF have been unwound), or be limited to information on the turnover, or else the report might be complete. Indeed, in some cases, an AIF that enters into a liquidation procedure (administrative procedure) is no longer managed by the AIFM and the liquidation is instead carried out by a liquidator. In that case, the AIFM should provide a report to its NCAs for the AIF before the liquidator takes over the responsibility for the liquidation of the AIF.

### IX. Procedures when AIFMs are subject to new reporting obligations

17. Tables 8, 9 and 10 in Annex IV [see doc. reference 2013/1360 on [ESMA website](#)] set out all the different possible changes in reporting frequency and provide clarification on the scope of the information to be provided. These procedures are based on the assumption that when an AIFM is granted its authorisation under the AIFMD, all the procedures necessary to comply with the new reporting obligations are in place. When AIFMs report for the first time after a shift in a reporting frequency, they should indicate the change to their NCAs by using a specific field.

18. When AIFMs report for the first time after a change in reporting frequency and the report covers several reporting periods (see examples below), AIFMs should send only one report and not one report per reporting period.

#### Examples:

##### - Table 8 – Case 1 - From registered AIFM to authorised AIFM with quarterly reporting obligations:

19. When a registered AIFM is granted authorisation and immediately becomes subject to quarterly reporting obligations, the new reporting should start as of the end of the first full quarter covering the entire period since the last reporting to its NCA under the registration requirements of Article 3(3)(d). However, if the AIFM is granted authorisation during the last quarter of the year, the AIFM should report according to the frequency applicable to the AIFM before the authorisation (i.e. yearly reporting). Authorised AIFMs should report the information required under Article 24 of the AIFMD.

20. For example, if the AIFM is granted authorisation in Q1, it should not report at the end of Q1 but at the end of Q2 for the period covering Q1-Q2; thereafter the AIFM should report in Q3 and in Q4. If the authorisation is granted in Q2, the AIFM should report at the end of Q3 for the period covering Q1-Q3, following which the AIFM should report in Q4. If the authorisation is granted in Q3, the AIFM should report at the end of Q4 covering the period Q1-Q4. Finally, if it obtains authorisation in Q4, the AIFM should report at the end of Q4 for the period Q1-Q4.

##### - Table 8 – Case 9 - From authorised AIFM with quarterly reporting obligations to authorised AIFM with half-yearly reporting obligations

21. If the change occurs during Q1, the AIFM should report at the end of H1 for the period covering Q1-Q2, following which the AIFM should report at the end of H2 for the subsequent quarters Q3 and Q4. If the change occurs in Q2, the AIFM should report at the end of H1 only for Q2, following which it should report at the end of H2 for the period covering Q3-Q4. If the change takes place in Q3, the AIFM should report at the end of H2 for the period covering Q3-Q4. Finally, if the change is in Q4, the AIFM should report at the end of H2 only for Q4.

*- Table 8 – Case 10 - From authorised AIFM with quarterly reporting obligation to registered AIFM*

22. When an AIFM shifts from being an authorised AIFM with quarterly reporting obligations to a registered AIFM with annual reporting obligations, the AIFM should report at the end of the year for the full period since the last round of reporting to its NCA. The AIFM should report only the information required under Article 3(3)(d).

*- Table 8 – Case 17 - From authorised AIFM with half-yearly reporting obligation to authorised AIFM with quarterly reporting obligations*

23. Unlike the situation above, the scope of the information to be reported in this case is exactly the same and only the frequency of the calculation differs (from half yearly to quarterly).

24. If the change occurs in Q1, the AIFM should report at the end of Q2 for the period covering Q1-Q2, following which the AIFM should report in Q3 and Q4. If the change occurs in Q2, the AIFM should report at the end of H1 covering Q1-Q2 following which it should report in Q3 and Q4. If the change takes place in Q3, the AIFM should report at the end of H2 covering Q3-Q4. Finally, if the change occurs in Q4, the AIFM should report at the end of H2 for Q3-Q4.

*– Table 8 – Case 35 - From authorised AIFM with only unleveraged AIFs investing in non-listed companies and issuers in order to acquire control to authorised AIFM with quarterly reporting obligations*

25. If the change occurs in Q1, the AIFM should report at the end of H1 for the period covering Q1-Q2, following which the AIFM should report at the end of Q3 and Q4. If the change occurs in Q2, the AIFM should report at the end of Q3 for the period covering Q1-Q3. If the change takes place in Q3, the AIFM should report at the end of Q4 for the period covering Q1-Q4. Finally, if the change is in Q4, the AIFM should report at the end of Q4 covering Q1-Q4.

*- Table 8 - Case 3 - From registered AIFM to authorised AIFM with annual reporting obligations*

26. Some registered AIFMs may decide to opt in under the AIFMD in order to benefit from the passport. This means that the frequency of reporting would not change (i.e. annual reporting) but that the scope of the information would be different because these AIFMs would become subject to the reporting obligations of Article 24.

27. Therefore, when AIFMs change from being registered AIFMs to authorised AIFMs subject to an annual reporting obligation, AIFMs should report at the end year information requested by Article 24 covering the full period since the last round of reporting to their NCA.

*- Table 9 – Case 1116 - From unleveraged EU AIF investing in non-listed companies and issuers in order to acquire control managed by an AIFM investing only in non-listed companies and issuers in order to acquire control to unleveraged EU AIF with AuM above the AIF threshold not investing in non-listed companies and issuers in order to acquire control managed by an authorised AIFM with half yearly reporting obligation*

28. The scope of the information to be reported in this case is exactly the same and only the frequency of the calculation differs (from yearly to quarterly).

29. If the change occurs in Q1, the AIFM should report that AIF at the end of H1 for the period covering Q1-Q2, following which the AIFM should report that AIF at the end of Q3 and Q4. If the change occurs in Q2, the AIFM should report at the end of Q3 for the period covering Q1-Q3. If the change takes place in Q3, the AIFM should report that AIF at the end of Q4 for the period covering Q1-Q4. Finally, if the change is in Q4, the AIFM should report that AIF at the end of Q4 covering Q1-Q4.

- *Table 9 – Code 200 - From unleveraged non-EU AIF with AuM below the threshold marketed in the Union and not investing in non-listed companies and issuers in order to acquire control managed by an authorised "opt-in" AIFM to unleveraged EU AIF with AuM below the AIF threshold marketed in the Union and not investing in non-listed companies and issuers in order to acquire control managed by an authorised AIFM with half yearly reporting obligation*

30. The scope of the information to be reported in this case is exactly the same and only the frequency of the calculation differs (from yearly to half yearly).

31. If the change occurs in Q1, the AIFM should report for that AIF at the end of H1 for the period covering Q1-Q2 and in H2 for the period covering Q3-Q4. If the change occurs in Q2, the AIFM should report at the end of H2 for the period covering H1-H2. If the change occurs in Q3, the AIFM should report for that AIF at the end of H2 for the period covering H1-H2. Finally, if the change occurs in Q4, the AIFM should report for that AIF according to the frequency applicable to the AIFM before the authorisation (annual reporting).

- *Table 9 – Case 1180 - From unleveraged non-EU AIF not marketed in the union not investing in non-listed companies and issuers in order to acquire control managed by an authorised AIFM with quarterly reporting obligations to leveraged non-EU AIF marketed in the Union managed by an authorised AIFM with quarterly reporting obligation*

32. When the AIF they manage become leveraged AIF marketed in the Union, AIFMs should also report information requested by Article 24(2) and 24(4). The reporting frequency remains quarterly.

## **X. Reporting of specific types of AIF**

- Feeder AIFs

33. AIFMs should treat feeder AIFs of the same master fund individually. They should not aggregate all the information on feeder AIFs of the same master(s) in a single report. AIFMs should not aggregate master-feeder structures in a single report (i.e. one report gathering all the information on feeder AIFs and their master AIF(s)).

34. When reporting information on feeder AIFs, AIFMs should identify the master AIF in which each feeder invests but should not look through the master AIF(s) to its(their) holdings. If applicable, AIFMs should also report detailed information on investments that are made at feeder AIF level, such as investments in financial derivative instruments.

- Funds of funds

35. When reporting information on funds of funds, AIFMs should not look through the holdings of the underlying funds in which the AIF invests.

- Umbrella AIFs

36. If an AIF takes the form of an umbrella AIF with several compartments or sub-funds, AIF-specific information should be reported at the level of the compartments or sub-funds.

## **XI. AIFM data reporting under Article 3(3)(d) and 24(1)**

### **XI.I. Identification of the AIFM**

37. For the name of the AIFM, AIFMs should use the legal name of the AIFM. AIFMs should also provide the following codes:

- The national identification code (code used by the NCAs of home Member States or the NCAs of the Member State of reference or the NCAs of the Member States where the AIFM markets its AIFs under Article 42 of the Directive); and

- The LEI or, if not available, the IEI or, if not available, the Bank Identifier Code (BIC).

38. If the national identification code changes, AIFMs should always (for the first reporting following the change of the national code and any subsequent reporting) indicate the former national identification code together with the current national code.

39. Finally, AIFMs should indicate the jurisdiction in which they are established.

**XI.II. Principal markets and instruments in which it trades on behalf of the AIFs it manages**

- Principal markets:

40. AIFMs should group their instruments by market where the trades took place. Markets should be understood as trading venues where AIFMs trade. The ranking of the top 5 markets should be based on the aggregated value of the instruments composing each market. The value of the instruments should be calculated as of the last business day of the reporting period. Where possible, AIFMs should identify the market by reporting the relevant MIC.

41. Instruments that are not traded on a specific market should be grouped together under a specific 'market type' code XXX. These instruments include, for instance, collective investment undertakings.

42. OTC transactions should be grouped under the specific 'market type' code OTC. If an AIFM invests via an OTC transaction in an instrument that is also listed on a market, the 'market type' should be OTC.

43. In addition to the identification of the markets, AIFMs should report the corresponding aggregated value.

44. If AIFMs trade on fewer than five markets, NOT should be entered in the column 'market type' for the ranks for which there is no value.

Examples:

Example 1a:

|                              | Market type | Market code     | Aggregated Value |
|------------------------------|-------------|-----------------|------------------|
| Most important Market        | MIC         | XEUR (EUREX)    | 65,450,000       |
| Second most important market | MIC         | XBRU (EURONEXT) | 25,230,000       |
| Third most important market  | NOT         |                 |                  |
| Fourth most important market | NOT         |                 |                  |
| Fifth most important market  | NOT         |                 |                  |

45. The above example means that the 2 markets in which the AIFM trades on behalf of the AIFs it manages are EUREX for an aggregated value of €65,450,000 and EURONEXT for an aggregated value of €25,230,000. It also means that the AIFM trades only on two markets because the third, fourth and fifth aggregated values are NOT.

Example 1b:

|                              | Market type | Market code | Aggregated Value |
|------------------------------|-------------|-------------|------------------|
| Most important Market        | XXX         |             | 452,000,000      |
| Second most important market | NOT         |             |                  |
| Third most important market  | NOT         |             |                  |
| Fourth most important market | NOT         |             |                  |
| Fifth most important market  | NOT         |             |                  |

46. Example 1b corresponds to a situation where the AIFM only trades assets for which no market exists for an aggregated value of €452,000,000. For example, this could be an AIFM managing private equity funds or real estate funds.

Example 1c:

|                              | Market type | Market code     | Aggregated Value |
|------------------------------|-------------|-----------------|------------------|
| Most important Market        | XXX         |                 | 452,000,000      |
| Second most important market | MIC         | XEUR (EUREX)    | 42,800,000       |
| Third most important market  | MIC         | XNAS (NASDAQ)   | 22,782,456       |
| Fourth most important market | MIC         | XBRU (EURONEXT) | 11,478,685       |
| Fifth most important market  | NOT         |                 |                  |

47. Example 1c corresponds to a situation where the AIFM trades mostly off market for an aggregated value of €452,000,000 but also trades for smaller proportions on EUREX (€42,800,000), NASDAQ (€22,782,456) and EURONEXT (€11,478,685).

- Principal instruments

48. AIFMs should group their instruments according to the sub-asset types category displayed in Annex II of the guidelines- Table 1[see doc. reference 2013/1586 on [ESMA website](#)] (i.e. highest level of detail available – for example certificates of deposits, ABS, single name financial CDS etc.) and then report the top five sub-asset types. The ranking should be based on the aggregated value of the instruments composing each sub-asset type. The value of the instruments should be calculated as of the last business day of the reporting period.

49. In addition to the identification of principal instruments, AIFMs should also report the corresponding aggregated value.

Example:

|                                  | Sub-asset type code | Sub-asset type label                       | Aggregated Value |
|----------------------------------|---------------------|--|------------------|
| Most important instrument        | SEQ_LEQ_OTHR        | Other listed equities                      | 248,478,000      |
| Second most important instrument | DER_FIX_FIXI        | Fixed income derivatives                   | 145,786,532      |
| Third most important instrument  | PHY_TIM_PTIM        | Timber                                     | 14,473,914       |
| Fourth most important instrument | CIU_NAM_OTHR        | CIU operated/managed by the AIFM/Other CIU | 7,214,939        |
| Fifth most important instrument  | NTA_NTA_NOTA        | N/A  |                  |

50. The example above corresponds to an AIFM that only invests in Other Listed Equities, Fixed Income Derivatives, Timber and other CIUs operated/managed by the AIFM.

### **XI.III. Values of assets under management for all AIFs managed**

51. AIFMs should report the value of assets under management for all AIFs managed using the method set out in Articles 2 and 10 of the Regulation. AIFMs should always indicate the value in Euro. In order to convert the total value of assets under management for all AIFs managed into Euro, AIFMs should use the conversion rate provided by the European Central Bank (ECB). If there is no ECB conversion rate, AIFMs should indicate the conversion rate used. Only when all AIFs of the AIFM are denominated in one single base currency that is not the

Euro should this value be complemented by the value in the base currency of the AIFs. This information should be reported as of the last business day of the reporting period.

## **XII. AIF data reporting under Articles 3(3)(d) and 24(1)**

### **XII.I. Identification of the AIF**

52. For the name of the AIF, AIFMs should use the legal name of the AIF. In the case of umbrella funds, the names of the umbrella and the sub-funds should be reported.

53. For the AIF identification code, AIFMs should provide:

- the national identification code (code used by the NCAs of home Member States for the identification of AIFs or the NCAs of the Member State of reference or the NCAs of the Member States where the AIFM markets its AIFs under Article 42 of the Directive). If available, AIFMs should also provide the ISIN codes and other international codes the AIF may have. For AIFs with multiple share classes, AIFMs should report all the codes of all the share classes (ISIN codes and other international codes).
  
- the LEI code of the AIF or the IEI of the AIF.

54. If the national identification code changes, AIFMs should always (for the first reporting following the change of the national code and any subsequent reporting) indicate the former national identification code together with the current national code.

55. The inception date of the AIF is defined as the date the AIF started business.

56. For EU AIFs, the domicile of the AIF should be understood as the home Member State of the AIF as defined in Article 4(1)(p) of the AIFMD. For non-EU AIFs, the domicile of the AIF should be the country where the AIF is authorised or registered or where it has its registered office.

57. For each prime broker of the AIF, the legal name of the entity should be reported and, when available, the LEI code or the IEI or, if not available, the BIC.

58. For the base currency of the AIF, only one currency should be reported. This means that AIFs with several share classes denominated in different currencies should have only one base currency. This base currency is the currency to be used for reporting the information. AIFMs should report the principal base currency using the ISO 4217.

59. For the total assets under management of the AIF, AIFMs should report the value in the base currency of the AIF. AIFMs should also indicate the exchange rate between the base currency of the AIF and the Euro using the ECB conversion rate if relevant. This information should also be supplemented by the Net Asset Value (NAV) of the AIF. Both values should be given as of the last business day of the reporting period.

60. For the jurisdiction of the three main funding sources, AIFMs should identify the country of the counterparty of the liability. For example, if the funding source takes the form of a loan, in that case the jurisdiction should be the jurisdiction of the lender.

61. For the predominant AIF type, AIFMs should select only one AIF type from the following list:

- Hedge Fund;
  
- Private Equity Fund;
  
- Real Estate Fund;
  
- Fund of funds;
  
- Other; and

- None

62. The predominant AIF type should be based on the NAV of the AIF. AIFMs should select "None" as predominant AIF type where the investment strategy of the AIF does not permit a predominant AIF type to be identified.

**XII.II. Breakdown of investment strategies**

63. After the predominant AIF type, AIFMs should provide information on the breakdown of investment strategies using the list of strategies provided in the reporting template (see strategy categories of Annex II of the guidelines – Table 3) [see doc. reference 2013/1586 on [ESMA website](#)]. Predominant AIF types are mutually exclusive, except when AIFMs select 'None'. Therefore, AIFMs should not allocate the strategies across the different group of strategies (hedge fund strategy, private equity strategy, real estate, fund of fund and other strategy). For instance, if an AIFM reports 'Hedge Fund' as a predominant AIF type, the investment strategies can only be those in the list of strategies corresponding to Hedge Funds.

64. If an AIFM reports 'None' as predominant AIF type, the investment strategies should be allocated across the different categories of AIF types.

65. AIFMs should first select one primary strategy of the AIF. This primary strategy should be the strategy that best describes the reporting fund's strategies. Primary strategy funds are likely to be consistently and predominantly focused on one strategy even though they may invest in other strategies. Multistrategy funds are likely to be diversified across multiple strategies on a regular basis, with this diversification being an explicit part of the investment strategy. When AIFMs select "other" as the strategy that best describes the reporting fund's strategies, they should provide a short explanation of the strategy.

66. For Hedge Fund, Private Equity, Real Estate, Fund of funds and Other Strategies, AIFMs should also report the percentage of NAV represented by all strategies of the AIF. The strategies listed are mutually exclusive (i.e. AIFMs should not report the same assets under multiple strategies) and the sum of the percentages should equal 100%. When reporting the breakdown by percentage of NAV, AIFMs should not indicate any share in NAV for multi-strategy but instead for the other strategies listed.

67. Money market AIFs should be classified in the investment strategy "fixed income".

- Hedge fund strategies

Example 3a:

|   | Strategy that best describes the AIF's strategy | Share in NAV (%) |
|---|---|------------------|
| Equity: Long Bias                             |   |                  |
| Equity: Long/Short                            |   | 50%              |
| Equity: Market neutral                        |   |                  |
| Equity: Short Bias                            |   |                  |
| Relative Value: Fixed Income Arbitrage        |   |                  |
| Relative Value: Convertible Bond Arbitrage    |   |                  |
| Relative Value: Volatility Arbitrage          |   |                  |
| Event Driven: Distressed/Restructuring        |   |                  |
| Event Driven: Risk Arbitrage/Merger Arbitrage |   |                  |
| Event Driven: Equity Special Situations       |   |                  |
| Credit Long/Short                             |   |                  |
| Credit Asset Based Lending                    |   |                  |
| Macro   |   | 50%              |
| Managed Futures/CTA: Fundamental              |   |                  |
| Managed Futures/CTA: Quantitative             |   |                  |
| Multi-strategy hedge fund                     | X   |                  |
| Other hedge fund strategy                     |   |                  |

68. The example above corresponds to a Hedge Fund AIF that has a multi-strategy involving ½ Macro and ½ Equity Long/Short. The AIFM should select "Multi-strategy hedge fund" as "the strategy that best describe the AIF's strategy" and then report 50% of NAV under "Equity Long / Short" and 50% under "Macro".

Example 3b:

|   | Strategy that best describes the AIF's strategy | Share in NAV (%) |
|---|---|------------------|
| Equity: Long Bias                             |   |                  |
| Equity: Long/Short                            | X   | 70%              |
| Equity: Market neutral                        |   |                  |
| Equity: Short Bias                            |   |                  |
| Relative Value: Fixed Income Arbitrage        |   |                  |
| Relative Value: Convertible Bond Arbitrage    |   |                  |
| Relative Value: Volatility Arbitrage          |   |                  |
| Event Driven: Distressed/Restructuring        |   |                  |
| Event Driven: Risk Arbitrage/Merger Arbitrage |   |                  |
| Event Driven: Equity Special Situations       |   |                  |
| Credit Long/Short                             |   | 20%              |
| Credit Asset Based Lending                    |   |                  |
| Macro   |   |                  |
| Managed Futures/CTA: Fundamental              |   |                  |
| Managed Futures/CTA: Quantitative             |   | 10%              |
| Multi-strategy hedge fund                     |   |                  |
| Other hedge fund strategy                     |   |                  |

69. The example above corresponds to a Hedge Fund AIF whose strategy is best described as Equity Long/Short for 70% of the NAV. It also means that 20% and 10% of the NAV of the AIF is respectively invested in Credit Long/Short Strategies and Managed Futures/CTA: Quantitative.

- Private equity strategies

Example 3c:

|                                    | Strategy that best describes the AIF's strategy | Share in NAV (%) |
|------------------------------------|---|------------------|
| Venture Capital                    | X   | 100%             |
| Growth Capital                     |   |                  |
| Mezzanine Capital                  |   |                  |
| Multi-strategy private equity fund |   |                  |
| Other private equity fund strategy |   |                  |

70. The example above corresponds to a Private Equity AIF whose only strategy is Venture Capital.

Example 3d:

|                                    | Strategy that best describes the AIF's strategy | Share in NAV (%) |
|------------------------------------|---|------------------|
| Venture Capital                    |   | 50%              |
| Growth Capital                     |   |                  |
| Mezzanine Capital                  |   | 50%              |
| Multi-strategy private equity fund | X   |                  |
| Other private equity fund strategy |   |                  |

71. The example above corresponds to a Private Equity AIF that has a multi-strategy involving ½ Venture Capital and ½ Mezzanine Capital.

- Real estate strategies

Example 3e:

|                                 | Strategy that best describes the AIF's strategy | Share in NAV (%) |
|---------------------------------|---|------------------|
| Residential real estate         |   |                  |
| Commercial real estate          | X   | 100%             |
| Industrial real estate          |   |                  |
| Multi-strategy real estate fund |   |                  |
| Other real estate strategy      |   |                  |

72. The example above corresponds to a Real Estate AIF that only invests in Commercial Real Estate strategies.

Example 3f:

|                                 | Strategy that best describes the AIF's strategy | Share in NAV (%) |
|---------------------------------|---|------------------|
| Residential real estate         |   | 30%              |
| Commercial real estate          |   | 30%              |
| Industrial real estate          |   | 40%              |
| Multi-strategy real estate fund | X   |                  |
| Other real estate strategy      |   |                  |

73. The example above corresponds to a Real Estate AIF that has a multi-strategy involving 40% Industrial Real Estate, 30% Commercial Real Estate and 30% Residential Real Estate.

- Fund of funds strategies

Example 3g:

|                        | Strategy that best describes the AIF's strategy | Share in NAV (%) |
|------------------------|---|------------------|
| Fund of hedge funds    |   |                  |
| Fund of private equity | X   | 100%             |
| Other fund of funds    |   |                  |

74. The example above corresponds to a Fund of funds AIF that only invests in Private Equity AIFs.

- Other Strategy

Example 3h:

|                     | Strategy that best describes the AIF's strategy | Share in NAV (%) |
|---------------------|---|------------------|
| Commodity fund      |   | 20%              |
| Equity fund         |   | 10%              |
| Fixed income fund   | X   | 70%              |
| Infrastructure fund |   |                  |
| Other fund          |   |                  |

75. The example above corresponds to an AIF whose strategy is best described as Fixed Income Fund strategy for 70% of the NAV. It also shows that 20% and 10% of the NAV of the AIF is allocated to Commodity funds and Equity funds.

Example 3i:

|                | Strategy that best describes the AIF's strategy | Share in NAV (%) |
|----------------|---|------------------|
| Commodity fund |   | 10%              |
| Equity fund    |   | 10%              |

|                     |   |     |
|---------------------|---|-----|
| Fixed income fund   | X | 30% |
| Infrastructure fund |   |     |
| Other fund          |   |     |

|   | Strategy that best describes the AIP's strategy | Share in NAV (%) |
|---|---|------------------|
| Equity: Long Bias                             |   |                  |
| Equity: Long/Short                            |   | 15%              |
| Equity: Market neutral                        |   | 5%               |
| Equity: Short Bias                            |   |                  |
| Relative Value: Fixed Income Arbitrage        |   |                  |
| Relative Value: Convertible Bond Arbitrage    |   |                  |
| Relative Value: Volatility Arbitrage          |   |                  |
| Event Driven: Distressed/Restructuring        |   |                  |
| Event Driven: Risk Arbitrage/Merger Arbitrage |   |                  |
| Event Driven: Equity Special Situations       |   |                  |
| Credit Long/Short                             |   |                  |
| Credit Asset Based Lending                    |   |                  |
| Macro   | X   | 30%              |
| Managed Futures/CTA: Fundamental              |   |                  |
| Managed Futures/CTA: Quantitative             |   |                  |
| Multi-strategy hedge fund                     |   |                  |
| Other hedge fund strategy                     |   |                  |

76. The example above corresponds to an AIF whose predominant AIF type is 'None' with 50% of the NAV allocated to 'Hedge Fund' strategies and 50% allocated to 'Other' strategies.

**XII.III. Principal exposures and most important concentration**

- Main instruments in which the AIF is trading

77. This information should be provided for each AIF, or each compartment or sub-fund in the case of an umbrella AIF. AIFMs should identify the 5 most important individual instruments of an AIF. The ranking should be based on the value of individual instruments. The values of the instruments should be calculated as of the last business day of the reporting period.

78. For each position, the AIFM should identify the sub-asset type using the highest level of detail available in the typology of assets listed in Annex II of the guidelines- Table 1 [see doc. reference 2013/1586 on [ESMA website](#)]. AIFMs should also report the instrument code and, when available, the ISIN code and the All code for derivatives. If AIFMs trade in assets that do not have any specific instrument code, such as timber or vineyards, they should report NONE for the "instrument code type" and give details on the assets in the column "instrument name".

79. AIFMs should also report the value of each position together with its type (long or short).

80. If an AIF has a very concentrated portfolio of investments and the AIFM reports fewer than five instruments, the AIFM should enter "NTA\_NTA\_NOTA" for the relevant ranks.

Example:

|                           | Sub-asset type code                         | Instrument name | Instrument code type | Instrument code (ISIN or All) | Value      | Long/short position |
|---------------------------|---|-----------------|----------------------|-------------------------------|------------|---------------------|
| Most important instrument | SEQ_LEQ_IFIN (Listed eq issued by financial | BANK XYZ        | ISIN                 | FRXXXXXXX<br>XXX              | 10,000,000 | Long                |

|   |                                     |        |      |                  |           |       |
|---|-------------------------------------|--------|------|------------------|-----------|-------|
|   | institution)                        |        |      |                  |           |       |
| 2 <sup>nd</sup> most important instrument | SEC_LEQ_OT HR (Other Listed Equity) | XYZ SA | ISIN | FRXXXXXXX<br>XXX | 3,500,000 | Short |
| 3 <sup>rd</sup> most important instrument | Vineyard                            |        | NONE |                  |           |       |

81. The example above corresponds to an AIF for which the main individual positions are a long position in XYZ Bank shares to the value of € 10,000,000 and a short position in shares of XYZ SA to the value of €3,500,000.

- Geographical focus

82. When reporting information on the geographical focus, AIFMs should look at the domicile of the investments made. The geographical regions are mutually exclusive and the sum of the percentages should equal 100%. The information should be reported as of the last business day of the reporting period.

83. Investments that do not have a predominant geographical focus should be included in the category "supranational/multiple regions". AIFMs may allocate investments in underlying collective investment schemes to a specific region if they have sufficient information on the portfolio of the collective investment scheme; if not, they should be allocated to the category supranational/multiple regions. For financial derivative instruments (OTC and listed derivatives), the domicile should be the domicile of the underlying assets of the financial derivative instrument. For cash-like bank deposits, the domicile should be based on the currency in which the deposit is denominated. For instance, the domicile of a cash deposit in Euro in a US bank should be Europe. The same approach should apply to cash borrowing (i.e. the domicile should be based on the currency of the cash borrowed and not on the domicile of the lender). AIFMs should refer to Annex III of the guidelines for the details on the geographical areas [see Annex III of the guidelines – doc. reference 2013/1339 on [ESMA website](#)].

- 10 principal exposures of the AIF at the reporting date

84. Under this section of the reporting template, AIFMs should indicate the 10 principal exposures by subasset type and by type of position (long or short). AIFMs should group their instruments according to the sub-asset type categories displayed in Annex II of the guidelines – Table 1 of the document [see doc. reference 2013/1586 on [ESMA website](#)] (i.e. to the highest level of detail available, such as certificates of deposit, ABS, single name financial CDS etc.) and then report the top 10 principal exposures. The ranking should be based on the aggregated value of the instruments composing each sub-asset type. The value of the instruments should be calculated as of the last business day of the reporting period, and AIFMs should not net the positions between instruments that are part of the same sub-asset type.

85. For the first column, AIFMs should indicate the Macro Asset type using the first level of detail available in the typology of assets listed in Annex II of the guidelines – Table 1 [see doc. reference 2013/1586 on [ESMA website](#)] (i.e. securities, derivatives etc.).

86. For the second column, AIFMs should indicate the sub-asset type using the highest level of detail available in the typology of assets listed in Annex II of the guidelines – Table 1 [see doc. reference 2013/1586 on [ESMA website](#)] (i.e. certificates of deposits or other equity derivatives etc.).

87. Then, AIFMs should indicate the aggregated value of the sub-asset type as well as its percentage in terms of total value of assets under management of the AIF.

88. If AIFMs are aware of the counterparty to OTC transactions they should report its identity and its identification codes such as the LEI or the IEI. In this case, CCPs should not be considered as a counterparty. AIFMs should not indicate a counterparty if there is more than one counterparty for one subasset type.

Example:

|    | Macro Asset type code | Sub-asset type code   | Aggregated Value | % of the Total value Of assets under management of the | Long/short position | Counterparty (where relevant) |
|----|-----------------------|---|------------------|--|---------------------|-------------------------------|
| 1  | SEC (Securities)      | SEC_CSH_CODP (Certificates of deposit)                            | 120,000,000      | 4%   | Long                |                               |
| 2  | DER (Derivatives)     | DER_CDS_INDX (Index CDS)  | 100,000,00       | 3.3%   | Long                |                               |
| 3  | DER (Derivatives)     | DER_FEX_INVNT (Foreign exchange for investment purposes)          | 85,000,000       | 2.83%  | Short               |                               |
| 4  | CIU (CIS)             | CIU_OAM_AETF (Investment in CIU operated/managed by the AIFM-ETF) | 84,500,000       | 2.82%  | Long                |                               |
| 5  | DER (Derivatives)     | DER_EQD_OTHD (Other equity derivatives)                           | 60,000,000       | 2%   | Long                | XYZ Bank                      |
| 6  | SEC (Securities)      | SEC_CSH_CODP (Certificates of deposit)                            | 45,000,000       | 1.5%   | Short               |                               |
| 7  | DER (Derivatives)     | DER_EQD_OTHD (Other equity derivatives)                           | 32,000,000       | 1.1%   | Short               |                               |
| 8  | NTA                   | NTA_NTA_NOTA  |                  |  |                     |                               |
| 9  | NTA                   | NTA_NTA_NOTA  |                  |  |                     |                               |
| 10 | NTA                   | NTA_NTA_NOTA  |                  |  |                     |                               |

89. The example above illustrates that AIFMs may report similar information under different lines. For instance, both lines 1 and 6 provide for exposures to the same macro asset type (securities) and the same sub-asset type (certificates of deposit) but the difference is that under line 1 it is a long position whereas under line 6 it is a short position.

90. For the last column, the counterparty should be reported when all the instruments reported in a row have the same counterparty. For instance, in the example above, line 5 means that the fifth most important exposure of the AIFM is represented by equity derivatives that all have the same counterparty (e.g. XYZ Bank). Counterparties that are part of the same group should be treated as a single counterparty. Conversely, if not all the instruments have the same counterparty, the relevant cell should be empty as shown in line 7.

#### - 5 most important portfolio concentrations

91. Under this section of the reporting template, AIFMs must report the five most important portfolio concentrations by asset type, market where the trade occurred and position (long or short). The ranking should be based on the aggregated value of each instrument composing each asset type. The value of the instruments should be calculated as of the last business day of the reporting period and AIFMs should not net the positions between instruments that are part of the same asset type.

92. For the first column, AIFMs should identify the asset type using the second level of detail in the typology of assets listed in Annex II of the guidelines – Table 1[see doc. reference 2013/1586 on [ESMA website](#)]. For the third column, AIFMs should report the MIC of the market. They should then report the aggregated value of each group of asset type.

93. Finally, AIFMs should indicate whether the exposure of each group of asset type reported is a short or long position.

94. When a category of investment is not traded on a market, AIFMs should report "XXX" for 'market type'. These instruments include for instance collective investment undertakings.

95. OTC instruments should also be grouped under the specific code OTC for 'market type'. If an AIFM invests via an OTC transaction in an instrument that is also listed on a market, the 'market type' should be OTC.

Examples:

Example 1a:

|   | Asset type code                   | Market type | Market code              | Aggregate value | % of the total value of <b>assets</b> under management of the AIF | Long/short position | Counterparty (where relevant) |
|---|-----------------------------------|-------------|--------------------------|-----------------|---|---------------------|-------------------------------|
| 1 | DER_EQD<br>(Equity derivatives)   | MIC         | XNYS<br>(NYSE)           | 120,000,000     | 3%  | Long                | N/A                           |
| 2 | SEC_LEQ<br>(Listed equities)      | MIC         | XPAR<br>(Euronext Paris) | 98,000,000      | 2,45%   | Long                | N/A                           |
| 3 | DER_EQD<br>(Equity derivatives)   | OTC         |                          | 72,000,000      | 1.8%  | Short               | XYZBank                       |
| 4 | CIU_OAM (CIU managed by the AIFM) | XXX         |                          | 21,000,000      | 0.5%  | Long                | N/A                           |
| 5 | Etc.                              |             |                          |                 |   |                     |                               |

96. The example above illustrates that the most important concentration of the AIF is made up of long positions in equity derivatives on NYSE for an aggregated value of € 120,000,000. It also means that the third most important concentration of the AIF is made up of short positions in OTC equity derivatives with XYZ Bank as counterparty for an aggregated value of €72,000,000.

Example 1b:

|   | Asset type code                 | Market type | Market code    | Aggregated value | % of the total value of <b>assets</b> under management of the AIF | Long/short position | Counterparty (where relevant) |
|---|---------------------------------|-------------|----------------|------------------|---|---------------------|-------------------------------|
| 1 | DER_EQD<br>(Equity derivatives) | MIC         | XNYS<br>(NYSE) | 330,000,000      | 4%  | Long                | N/A                           |
| 2 | DER_EQD<br>(Equity derivatives) | MIC         | XNYS<br>(NYSE) | 150,000,000      | 2%  | Short               | N/A                           |

|   |   |     |  |            |       |       |     |
|---|---|-----|--|------------|-------|-------|-----|
| 3 | DER_EQD<br>(Equity derivatives)         | OTC |  | 75,000,000 | 1%    | Short | N/A |
| 4 | CIU_OAM (CIU<br>Managed by the<br>AIFM) | XXX |  | 25,000,000 | 0.33% | Long  | N/A |
| 5 | Etc.                                    |     |  |            |       |       |     |

97. The example above illustrates that the two most important concentrations of the AIF are made up of long positions in equity derivatives on NYSE for an aggregated value of €330,000,000 and of short positions in the same types of asset on NYSE for an aggregated value of €150,000,000. It also means that the third most important concentration of the AIF is made up of short positions in OTC equity derivatives for an aggregated value of €75,000,000 for which the counterparties are not all the same.

#### - Typical deal/position size for "private equity" AIFs

98. To report this information, AIFMs should select only one deal/position size. AIFMs should complete this question only if they have selected as a predominant AIF type "private equity fund". AIFMs should select the deal/position size in which the AIF typically invests (see position size categories of Annex II of the guidelines – Table 4 [see doc. reference 2013/1586 on [ESMA website](#)]):

- Very small < €5m
- Small (€5m to < €25m)
- Lower/mid-market (€25m to < €150m)
- Upper mid-market (€150m to < €500m)
- Large cap (€500m to < €1bn)
- Mega cap (€1bn and greater).

#### - Principal markets in which the AIF trades

99. For this information, AIFMs should take the same approach as for the information at the level of the AIFM (see section XI.II above) but apply it to AIFs.

#### - Investor concentration

100. For AIFs with several unit or share classes, AIFMs should consider the percentage of these units or shares in relation to the NAV of the AIF in order to be able to aggregate the five beneficial owners that have the largest equity interests in the AIF. Investors that are part of the same group should be considered as a single investor.

101. When reporting the investor concentration between retail investors and professional clients, the total should equal 100%.

### **XIII. AIF data reporting under Article 24(2)**

#### **XIII.I. Instruments traded and individual exposures**

102. For this section of the reporting template, AIFMs should report the information in the base currency of the AIF. AIFMs should report values to the highest level of detail available. The table below provides information on the exact meaning of each category of asset.

|                                      |  |
|--------------------------------------|--|
| Cash and cash equivalents            | Include exposures to cash and cash-equivalent asset classes, such as certificates of deposit, banker's acceptances and similar instruments held for investment purposes that do not provide a return greater than a 3-month high credit quality government bond.   |
| Listed equities                      | Include all physical exposure by the AIF to equities listed or traded on a regulated market. Do not include in this category exposures obtained synthetically or through derivatives (instead include these under the 'equity derivatives' category).  |
| Unlisted equities                    | Include all physical exposure to unlisted equities. Unlisted equities are those that are not listed or traded on a regulated market. Do not include in this category exposures obtained synthetically or through derivatives (instead include these under the 'equity derivatives' category).  |
| Corporate bonds                      | Include all physical exposure to all corporate bonds held by the AIF. Do not include in this category exposures obtained synthetically or through derivatives (instead include these under the 'fixed income derivatives' category).   |
| Sovereign bonds                      | Include the exposure to all sovereign bonds held by the AIF. For the purposes of this question, a sovereign bond is a bond issued by a national government (including central governments, government agencies, other governments and central banks) denominated in a local or foreign currency. Also include any supranational bonds in the category of non-G10 sovereign bonds. Include EU supranational bonds in the category "EU bonds" for individual exposures and "EU Member State bonds" for the turnover. |
| Non-EU G10 sovereign bonds           | Include the exposure to all non-EU G10 sovereign bonds.  |
| Municipal bonds                      | Include all the exposure to municipal bonds that are not guaranteed by national governments.   |
| Convertible bonds                    | Include the exposure to all convertible notes or debentures (not yet converted into shares or cash) held by the AIF.   |
| Leveraged Loans                      | <p>Include the notional value of all leveraged loans held by the AIF. In practice, such loans generally form part of the financing structure of an LBO and may be of higher credit risk.</p> <p>Do not include any positions held via LCDS (these should be recorded in the CDS category).</p>   |
| Other loans                          | <p>Include the notional value of all other loans, including bilateral or syndicated loans, factoring or forfeiting finance and invoice discounting.</p> <p>Do not include any positions held via LCDS (these should be recorded in the CDS category).</p>  |
| Structured/securities products - ABS | <p>Include the notional value of any investments held by the AIF in structured products in asset-backed securities including (but not limited to) auto loans, credit card loans, consumer loans, student loans, equipment loans, CDOs (cash flow and synthetic) and whole business securitisations.</p> <p>Do not include any positions held in MBS, RMBS, CMBS and CDS (these should be recorded in the MBS, RMBS, CMBS and CDS categories).</p>  |

Appendix XIII: Guidelines on reporting obligations under AIFMD

|  |   |
|--|---|
| Structured/securities products – MBS/RMBS/CMBS                             | <p>Include the notional value of all investments by the AIF in mortgage-backed securities, residential mortgage-backed securities and commercial mortgage-backed securities.</p> <p>Do not include any position held via CDS (these should be included in the CDS category).</p>  |
| Structured/securities products – ABCP                                      | <p>Include the notional value of all investments by the AIF in asset-backed commercial paper, including (but not limited to) Structured Investment Vehicles, Single-Seller Conduits and Multi-Seller Conduit programs.</p> <p>Do not include any position held via CDS (these should be included in the CDS category).</p>  |
| Structured/securities products – CDO/CLOs                                  | <p>Include the notional value of all investments by the AIF in collateralised debt obligations (cash flow and synthetic) or collateralised loan obligations.</p> <p>Do not include any position held via CDS (these should be included in the CDS category).</p>  |
| Structured/securities products – Other                                     | <p>Include the notional value of all investments by the AIF in other forms of structured investment which are not covered by another category.</p> <p>Do not include any position held via CDS (these should be included in the CDS category).</p>  |
| Equity derivatives   | <p>Include the value of all exposure by the AIF to equities held synthetically or through derivatives. Measure exposure as the total notional value of futures and delta-adjusted notional value of options. Include equity index futures as well as single stock derivatives. Dividend swaps and options should also be included in this category.</p>                                       |
| Fixed income derivatives   | <p>Include the value of all exposure by the AIF to fixed income held synthetically or through derivatives (total notional value for futures) but do not include any positions held via CDS (these should be recorded in the CDS category).</p>  |
| Credit default derivatives – Single name CDS                               | <p>Include the notional value of CDS referencing a single entity. The long value should be the notional value of protection written or sold, and the short value should be the notional value of protection bought.</p> <p>Include any single name LCDS in this calculation. Provide a breakdown between single name credit protection on sovereign, financial sector and other entities.</p> |
| Credit default derivatives – Index CDS                                     | <p>Include the notional value of CDS referencing a standardised basket of credit entities, for example the CDX and iTraxx indices. Include indices referencing leveraged loans (such as the iTraxx LevX Senior Index).</p> <p>The long value should be the notional of protection written or sold, and the short value should be the notional value of protection bought.</p>                 |
| Credit default derivatives – Exotic (including credit default tranche) CDS | <p>Include the notional value of CDS referencing bespoke baskets or tranches of CDOs, CLOs and other structured vehicles. The long value should be the notional value of protection written or sold, and the short value should be the notional value of protection bought.</p>   |

|  |   |
|--|---|
| Commodity derivatives –<br>Crude oil         | Include the value of all exposure by the AIF to crude oil, whether held synthetically or through derivatives (regardless of whether the derivatives are physically or cash settled). Include the total notional value of futures, delta-adjusted notional value of options. Other types of oil or energy product (aside from natural gas) such as ethanol, heating oil, propane and gasoline should be included in the "Other Commodities" category.  |
| Commodity derivatives –<br>Natural gas       | Include the value of all exposure by the AIF to natural gas, whether held synthetically or through derivatives (regardless of whether the derivatives are physically or cash settled). Include the total notional value of futures, delta-adjusted notional value of options. Other types of oil or energy product (aside from natural gas) such as ethanol, heating oil, propane and gasoline should be included in the "Other Commodities" category.  |
| Commodity derivatives –<br>Gold              | Include the value of all exposure by the AIF to gold, whether held synthetically or through derivatives (regardless of whether the derivatives are physically or cash settled). Include the total notional value of futures, delta-adjusted notional value of options.  |
| Commodity derivatives –<br>Power             | Include the value of all exposure by the AIF to power (all regions), whether held synthetically or through derivatives (regardless of whether the derivatives are physically or cash settled). Include the total notional value of futures, delta-adjusted notional value of options.   |
| Commodity derivatives –<br>Other commodities | Include the value of all exposure by the AIF to other commodities (which are not covered by the above categories), whether held synthetically or through derivatives (regardless of whether the derivatives are physically or cash settled). Include the total notional value of futures, delta-adjusted notional value of options.   |
| Foreign exchange                             | Give the total gross notional value of the AIF's outstanding contracts. Only one currency side of every transaction should be counted. Only include foreign exchange for investment purposes (i.e. not that done for currency hedging of different share classes).  |
| Interest rate derivatives                    | Include the total gross notional value of the AIF's outstanding interest rate derivative contracts. Include the total notional value of futures and delta-adjusted notional value of options.   |
| Other derivatives                            | Give the total gross notional value of the AIF's outstanding contracts regarding all exotic derivatives (for example weather or emission derivatives); include volatility, variance and correlation derivatives.  |
| Real estate/tangible assets                  | <p>For real estate include the value of real estate held physically. Do not include real estate exposures held through equity securities of companies, such as listed equity securities (or their related derivatives) or equity holdings of unlisted Real Estate Investment Trusts, unless the real estate company for which the equity security is held was created for the express purpose of holding the real estate investment for the AIF, and the principal assets and purpose of the company is to invest in that real estate and the AIF has the controlling interest in that company (otherwise include the exposure under "listed equities" or "unlisted equities" as deemed appropriate). Real estate refers to land, as well as any physical property or other features of the land that may be considered immovable including houses, buildings, landscaping, fencing etc. Include any mineral rights to any geophysical aspects of the real estate occurring thereon.</p> <p>Report the value for the real estate investment reported in the AIF's most recent financial accounts or, if this is not available, at fair value. AIFMs do not need to obtain a new estimate of the value of physical real estate for the purpose of the reporting.</p> |

|                                   |  |
|-----------------------------------|--|
| Commodities                       | For commodities include the value of commodities held in physical or raw form. Do not include commodity exposures currently held via derivatives even if they are expected to be physically settled in the future. Include commodity exposures that were originally obtained via derivatives, providing settlement has occurred and the commodities are currently held in physical or raw form.  |
| Investments in funds              | For money market funds and investments in AIFs for cash management purposes include all investments by the fund in money market funds and cash management funds. Separate into those managed by the management company and those managed by external unrelated management companies.<br><br>For other AIFs include all investments by the AIF in other AIFs (not including money market or cash management) including (but not limited to) hedge funds, private equity funds and retail funds (i.e. mutual funds and/or UCITS). Separate into those managed by the AIFM and those managed by external unrelated AIFMs. |
| Investment in other asset classes | When reporting information on individual exposures, AIFMs should include non-EU G10 sovereign bonds.   |

- Individual exposures in which it is trading and the main categories of asset in which the AIF invested as of the reporting date

103. AIFMs should report the information only at the sub-asset type level (see sub-asset type category in Annex II of the guidelines – Table 1 [see doc. reference 2013/1586 on [ESMA website](#)]) and should report long and short values and, where relevant, gross value. Values should be calculated according to Articles 2 and 10 of the Regulation.

- Value of turnover in each asset class over the reporting months

104. AIFMs should report the information only at the sub-asset type level (see sub-asset type category in Annex II of the guidelines – Table 2 [see doc. reference 2013/1586 on [ESMA website](#)]). The value of the turnover in the reporting period should be the sum of the absolute values of buys and sells that occur during the reporting period. For example, an AIF that has bought assets for €15,000,000 and sold assets for €10,000,000 over the reporting period would report a turnover of €25,000,000.

105. For derivatives, notional values should be calculated in accordance with Article 10 of the Regulation. For the purpose of this information, packages such as call-spreads, put spreads, straddles, strangles, butterfly, collar and synthetic forward may be treated as a single position (rather than as a long position and a short position).

- Currency exposure

106. For the exposure by currency group, the long and short values should be given at the level of the AIF and denominated in the base currency of the AIF. For exposure in currencies that are not listed in the reporting template, AIFMs should indicate the currency code.

- Dominant influence (see Article 1 of Directive 83/349/EEC)

107. This paragraph should be filled in only if the predominant AIF type selected is "private equity fund". AIFMs should indicate the legal name and, if available, the LEI or the IEI of the companies in which the AIF has a dominant influence (as defined in Article 1 of Directive 83/349/EEC) together with the percentage of voting rights and the type of transaction. If the LEI and the IEI are not available, AIFMs should provide the BIC code (if available).

108. For the type of transaction, AIFMs should choose one type from the following list (see transaction types in Annex II of the guidelines – Table 5 [see doc. reference 2013/1586 on [ESMA website](#)]):

- Acquisition capital;
- Buyouts;
- Consolidations (industry roll-ups)
- Corporate Divestitures;
- Employee Stock Ownership Plans;
- Growth Capital;
- Recapitalisation
- Shareholder Liquidity;
- Turnarounds; and
- Others.

109. When AIFMs report "Others" for the type of transaction, they should explain the nature of the transaction.

## **XII.II. Risk profile of the AIF**

### - Market risk profile

110. Under this section, AIFMs should report the following measures of risk:

- The Net DV01 in three buckets defined by maturity of the security <5yrs, 5-15yrs and >15yrs<sup>99</sup>;
- The CS 01<sup>100</sup> in three buckets defined by maturity of the security <5yrs, 5-15yrs and >15yrs;
- The Net Equity Delta;

111. AIFMs should always use the same methodology. When AIFMs report a "0" value for any measures of risk they should explain the reasons for this value.

### - Counterparty risk profile

- Trading and clearing mechanisms

112. When reporting information on derivative transactions cleared pursuant to the obligations under the European Market Infrastructure Regulation (EMIR), AIFMs should not take into account listed derivatives.

113. When reporting details on repo trades, AIFMs should also include information on reverse repo transactions.

- Value of collateral

114. AIFMs should include all collateral posted to the counterparties, including as collateral assets sold and pledged in connection with repos and collateral posted under an arrangement pursuant to which the secured party has borrowed the securities. Repos and reverse repos with the same counterparty may be netted to the extent that they are secured by the same type of collateral. AIFMs should use the mark-to-market value of the collateral. Information should be given as of the last business day of the reporting period.

- Re-hypothecation rate

115. The percentage expressed should be the ratio between the total mark-to-market value of all collateral re-hypothecated by the counterparty and the mark-to-market value of all the collateral posted by the AIF over the reporting period. When the contract between the AIFM and the counterparty does not allow the counterparty to re-hypothecate collateral for a given AIF, AIFMs should indicate "No".

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<sup>99</sup> As per ISDA definition.

<sup>100</sup> As per ISDA definition.

- Top five counterparties

116. AIFMs should report any type of exposure to a counterparty net of any collateral posted to reduce the counterparty risk. Counterparty risk should be understood as market risk and therefore includes interalia counterparties issuing bonds or shares or underlyings to financial derivative instruments as well as counterparties to financial derivative instruments. AIFMs should report the name, the BIC and the LEI or the IEI of the counterparty as well as the exposure expressed as a percentage of NAV. When counterparties are part of the same group they should be aggregated at the group level and not treated as separate entities.

- Direct clearing through central clearing counterparties

117. This question should be understood as covering AIFMs that have an account with clearing members. AIFMs should report the name, the LEI or the IEI and the BIC of the 3 CCPs for which the AIF has the greatest net credit exposures.

#### - Liquidity profile

- Portfolio liquidity profile

118. AIFMs should report the percentage of the fund's portfolio that is capable of being liquidated within each of the liquidity periods specified. Each investment should be assigned to one period only and such assignment should be based on the shortest period during which such a position could reasonably be liquidated at or near its carrying value. The total should equal 100%.

119. If individual positions are important contingent parts of the same trade, AIFMs should group all of these positions under the liquidity period of the least liquid part. For example, in a convertible bond arbitrage trade, the liquidity of the short position should be the same as the convertible bond.

- Investor liquidity profile

120. AIFMs should divide the NAV of the AIF among the periods indicated depending on the shortest period within which the invested funds could be withdrawn or investors could receive redemption payments, as applicable. AIFMs should assume that they would impose gates where they have the power to do so but that they would not suspend withdrawals/redemptions and that there are no redemption fees. The total should equal 100%.

- Investor redemptions

121. AIFMs should choose between the following values for the investor redemption frequency (see the investor redemption frequencies in Annex II of the guidelines – Table 6 [see doc. reference 2013/1586 on [ESMA website](#)]):

- Daily
- Weekly
- Fortnightly
- Monthly
- Quarterly
- Half-yearly
- Yearly
- Other
- None

122. AIFMs would indicate NONE if, for instance, the AIF does not offer investors the opportunity to redeem. According to the Regulation, if an AIF is comprised of several share classes with different redemption frequencies, only information on the largest share class should be reported.

- Breakdown of ownership

123. To report this information, AIFMs should use the typology of investors below (see investor categories in Annex II of the guidelines – Table 7 [see doc. reference 2013/1586 on [ESMA website](#)]). The information should be expressed as a percentage of the NAV of the AIF.

- Non-financial corporations;
- Banks;
- Insurance corporations;
- Other financial institutions;
- Pension plans / funds;
- General government;
- Other collective investment undertakings (e.g. fund of funds or master);
- Households
- Unknown; and
- None.

- Borrowing and exposure risk

- Value of borrowings

124. Collateralised borrowings should be classified according to the legal agreement governing the borrowing.

125. Borrowings embedded in financial instruments should represent the total gross notional exposure in relation to such instruments, less all margins. According to the reporting template, derivatives traded on exchanges and OTC should be separated.

126. The values should be reported in the base currency of the AIF.

- Leverage of the AIF

127. For the calculation of the leverage under the Gross and the Commitment methods, AIFMs should report values expressed as a percentage of the NAV.

- Operational and other risk aspects

128. For the total number of open positions, AIFMs should calculate at the position level (and not the issuer level) as this question has an operational focus. The calculation should be done as of the last business day of the reporting period.

129. For gross investment returns, AIFMs should report the gross return for each month of the reporting period. The same approach should be taken for net investment returns. For AIFs with multiple share classes, the gross and net returns should be provided at the level of the AIF and not for each share class.

130. For the change in NAV, AIFMs should report the change in NAV for each month of the reporting period. This calculation should be net of fees and include the impact of subscriptions and redemptions.

131. For AIFs with private equity as a predominant AIF type, the number of subscriptions should be based on the actual amount paid by investors for each month of the reporting period and not the promised capital.

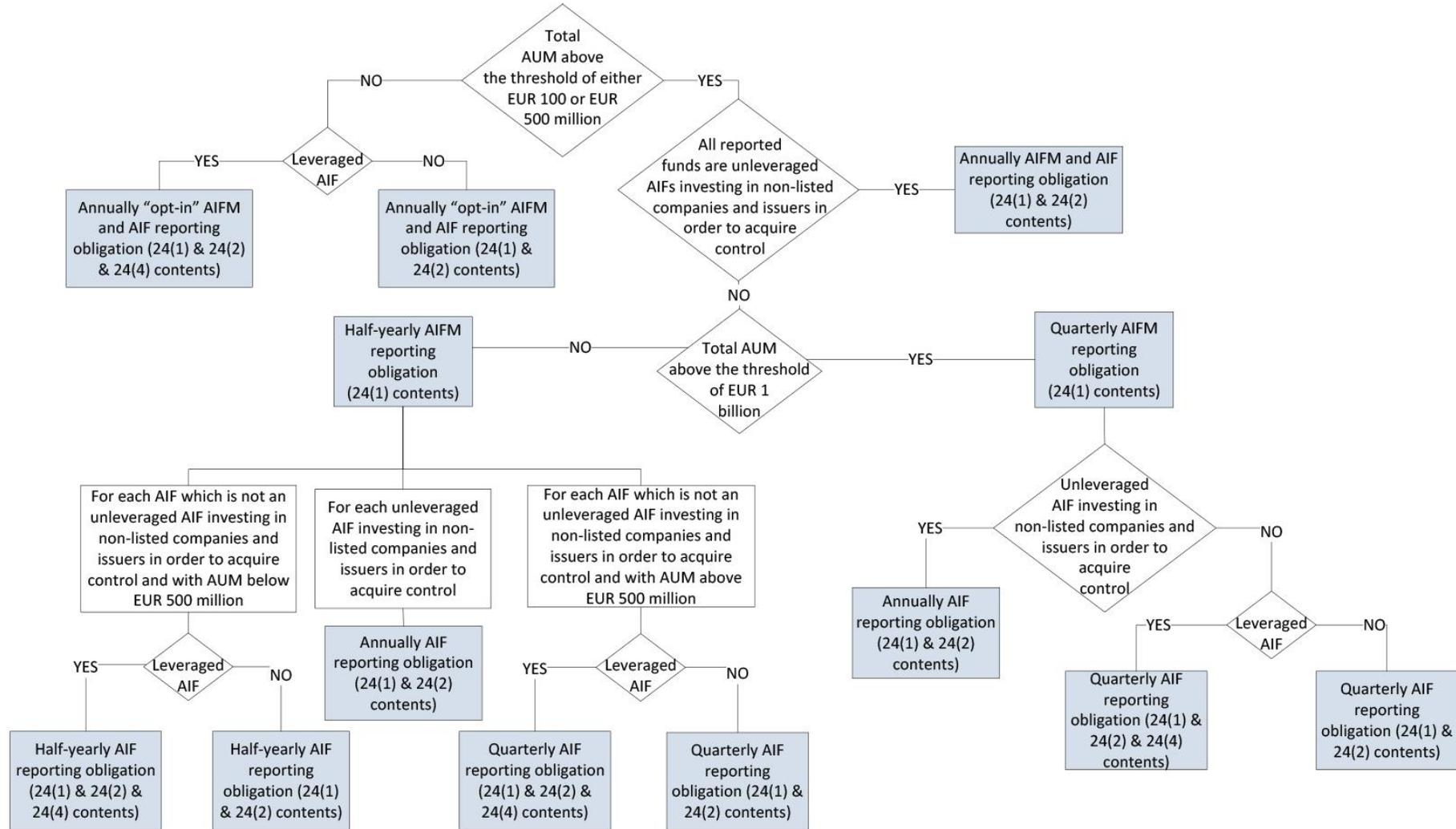
**XIV. Information under Article 24(4)**

132. For the five largest sources of borrowed cash or securities (short positions), AIFMs should report the name, the LEI or IEI and, if neither is available, the BIC of the entity as well as the corresponding amount in the base currency of the AIF.

**Annex I of the guidelines: Reporting obligation diagrams**

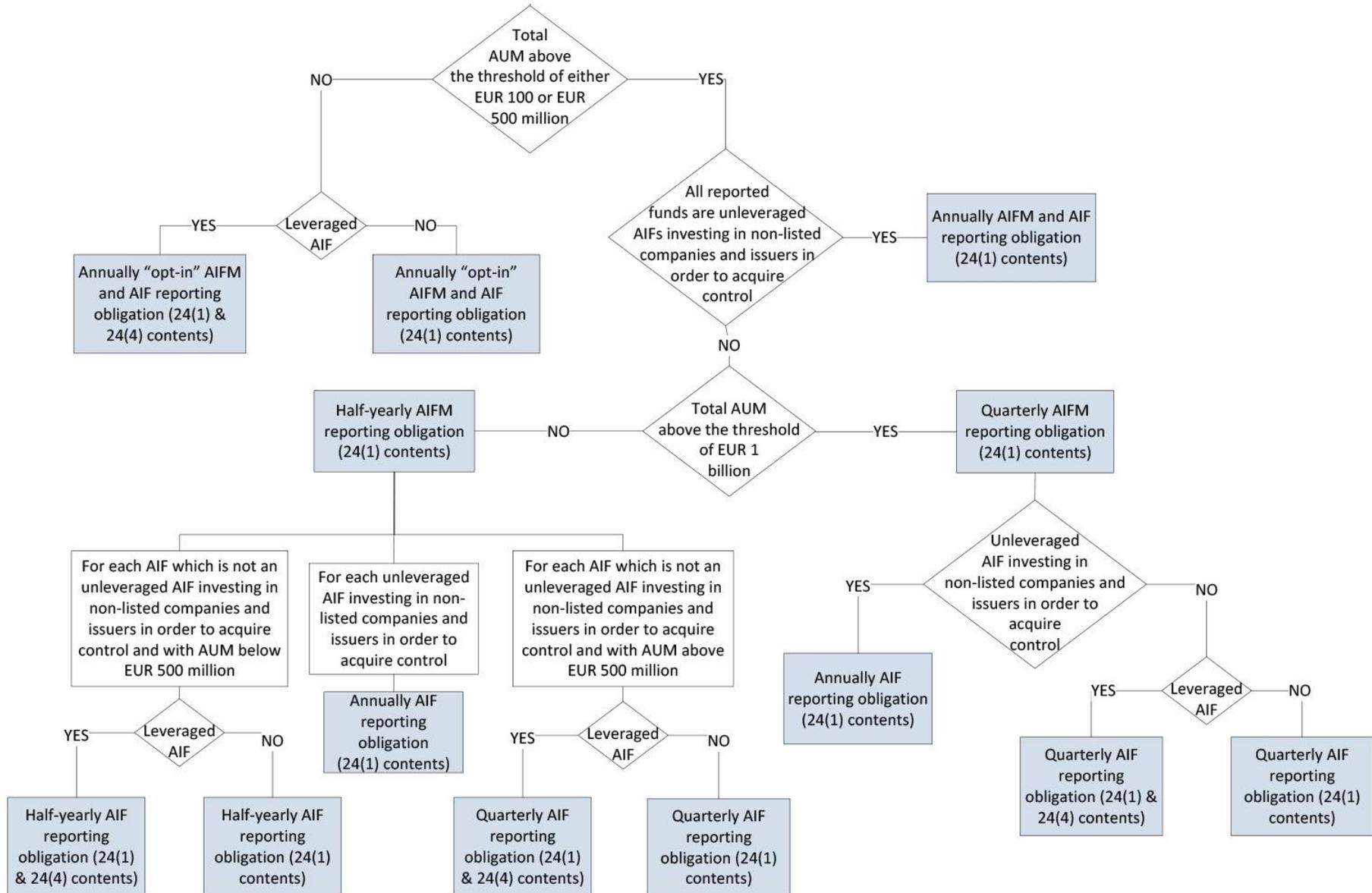
**1. Authorised AIFMs**

**A) Reporting obligations for each EU AIF managed or each AIF marketed in the Union \***



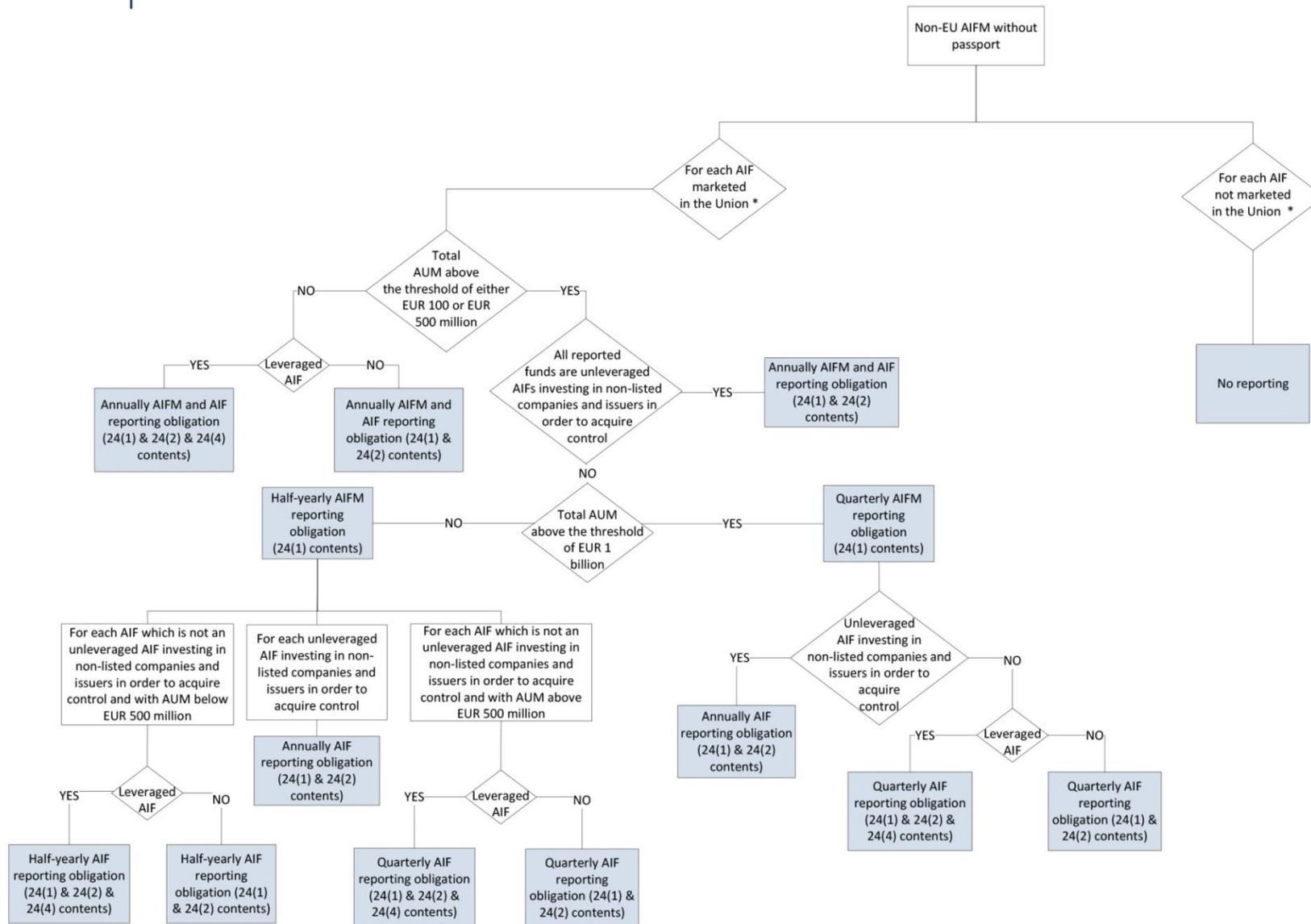
\* The reporting obligation diagram for authorised AIFMs should be read together with ESMA's opinion on collection of information under AIFMD ([ESMA/2013/1340](https://www.esma.europa.eu/press-material/press-conferences-and-events/press-conference-2013-1340)) and, in particular, ESMA's view on the provision of information on non-EU master AIFs not marketed in the Union.

**B) Reporting obligations for each non-EU AIF not marketed in the Union \***



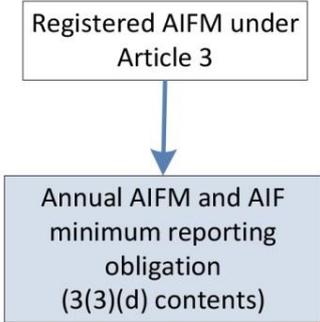
\* The reporting obligation diagram for authorised AIFMs should be read together with ESMA's opinion on collection of information under AIFMD ([ESMA/2013/1340](#)) and, in particular, ESMA's view on the provision of information on non-EU master AIFs not marketed in the Union.

2. Non-EU AIFMs under Private Placement Regime



\* The reporting obligation diagram for non-EU AIFMs marketing AIFs in the Union should be read together with ESMA's opinion on collection of information under the AIFMD ([ESMA/2013/1340](https://www.esma.europa.eu/press-news/esma-news/esma20131340)) and in particular ESMA's view on the provision of information on non-EU master AIFs not marketed in the Union.

**3. Registered AIFMs**



## Appendix XIV: Q&A published by ESMA

(ESMA Q&A on the application of the AIFMD 14 June 2023 – [ESMA34-32-352](#), including additional questions issued from 1 January 2024 in the [ESMA Q&A IT-tool](#))

### Section I: Remuneration

Date last updated: 27 June 2014

[Art. 13 AIFMD](#) | [Annex II AIFMD](#) | [Appendix VII \(Guidelines on sound remuneration policies under the AIFMD\)](#)

**Question 1 [last update 17 February 2014]:** To which accounting period should AIFMs performing activities under the AIFMD before 22 July 2013 and submitting an application for authorisation under the AIFMD between 22 July 2013 and 22 July 2014 apply the AIFMD remuneration rules for the first time?

**Answer 1:** Paragraph 4 of the Guidelines on sound remuneration policies under the AIFMD ([ESMA/2013/232](#)) (the Remuneration Guidelines) states that "*These Guidelines apply from 22 July 2013, subject to the transitional provisions of the AIFMD*". The [Commission Q&A](#) on the AIFMD provided specific guidance on the interpretation of the transitional provisions under Article 61(1) of the AIFMD<sup>101</sup>.

According to Article 61(1) of the AIFMD, AIFMs performing activities under the AIFMD before 22 July 2013 have one year from that date to submit an application for authorisation. Once a firm becomes authorised under the AIFMD, it becomes subject to the AIFMD remuneration rules and the Remuneration Guidelines. Therefore, the relevant rules should start applying as of the date of authorisation.

However, as for the rules on variable remuneration (i.e. the ones for which guidance is provided under Sections XI. ([Guidelines on the general requirements on risk alignment](#)) and XII. ([Guidelines on the specific requirements on risk alignment](#)) of the Remuneration Guidelines), AIFMs should apply them for the calculation of payments relating to new awards of variable remuneration to their identified staff (as defined in the Remuneration Guidelines) for performance periods following that in which they become authorised. So the AIFMD regime on variable remuneration should apply only to full performance periods and should first apply to the first full performance period after the AIFM becomes authorised. For example:

1. An existing AIFM whose accounting period ends on 31 December and which obtained an authorisation between 22 July 2013 and 31 December 2013: the AIFMD rules on variable remuneration should apply to the calculation of payments relating to the 2014 accounting period.
2. An existing AIFM whose accounting period ends on 31 December obtains an authorisation between 1 January 2014 and 22 July 2014: the AIFMD rules on variable remuneration should apply to the calculation of payments relating to the 2015 accounting period.

However, for an existing AIFM whose accounting period ends on 31 December which submits an application for authorisation by 22 July 2014 and obtains an authorisation after that date (including when the authorisation is obtained after 31 December 2014), the AIFMD rules on variable remuneration should apply to the calculation of payments relating to the 2015 accounting period.

**Question 2 [last update 17 February 2014]:** To which accounting period should AIFMs not performing activities under the AIFMD before 22 July 2013 and obtaining an authorisation under the AIFMD after 22 July 2013 apply the remuneration rules for the first time?

**Answer 2:** Once a firm becomes authorised under the AIFMD, it becomes subject to the AIFMD remuneration rules and the Remuneration Guidelines and the relevant rules should start to apply as of the date of authorisation.

However, as for the rules on variable remuneration (i.e. the ones for which guidance is provided under Sections XI. ([Guidelines on the general requirements on risk alignment](#)) and XII. ([Guidelines on the specific requirements](#)

<sup>101</sup>Q&A published by EU Commission (Appendix X), ID1180.

on risk alignment) of the Remuneration Guidelines), AIFMs should apply them for the calculation of payments relating to new awards of variable remuneration to their identified staff (as defined in the [Remuneration Guidelines](#)) for performance periods following that in which they submit an application for authorisation. An AIFM submitting an application for authorisation in the year N (after 22 July 2013), should apply the AIFMD remuneration regime on variable remuneration only to the calculation of payments relating to the accounting period for year N+1.

**Question 3 [last update 17 February 2014]:** Which staff of the delegate should be covered by the "appropriate contractual arrangements" that ensure there is no circumvention of the remuneration rules as set out in [paragraph 18\(b\) of the Remuneration Guidelines](#)?

**Answer 3:** Such contractual arrangements must only be in place in respect of the delegate's identified staff who have a material impact on the risk profiles of the AIFs it manages as a result of the delegation, and only in respect of the remuneration for such delegated activities.

**Question 4 [last update 17 February 2014]:** In a delegation arrangement where the delegate is subject to the CRD rules, can the delegate be considered to be subject to regulatory requirements on remuneration that are equally as effective as those applicable [under the Remuneration Guidelines](#)?

**Answer 4 :** Provided that the staff of these entities who are identified staff for the purpose of the Remuneration Guidelines are subject to the CRD rules, these entities are subject to regulatory requirements on remuneration that are equally as effective as those applicable under the Guidelines.

**Question 5 [last update 27 June 2014]:** Can AIFMs choose to exclude portfolio managers from the scope of identified staff for the purpose of the Remuneration Guidelines purely because they are bound by investment limits set out by law and/or internal risk limits set out in the investment restrictions of the AIF?

**Answer 5:** No.

[Paragraph 20 of the Remuneration Guidelines](#) provides for a presumption that certain categories of staff should be included as the *identified staff*. 'Other risk takers' are mentioned among these categories of staff. This category includes '*staff members, whose professional activities – either individually or collectively, as members of a group (e.g. a unit or part of a department) – can exert material influence on the AIFM's risk profile or on an AIF it manages*'. When assessing whether a portfolio manager can exert material influence, a number of questions are relevant:

- 1) is the percentage size of the AIF portfolio being managed small?
- 2) is the portfolio manager required to meet (and outperform) a performance benchmark?
- 3) is the percentage deviation from that benchmark which is tolerated by the AIFM small?
- 4) does the AIFM monitor the performance of the portfolio manager daily?

Where the answer to any of the above questions is 'no', a portfolio manager is likely to fall within the scope of *identified staff*. Where the answer to all of the questions above is 'yes', a portfolio manager is more likely to fall outside the scope of identified staff. Given that the criteria are qualitative, it may still be the case that for some combinations of 1) and 3) above, a portfolio manager may still exert material influence on an AIFM's risk profile or on an AIF it manages, in which case the Remuneration Guidelines should apply.

**Question 6 [last update 5 October 2017]:** Do the remuneration-related disclosure requirements under [Article 22\(2\)\(e\) of the AIFMD](#) also apply to the staff of the delegate of an AIFM to whom portfolio management or risk management activities have been delegated?

**Answer 6:** Yes. In line with the approach followed under the [AIFMD Remuneration Guidelines](#)<sup>102</sup>, AIFMs can ensure compliance in one of the following two ways:

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<sup>102</sup> See [paragraph 18 of the AIFMD Remuneration Guidelines](#).

i) where the delegate is subject to regulatory requirements on remuneration disclosure for its staff to whom portfolio management or risk management activities have been delegated that are equally as effective as those under [Article 22\(2\)\(e\) of the AIFMD](#), the AIFM should use the information disclosed by the delegate for the purposes of fulfilling its obligations under [Article 22\(e\) of the AIFMD](#) and [Article 107 of the AIFMD Level 2 Regulation](#); or

ii) in other cases, appropriate contractual arrangements should be put in place with the delegate allowing the AIFM to receive (and disclose in the annual report for the relevant AIF(s) that it manages) at least information on the total amount of remuneration for the financial year, split into fixed and variable remuneration, paid by the AIF and/or the AIFM to the identified staff of the delegate – and number of beneficiaries, and, where relevant, carried interest – which is linked to the delegated portfolio. This means that the disclosure should be done on a prorated basis for the part of the AIF's assets which are managed by the identified staff within the delegate.

In both situations set out above, the disclosure may be provided on an aggregate basis i.e. by means of a total amount for all the delegates of the AIFM in relation to the relevant AIF.

**Question 7 [last update 5 October 2017]:** Can the information mentioned under [Article 22\(2\)\(e\)](#) and [\(f\)](#) of the AIFMD be disclosed in the annual report by the way of a link to a document where the relevant information is available?

**Answer 7:** No. The information prescribed by [Article 22\(2\)\(e\)](#) and [\(f\)](#) of the AIFMD should be included in the annual report. This is without prejudice to references in the annual report to other documents where additional information may be found.

## Section II: Notifications of AIFs

Date last updated: 13 June 2023

[↶ Annex IV AIFMD](#) | [↶ Art. 32 AIFMD](#) | [↶ Annex III AIFMD](#) | [↶ Art. 31 AIFMD](#)

**Question 1 [last update 17 February 2014]:** What additional information should be provided under letter (f) of Annex IV of the AIFMD?

**Answer 1:** Letter (f) of Annex IV of the AIFMD should be understood as requesting all information set out in Article 23(1) of the AIFMD that is not already contained in Annex IV of the AIFMD.

**Question 2 [last update 17 February 2014]:** Should AIFMs that wish to market new investment compartments of AIFs in a Member State where these AIFs have been already notified undertake a new notification procedure via their competent authority?

**Answer 2:** Yes.

**Question 3 [last update 1 April 2016]:** If an EU AIF decides to offer additional fund units to investors, and the offer is limited to the investors already invested in the AIF, does the AIFM have to submit a new notification to the national competent authority in accordance with Article 31(2) of AIFMD?

**Answer 3:** No.

**Question 4 [last update 3 June 2016]:** For the purposes of [Article 31 of AIFMD](#) (marketing of units or shares of EU AIFs in the home Member State of the AIFM), does it make a difference whether the EU AIF to be marketed is domiciled in the home Member State of the EU AIFM or in another Member State?

**Answer 4:** No. Article 31 does not differentiate between the marketing of EU AIFs domiciled in the home Member State of the AIFM and EU AIFs domiciled in another Member State.

**Question 5 [last update 3 June 2016]:** Can an authorised EU AIFM, in its home Member State, market an EU feeder AIF with a non-EU master AIF pursuant to [Article 31 of AIFMD](#)?

**Answer 5:** No. Article 31(1), second subparagraph, allows an EU AIFM to market an EU feeder AIF in the home Member State of the AIFM as long as it has an EU master AIF which is managed by an authorised EU AIFM. Marketing of an EU feeder AIF with a non-EU master AIF is subject to Article 36(1) of AIFMD.

**Question 6 [last update 16 November 2016]:** An AIF is marketed in a host Member State by way of the AIFMD marketing passport (Article 32 of AIFMD). A new share class of the AIF is set up, which will be marketed in the host Member State. Should this be regarded as a material change, which would require a new notification pursuant to Article 32?

**Answer 6:** No. The creation of a share class, which is to be marketed cross-border within an already notified (sub-)fund, does not constitute a material change of the notification.

**Question 7 [last update 16 November 2016]:** An AIFM wishes to notify a material change to a notification made to the competent authorities in its home Member State to manage or market an AIF on a cross-border basis (Articles 32(7) or 33(6) of AIFMD). Does the AIFM have to include the full set of documentation required by Articles 32 or 33 in the notification letter?

**Answer 7:** Yes. Material changes to existing notifications require the AIFM to hand in a full set of documentation with the revised notification letter. AIFMs are asked to highlight any amendment to the original notification letter and accompanying documentation.

**Question 8 [last update: 6 April 2017]:** In addition to the AIFMD categories of "professional investor" and "retail investor", a number of Member States have introduced further categories for retail investors (such as "qualifying investor", "informed investor", or "semi-professional investor"), which, by their definition, share some, but not all elements of the definition of "professional investor" pursuant to Article 4(1)(ag) of AIFMD. Does the AIF marketing passport (Article 32 of AIFMD) extend to those investors?

**Answer 8:** No. The AIF marketing passport may only be used for marketing to professional investors as defined in Article 4(1)(ag) of AIFMD. Any other cross-border marketing activity to non-professional investors as defined in Member States has to be notified and carried out according to national legislation in the host Member State of the AIF and cannot be carried out by way of the AIF marketing passport.

**Question 9 [last update: 13 June 2023] [QA 1069]:** Where an investment strategy is developed by a third party (the fund initiator), are the obligations set out in Article 30a of the AIFMD applicable to this third party?

**Answer 9: Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>103</sup>**

Yes. Pursuant to Article 30a(3) AIFMD, pre-marketing can be conducted by the EU AIFM or by a third party on behalf of an authorised EU AIFM only if that third party is authorised as an investment firm in accordance with Directive 2014/65/EU, as a credit institution in accordance with Directive 2013/36/EU, as a UCITS management company in accordance with Directive 2009/65/EC, as an AIFM in accordance with AIFMD, or acts as a tied agent in accordance with Directive 2014/65/EU. Moreover, such third party is subject to the conditions for pre-marketing set out in Article 30a AIFMD.

**Question 10 [last update: 13 June 2023] [QA 1070]:** Are registered AIFMs referred to in Article 3(2) of the AIFMD, which do not qualify as EuSEF manager or EuVECA manager, subject to the obligation to notify pre-marketing pursuant to Article 30a(1) of the AIFMD?

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<sup>103</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

**Answer 10: Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>104</sup>**

No, unless it is required otherwise under national rules. Article 30a AIFMD applies to the authorised EU AIFMs. Sub-threshold EU AIFMs covered by Article 3(2) AIFMD, which have not opted in under Article 3(4) AIFMD, are referred to as registered AIFMs in AIFMD, which do not have the EU-wide AIFM passport to exert asset management activities across the borders. Except for Article 3(3) and (4) and Article 46 AIFMD activities of sub-threshold EU AIFMs are governed by the national rules, including those on pre-marketing.

**Question 11 [last update: 13 June 2023] [QA 1071]:** In case there are no investors in a host Member State, do AIFMs wishing to de-notify the arrangements previously made for marketing the units or shares of the EU AIFs they manage have to comply with the obligations set out in [Article 32a\(1\)](#) of the AIFMD?

**Answer 11: Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>105</sup>**

Yes. [Article 32a\(1\), point \(a\)](#), AIFMD lays down an explicit exemption referring to closed-ended European long-term investment funds governed by Regulation (EU) 2015/760. In all other cases not covered by that exemption, all the conditions laid down in Article 32a(1) AIFMD are to be complied with, making sure that there are no investors uninformed about the AIFM's market exit, that all marketing is publicly terminated and any marketing arrangements with the third parties are terminated or modified to prevent any further marketing of the de-notified AIF. Finally, Article 32a(1), second subparagraph, AIFMD remains applicable. That provision requires the AIFM to cease any new or further marketing of units or shares of the AIF it manages in the Member State in respect of which it has submitted a de-notification.

**Section III: Reporting to national competent authorities under Articles 3, 24 and 42**

Date last updated: 28 May 2021

[↻ Art. 3 AIFMD](#) | [↻ Art. 24 AIFMD](#) | [↻ Art. 42 AIFMD](#) | [↻ Appendix XIII \(ESMA Guidelines on reporting obligations\)](#) | [↻ Appendix XV \(FAQ AIFM published by CSSF Section 14 Reporting Questions 14a\) to Question 14.r\)](#)

**Question 1 [last update 16 December 2016]:** When a non-EU AIFM reports information to the national competent authorities of a Member State under [Article 42 of the AIFMD](#), which AIFs have to be included in the reports?

**Answer 1:** When a non-EU AIFM reports information to the national competent authorities of a Member State under Article 42, only the AIFs marketed in that Member State have to be taken into account for the purpose of the reporting. When Member States apply [ESMA's opinion on collection of additional information under Article 24\(5\) of the AIFMD](#), AIFMs should also report information on non-EU master AIFs not marketed in the EU that have either EU feeder AIFs or non-EU feeder AIFs marketed in the Union under Article 42. Non-EU AIFMs should apply the same principle if the master AIF is established in the Union and not marketed in the Union (i.e. they should report information on the EU master AIF not marketed in the Union).

**Question 2 [last update 25 March 2014]:** Should repurchase transactions (at the level of the portfolio of the AIF) by or on behalf of a reporting AIF be considered as financing operations for the purpose of the AIFMD reporting obligations (questions 54 – 56 and 210- 217 of the [consolidated reporting template](#))?

<sup>104</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

<sup>105</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

**Answer 2:** Yes. Therefore, AIFMs should take into account the counterparties of those transactions when reporting the information related to funding sources in questions 54 – 56 and take into account the aggregate amount of these transactions in questions 210-217.

**Question 3 [last update 25 March 2014]:** Which period should AIFMs use when reporting information on 'Instruments traded and individual exposures' (questions 121 to 124 of the [consolidated reporting template](#)): the residual maturity of the instrument or the maturity at issuance?

**Answer 3:** AIFMs should use the residual maturity as of the reporting date.

**Question 4 [last update 25 March 2014]:** What should be the basis of the numerator for calculating the geographical exposure as a percentage of the NAV of the AIF (question 78 to 85 of the [consolidated reporting template](#))?

**Answer 4:** The numerator used for calculating the geographical exposure as a percentage of the net asset value of the AIF should be the NAV of the AIF for each geographical area. Therefore, this may result in negative values for certain regions but the total should equal 100%.

**Question 5 [last update 25 March 2014]:** What should be the basis of the numerator and the denominator for calculating the geographical exposure as a percentage of the aggregated value of the AIF (questions 86 to 93 of the [consolidated reporting template](#))?

**Answer 5:** The numerator used for calculating the geographical exposure as a percentage of the aggregated value of the AIF should be the total value of assets under management of the AIF for each geographical area. The basis for the denominator should be the total value of assets under management of the AIF. The total should equal 100%.

**Question 6 [last update 25 March 2014]:** What should be the basis of the numerator for calculating the breakdown of investment strategies as a percentage of the NAV of the AIF (question 60 of the [consolidated reporting template](#))?

**Answer 6:** The numerator used for calculating the breakdown of investment strategies as a percentage of the NAV of the AIF should be the net asset value of the AIF for each investment strategy. Therefore, this may result in negative values for certain investment strategies but the total should equal 100%.

**Question 7 [last update 25 March 2014]:** ESMA's guidelines recommend that AIFMs submit the last report of the AIF immediately after it has been liquidated or put into liquidation. When should AIFMs submit this last report?

**Answer 7:** AIFMs should submit the last AIF report not later than one month after the end of the quarter in which the AIF has been liquidated or put into liquidation.

**Question 8 [last update 25 March 2014]:** How should AIFMs calculate the percentage of market value for securities traded on regulated markets and OTC markets (questions 148 and 149 of the [consolidated reporting template](#))?

**Answer 8:** AIFMs should aggregate the market value of all securities traded and report the percentage of the market value of securities traded on a regulated exchange and OTC. Regulated exchanges include regulated markets, multilateral trading facilities and organised trading facilities. For the European Union, regulated markets<sup>106</sup> and multilateral trading facilities<sup>107</sup> are published on ESMA's website. Securities that are not traded on regulated exchanges should be considered as traded OTC. This means that the total should equal 100%.

**Question 9 [last update 25 March 2014]:** How should AIFMs calculate the percentage of trade volumes for derivatives traded on regulated markets and OTC markets (questions 150 and 151 of the [consolidated reporting template](#))?

**Answer 9:** AIFMs should take into account the total number of trades and report the percentage of number of trades on a regulated exchange and OTC. Regulated exchanges include regulated markets, multilateral trading

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<sup>106</sup> [http://mifiddatabase.esma.europa.eu/Index.aspx?sectionlinks\\_id=23&language=0&pageName=REGULATED\\_MARKETS\\_Display](http://mifiddatabase.esma.europa.eu/Index.aspx?sectionlinks_id=23&language=0&pageName=REGULATED_MARKETS_Display)

<sup>107</sup> [http://mifiddatabase.esma.europa.eu/Index.aspx?sectionlinks\\_id=22&language=0&pageName=MTF\\_Display](http://mifiddatabase.esma.europa.eu/Index.aspx?sectionlinks_id=22&language=0&pageName=MTF_Display)

facilities and organised trading facilities. For the European Union, regulated markets<sup>108</sup> and multilateral trading facilities<sup>109</sup> are published on ESMA's website. Securities that are not traded on regulated exchanges should be considered as traded OTC. This means that the total should equal 100%.

**Question 10 [last update 25 March 2014]:** How should AIFMs report the information on the liquidity portfolio when the AIF is invested in assets with no current liquidity for which it is not possible to determine the future liquidity (questions 178 -184 of the [consolidated reporting template](#))?

**Answer 10:** In that case, AIFMs should adopt a conservative approach and assign the instrument to the longest period bucket.

**Question 11 [last update 25 March 2014]:** How should AIFMs report the information on investor liquidity?

**Answer 11:** AIFMs should divide the AIF's NAV among the period buckets depending on the shortest period within which investors are entitled, under the fund documents, to withdraw invested funds or receive redemption payments, as applicable.

For example, an AIF has a NAV of € 1,000,000 with two investors. According to the fund documents, investor A whose share of the NAV is €600,000 is entitled to withdraw 50% of its investment on a daily basis and 50% of its investments between 2 and 7 days. Investor B, whose share of the NAV is €400,000, is entitled to withdraw 60% of its investments between 31 and 90 days and 40% of its investment within 91 and 180 days. The investor profile of the AIF will be the following

| 1 day or less | 2-7 days | 8-30 days | 31-90 days | 91-180 days | 181-365 days | More than 365 days |
|---------------|----------|-----------|------------|-------------|--------------|--------------------|
| 30%           | 30%      | 0         | 24%        | 16%         | 0            | 0                  |

**Question 12 [last update 25 March 2014]:** According to question 22 of the consolidated reporting template, AIFMs must indicate the inception date of the AIF. What does inception date mean?

**Answer 12:** If an AIF is subject to pre-authorisation, the inception date should be the date of authorisation. If an AIF is established without pre-authorisation by the competent authority, the inception date should be the date when the AIF was established. Finally, if the AIF is subject to registration obligation at national level with its competent authority after the date of establishment, the inception date should be the date when the AIF was constituted.

**Question 13 [last update 25 March 2014]:** Should AIFMs report the information in English or in the language of the jurisdiction to which they report?

**Answer 13:** Apart from the sections on assumptions and stress tests, where text is allowed, the rest of the information to be reported will consist of figures, predetermined values or names of counterparties. For assumptions and stress tests, ESMA recommends that the national competent authority allow AIFMs to report the information in English, which would allow multinational groups to centralise and harmonise their AIFMD reporting. However, this will depend on the national legislation transposing the AIFMD.

**Question 14 [last update 25 March 2014]:** There are predetermined codes for the XML filing. Should these codes be translated into national languages?

**Answer 14:** No. These codes are predetermined values that cannot be changed for the XML filing.

**Question 15 [last update 25 March 2014]:** Is cash resulting from repurchase agreements included in the amount of cash and cash equivalents to be reported by AIFMs under [questions 121 -124](#)?

<sup>108</sup> [http://mifidatabase.esma.europa.eu/Index.aspx?sectionlinks\\_id=23&language=0&pageName=REGULATED\\_MARKETS\\_Display](http://mifidatabase.esma.europa.eu/Index.aspx?sectionlinks_id=23&language=0&pageName=REGULATED_MARKETS_Display)

<sup>109</sup> [http://mifidatabase.esma.europa.eu/Index.aspx?sectionlinks\\_id=22&language=0&pageName=MTF\\_Display](http://mifidatabase.esma.europa.eu/Index.aspx?sectionlinks_id=22&language=0&pageName=MTF_Display)

**Answer 15:** Yes. When reporting information on cash and cash equivalents, AIFMs should include all amounts of cash held, including as a result of repurchase arrangements.

**Question 16 [last update 25 March 2014]:** According to questions 163 and 164 of the [consolidated reporting template](#), AIFMs should report the BIC and LEI of the five biggest counterparties to which an AIF has exposure. How should AIFMs identify those counterparties if they do not have such codes?

**Answer 16:** In that case, AIFMs should only report the full name of the counterparty.

**Question 17 [last update 25 March 2014]:** What information should AIFMs report for question 137 of the [consolidated reporting template](#) when they do not have an expected annual return/IRR in normal market conditions?

**Answer 17:** In that case, AIFMs should report the value 'N/A' for non-applicable.

**Question 18 [last update 25 March 2014]:** Must all AIFMs answer questions 296 to 301 of the consolidated reporting template?

**Answer 18:** No. Only AIFMs managing AIFs employing leverage on a substantive basis must answer questions 296 to 301 of the consolidated reporting template.

**Question 19 [last update 27 June 2014]:** Pursuant to questions 19 of the consolidated reporting template for AIF-specific information and 20 of the [consolidated reporting template](#) for AIFM-specific information, AIFMs must specify whether the AIFs and the AIFMs are EEA AIFs and EEA AIFMs. Which countries are covered by the reference to "EEA"?

**Answer 19:** EEA AIFs and EEA AIFMs should be understood as AIFs and AIFMs established in one of the 28 EU Member States or Iceland, Norway and Liechtenstein.

**Question 20 [last update 27 June 2014]:** According to [Article 24\(2\) of the AIFMD](#), AIFMs must report specific information for all EU AIFs they manage or AIFs they market in the Union. Which countries are covered by the reference to "the Union"?

**Answer 20:** The reference to the Union should be understood as including the 28 EU Member States and, once the AIFMD has been incorporated into the EEA agreement, Norway, Iceland and Liechtenstein.

**Question 21 [last update 27 June 2014]:** The technical guidance indicates for each information item whether the information is mandatory (M), optional (O) or conditional (C). What do these categories mean?

**Answer 21:** Information marked as mandatory should be reported by all AIFMs. Information marked as optional has to be reported if the AIFM has information to report. For example, question 10 of the reporting template (change in AIF reporting obligation frequency code) is marked as optional. This means that AIFMs should report this information if the reporting code has changed compared to the previous reporting. Information marked as conditional is linked to other information (flags) in the reporting template. If those flags are answered with "Yes", the corresponding conditional information has to be reported. However, if those flags are answered with "No", the corresponding conditional information should not be reported. For example, if the question 41 (master feeder flag) is answered with "Yes", AIFMs should indicate in field 42 the name of the master AIFs.

**Question 22 [last update 21 July 2014]:** How should AIFMs calculate the percentage of trade volumes for derivatives cleared by a CCP and bilaterally (questions 152 and 153 of the [consolidated reporting template](#))?

**Answer 22:** AIFMs should take into account the total number of trades and report the percentage of number of trades cleared by a CCP and bilaterally. The total should equal 100%.

**Question 23 [last update 21 July 2014]:** How should AIFMs calculate the percentage of market value for repo trades cleared by a CCP, bilaterally or on a tri-party basis (questions 154 and 156 of the [consolidated reporting template](#))?

**Answer 23:** AIFMs should aggregate the market value of all repo trades and report the percentage of the market value of repo trades cleared by a CCP, bilaterally or on a tri-party basis. The total should equal 100%.

**Question 24 [last update 21 July 2014]:** How should AIFMs classify FX spot trades when answering questions such as on individual exposures (questions 121 to 124 of the [consolidated reporting template](#) for AIF-specific information) or value of turnover in each asset class over the reporting period (questions 125 to 127 of the consolidated reporting template for AIF-specific information)?

**Answer 24:** When reporting information other than value of turnover, AIFMs should classify FX spot trades as 'other cash equivalent (excluding government securities)' with the sub-asset type code 'SEC\_CSH\_OTHC'. When reporting information on value of turnover, AIFMs should classify FX spot trades as 'other cash equivalent' with the sub-asset type code 'SEC\_CSH\_CSH'.

**Question 25 [last update 21 July 2014]:** AIFMs have to report value of turnover in each asset class over the reporting period (questions 125 to 127 of the [consolidated reporting template](#) for AIF-specific information). What information should AIFMs report for these questions when no trades took place during the reporting period?

**Answer 25:** AIFMs should use the field 'total other' with the sub-asset type code 'OTH\_OTH\_OTH' and report '0'.

**Question 26 [last update 21 July 2014]:** How should AIFMs classify cross-currency interest swaps when answering questions such as those on individual exposures (questions 121 to 124 of the [consolidated reporting template](#) for AIF-specific information) or value of turnover in each asset class over the reporting period (questions 125 to 127 of the consolidated reporting template for AIF-specific information)?

**Answer 26:** When reporting information other than value of turnover, AIFMs should classify cross-currency interest swaps as 'interest rate derivatives' with the sub-asset type code 'DER\_IRD\_INTR'. When reporting information on value of turnover, AIFMs should classify cross-currency interest swaps as 'interest rate derivatives' with the sub-asset type code 'DER\_IRD\_IRD'.

**Question 27 [last update 11 November 2014]:** When answering questions 148 and 149 of the [consolidated reporting template](#), should AIFMs include repo and reverse repurchase agreements?

**Answer 27:** Yes, but AIFMs should only include securities received by the AIFs.

**Question 28 [last update 21 July 2014]:** How should AIFMs managing AIFs holding cash report the breakdown of investment strategies?

**Answer 28:** When the holding of cash is part of a strategy such as a CTA<sup>110</sup> strategy, AIFMs should not report cash separately. For example, an AIF with a CTA strategy representing 70% of its NAV, out of which 30% of the NAV is made up of cash at the time of the reporting date, should allocate 70% of its NAV to the CTA strategy.

If the holding of cash is not part of an investment strategy, AIFMs should use the strategy 'other' of the predominant AIF type selected and report the corresponding percentage of the NAV held in cash. AIFMs should also use the field 'description' to make it clear that the field 'other' is made up of cash.

**Question 29 [last update 21 July 2014]:** Question 6 above clarifies that negative values can be reported for investment strategies. How should AIFMs report information on investment strategies with negative values?

**Answer 29:** AIFMs should allocate the status of predominant AIF type to the strategy with the highest absolute percentage of the NAV. The predominant AIF type 'multi-strategy hedge fund' should be used when no strategy has an absolute value greater than 50% of the NAV.

**Question 30 [last update 21 July 2014]:** Should AIFMs consider bank overdrafts as funding sources?

**Answer 30:** Yes.

<sup>110</sup> A commodity trading advisor (CTA) generally acts as an asset manager, following a set of investment strategies utilizing futures contracts and options on futures contracts on a wide variety of underlying instruments.

**Question 31 [last update 21 July 2014]:** Pursuant to Article 111 of the implementing Regulation, leverage shall be considered to be employed on a substantial basis when the exposure of an AIF, as calculated according to the commitment method, exceeds three times its NAV. How should AIFMs assess this limit?

**Answer 31:** AIFs should be considered as employing leverage on a substantial basis if, over the reporting period, the average daily calculation of the exposure as calculated according to the commitment method exceeds three times the average daily calculation of the NAV. If the exposure is calculated less frequently than daily, AIFs should be considered as employing leverage on a substantial basis where, at least once during the reporting period, the exposure as calculated according to the commitment method exceeds three times its NAV.

**Question 32 [last update 21 July 2014]:** How should AIFMs managing AIFs with multiple share classes identify the AIFs?

**Answer 32:** AIFMs reporting information for AIFs with multiple share classes should answer questions 24 and questions 30 to 40 of the [consolidated reporting template](#).

For AIFs with only one share class, AIFMs should only answer questions 24 to 33 of the consolidated reporting template.

**Question 33 [last update 21 July 2014]:** In question 282 of the [consolidated reporting template](#), should AIFMs report the percentage of collateral posted to all counterparties that has been re-hypothecated as of the last business day of the reporting period or during the reporting period?

**Answer 33:** AIFMs should report the percentage of the market value of the collateral that has been re-hypothecated during the reporting period. This percentage should be the ratio of the aggregated market value of the collateral re-hypothecated during the reporting period by all counterparties over the aggregated market value of all the collateral posted by AIFMs to all counterparties.

**Question 34 [last update 21 July 2014]:** What information should AIFMs report under questions 283 to 286 of the [consolidated reporting template](#)?

**Answer 34:** For questions 283, 284, 285 and 286, AIFMs should aggregate the market value of cash and securities borrowed.

**Question 35 [last update 21 July 2014]:** In which currency should AIFMs report information on the five principal markets and five principal instruments in which they trade (questions 29 and 32 of the [consolidated reporting template](#) for AIFM-specific information)?

**Answer 35:** AIFMs should report this information in Euro.

**Question 36 [last update 30 September 2014]:** A non-EU AIFM markets its AIFs in the Union under [Article 42 of the AIFMD](#). Should the AIFM continue to report to the national competent authorities of the Member States in which it markets its AIFs after the marketing period of the AIF has ended?

**Answer 36:** For non-EU AIFMs marketing their AIFs in the Union under [Article 42 of the AIFMD](#), the reporting obligations to national competent authorities does not depend on the actual marketing period of the AIF but rather on the existence of investors in the AIF in the jurisdiction of the authority concerned.

Therefore, non-EU AIFMs should continue to report to national competent authorities after the marketing period has ended unless they confirm that no investors in the jurisdiction of the authority concerned are invested in the AIFs.

**Question 37 [last update 26 March 2015]:** A non-EU AIFM markets its AIFs in several Member States under [Article 42 of the AIFMD](#). Should the AIFM calculate a reporting frequency for each Member State where it markets its AIFs or should the AIFM calculate a unique reporting frequency for all Member States in which it markets its AIFs?

**Answer 37:** According to [Article 110 of the implementing Regulation](#), AIFMs shall take into account all the EU AIFs they manage and AIFs they market in the Union to calculate the reporting frequency. The AIFM should

therefore calculate a unique reporting frequency taking into account all the AIFs it markets in the Union and apply the same reporting frequency to all Member States where it markets its AIFs.

Similarly, the assets under management in questions 33 and 34 of the consolidated reporting template for AIFM-specific information should be based on all the AIFs marketed in the Union by a non-EU AIFM and not on the AIFs marketed by a non-EU AIFM in a particular Member State. This means that non-EU AIFMs should report the same amount of assets under management to all NCAs to which they report under Article 42 of the AIFMD.

**Question 38 [last update 30 September 2014]:** Should AIFMs use the NAV when they report information under questions 48 and 86 to 93 of the [consolidated reporting template](#) for AIF-specific information?

**Answer 38:** No. AIFMs should use the total value of assets under management calculated in accordance with Article 2 of the implementing Regulation. In addition, if the national competent authorities to which they report have decided to apply ESMA's opinion on collection of information under Article 24(5), AIFMs should also use the total value of assets under management for questions 86 to 93 of the consolidated reporting template for AIF-specific information.

**Question 39 [last update 30 September 2014]:** How should AIFMs calculate the value of the five main instruments in which the AIF is trading (question 76 of the [consolidated reporting template](#) for AIF-specific information)?

**Answer 39:** AIFMs should calculate the values according to Article 2 of the implementing Regulation and not according to Article 3 of the AIFMD as stated in [Annex IV](#) of the implementing Regulation.

**Question 40 [last update 30 September 2014]:** According to [Article 110 of the implementing Regulation](#), AIFMs shall report to national competent authorities no later than 30 days or 45 days for fund of funds after the end of the reporting period. What should AIFMs do if the final NAV of the AIFs for which they report is not available by this deadline or is no longer representative?

**Answer 40:** In that situation, AIFMs should use estimates of the NAV of the AIFs and send updates afterwards if there is a difference between the estimated NAV and the final NAV.

**Question 41 [last update 30 September 2014]:** Should the position type (Long or Short) in relation to a derivative instrument be determined by reference to the derivative contract or by reference to the exposure to the underlying of the derivative instrument (questions 75, 97, 105, 123, 124, 129 and 130 of [consolidated reporting template](#) for AIF-specific information)?

**Answer 41:** The position type should be determined by reference to the exposure to the underlying of the derivative instrument. As a result, a long position on a put option should be reported as 'Short' whereas a short position on a put option should be reported as 'Long'.

**Question 42 [last update 30 September 2014]:** Should AIFMs take into account the settlement period when they report information on portfolio liquidity (questions 178 to 184 of the [consolidated reporting template](#) for AIF-specific information)?

**Answer 42:** AIFMs should adopt a conservative approach when they report information on the portfolio liquidity. As a consequence, AIFMs should take into account the time delay for having the proceeds of the sale available on a cash account if it has as a non-negligible impact on the liquidity profile of the AIF.

**Question 43 [last update 30 September 2014]:** Should AIFMs include cash accounts when reporting information on the total number of open positions (question 218 of the [consolidated reporting template](#) for AIF specific information)?

**Answer 43:** Yes, AIFMs should take into account all cash accounts that exist.

**Question 44 [last update 30 September 2014]:** What value should AIFMs use to report information on the value of securities borrowed for short positions (question 289 of the [consolidated reporting template](#) for AIF-specific information)?

**Answer 44:** AIFMs should use the market value of the securities borrowed.

**Question 45 [last update 30 September 2014]:** Should AIFMs report information on turnover of financial derivative instruments based on both market values and notional values (questions 126 and 127 of the [consolidated reporting template](#) for AIF-specific information)?

**Answer 45:** Yes.

**Question 46 [last update 30 September 2014]:** How should AIFMs treat bank overdrafts for the purpose of information on individual exposures (questions 123 and 124 of the [consolidated reporting template](#))?

**Answer 46:** AIFMs should treat bank overdrafts as short positions in 'Cash and Cash Equivalent'.

**Question 47 [last update 11 November 2014]:** AIFMs shall report the value of collateral and other credit support posted to all counterparties (questions 157 to 159 of the [consolidated reporting template](#)). Should AIFMs include collateral passed to a clearing member for transmission to a CCP in these questions?

**Answer 47:** Yes.

**Question 48 [last update 11 November 2014]:** How should AIFMs calculate the turnover expressed in notional value for derivative instruments (question 127 of the consolidated reporting template)?

**Answer 48:** AIFMs should convert the derivative positions into an equivalent position in the underlying assets as prescribed in [Article 10](#) and [Annex II of the implementing Regulation](#) using the value at the date of the trade and not at the reporting date.

**Question 49 [last update 11 November 2014]:** In which categories should AIFMs allocate sovereign bonds which fall in the categories 'Non-G10 with 0-1 year/1year+ term to maturity' and also in the categories 'EU bonds with 0-1 year/1 year + term to maturity'?

**Answer 49:** AIFMs should allocate those sovereign bonds to the categories 'EU bonds with 0-1 year/1 year + term to maturity'.

**Question 50 [last update 9 January 2015]:** How should AIFMs report information on subscriptions and redemptions over the reporting period (questions 255 to 278 of the [consolidated reporting template](#))?

**Answer 50:** AIFMs should report the value of subscription and redemption orders and not the number of subscription and redemption orders. Information should be reported for the month of the cash-flows and not for the month of the subscription and redemption orders unless it is the same month.

For example, an AIFM is subject to quarterly reporting obligations and investors can subscribe/redeem 4 times per year on the NAVs of 31/03, 30/06, 30/09 and 31/12 of each year. The AIFM receives for January 100 redemption orders, for February 200 redemption orders and for March 50 redemption orders (350 redemption orders in total over the reporting period Q1). Redemption orders are executed in April on the NAV calculated on 31 March. The NAV is €100 per share. Therefore, the AIFM will report redemption orders for a total value of €35,000 (350\*100) in April (reporting for Q2).

**Question 51 [last update 9 January 2015]:** How should AIFMs report information on the change in NAV per month (questions 243 to 254 of the [consolidated reporting template](#))?

**Answer 51:** The change in NAV captures both the change due to subscriptions and redemptions and the change due to investment performance. It is the net effect on the fund's NAV over the given reporting period after all inflows, outflows and performance are taken into account. AIFMs should report information on the change in NAV for each month of the reporting period. If no official NAV is available for the calculation, AIFMs should use estimates of the NAV. In some cases (e.g. for AIFs investing in illiquid assets), the best estimate may be the previous NAV.

**Question 52 [last update 9 January 2015]:** How should AIFMs report information on the percentage of gross and net investment returns per month (questions 219 to 242 of the [consolidated reporting template](#))?

**Answer 52:** AIFMs should report the information for each month of the reporting period. If no official NAV is available for the calculation, AIFMs should use estimates of the NAV. In some cases (e.g. for AIFs investing in illiquid assets), the best estimate may be the previous NAV.

**Question 53 [last update 9 January 2015]:** An AIFM manages both funds and funds of funds. When should the AIFM report aggregated information at the level of the AIFM (AIFM file of the [consolidated reporting template](#))?

**Answer 53:** In that case, the AIFM should report aggregated information at the level of the AIFM and on funds of funds no later than 45 days after the end of the reporting period. Information on AIFs that do not take the form of fund of funds should be reported 1 month after the end of the reporting period as required by Article 110 of the implementing Regulation.

**Question 54 [last update 26 March 2015]:** How should AIFMs report information on the total long and short value of exposures before currency hedging (questions 128 to 130 of the [consolidated reporting template](#))?

**Answer 54:** AIFMs should report information on long and short value of exposures for all the sub-asset types of questions 122 to 124 of the consolidated reporting template. The information should be provided in the base currency of the AIF. This means that the sum of the short and long value of exposures in questions 129 and 130 should equal the sum of the questions 122 to 124.

**Question 55 [last update 26 March 2015]:** Should non-EU AIFMs marketing their AIFs in the Union under [Article 42 of the AIFMD](#) report the results of stress tests under [Articles 15 and 16 of the AIFMD](#) (questions 279 and 280 of the [consolidated reporting template](#))?

**Answer 55:** Non-EU AIFMs marketing their AIFs in the Union under [Article 42 of the AIFMD](#) should report the results of stress tests insofar as this is required by the national private placement regime of the Member States where they market their AIFs or if the non-EU AIFMs have carried out such stress tests.

**Question 56 [last update 12 May 2015]:** How do the reporting obligations apply to AIFMs that are sister companies and that are owned by another AIFM?

**Answer 56:** The reporting obligations apply to each individual AIFM for the AIFs they manage and/or market in the Union. This means that each AIFM should report individually to the competent authorities of their home Member State according to their own reporting frequency as calculated pursuant to [Article 110 of the implementing Regulation](#).

**Question 57 [last update 12 May 2015]:** Should AIFMs consider commitments or actual capital drawdowns when they report information on subscriptions over the reporting period for AIFs pursuing private equity strategies (questions 255 to 266 of the [consolidated reporting template](#))?

**Answer 57:** AIFMs should consider actual capital drawdowns and not commitments when they report information on subscriptions for AIFs pursuing private equity strategies.

**Question 58 [last update 12 May 2015]:** What are the reporting obligations for a registered AIFM that decides to opt in under the Directive?

**Answer 58:** Once a registered AIFM has opted in under the Directive it has to comply with the Directive in its entirety. Therefore, an AIFM that has opted in has to report to its national competent authorities the information listed in [Article 24 of the Directive](#). However, the fact that the AIFM has opted into the Directive does not impact the reporting frequency. Indeed, the AIFM should continue to report on an annual basis to its national competent authorities.

However, if at a later stage the total value of assets under management of the AIFM that has opted in exceeds the thresholds of [Article 110 of the implementing Regulation](#), the AIFM will have to report on a more frequent basis to its national competent authorities.

In certain Member States, all AIFMs have to be authorised under the Directive. Therefore, in these jurisdictions, AIFMs whose total value of assets under management is under the thresholds of [Article 3\(2\)\(a\) and \(b\) of the](#)

**Directive** have to report to their national competent authorities the information listed in **Article 24 of the Directive**.

**Question 59 [last update 12 May 2015]:** What information should a non-EU AIFM whose total value of assets under management does not exceed the thresholds of **Article 3(2)(a) and (b) of the Directive** and that markets its AIFs in the Union under a national private placement regime report to the competent authorities?

**Answer 59:** Article 3 of the AIFMD does not make any distinction between EU AIFMs and non-EU AIFMs. Therefore, non-EU AIFMs whose total value of assets under management does not exceed the thresholds of Article 3(2)(a) and (b) and that market their AIFs in the Union under a national private placement regime should at least report to the competent authorities where they market their AIFs the information listed in Article 3(3)(d) of the Directive. Indeed, the national private placement regimes of the Member States where the non-EU AIFM markets its AIFs may require non-EU AIFMs to report additional information.

**Question 60 [last update 12 May 2015]:** What information should an AIFM report for questions 128 to 130 of the [consolidated reporting template](#) when an AIF invests exclusively in assets denominated in the base currency of the AIF?

**Answer 60:** The AIFM should report the long and short positions in the base currency of the AIF.

**Question 61 [last update 12 May 2015]:** Should AIFMs consider distribution of dividends to investors as redemptions for the purpose of questions 267 to 278 of the [consolidated reporting template](#)?

**Answer 61:** No.

**Question 62 [last update 12 May 2015]:** Should AIFMs always apply the same reporting frequency to AIFs that are sub-funds of the same umbrella AIFs?

**Answer 62:** No. The reporting frequency of an AIF is not affected by the legal structure of the AIF. Each AIF, being sub-funds of the same umbrella AIFs or not, has to be treated separately for the purpose of the reporting obligations (including for the reporting frequency).

**Question 63 [last update 12 May 2015]:** Should AIFMs take into account cash and cash equivalents for the purpose of the main instruments in which the AIF is trading (questions 64 to 77 of the [consolidated reporting template](#)), the principal exposures of the AIF (questions 94 to 102 of the consolidated reporting template) and the five most important portfolio concentrations (questions 103 to 112 of the consolidated reporting template)?

**Answer 63:** Yes.

**Question 64 [last update 12 May 2015]:** What should be the procedure for the first reporting on AIFs?

**Answer 64:** The procedure should be the same procedure as for the first reporting on AIFMs. This procedure is detailed in paragraphs 11 to 13 of **ESMA's guidelines on reporting obligations** under Articles 3(3)(d) and 24 (1), (2) and (4) of the AIFMD.

**Question 65 [last update July 2017]:** How should AIFMs convert the total value of assets under management into Euro?

**Answer 65:** First of all, AIFMs should use the rounded values of the AIFs in the base currency of the AIFs. Then, AIFMs should divide these rounded values by the corresponding rate of one unit of the base currency in Euros. For example, if the base currency of an AIF, reporting for 31 March 2015, is the US dollar and is using the ECB rate, AIFMs should multiply the rounded value in US dollar of the AIF by 0.9312, which was the spot rate on that date.

AIFMs should report the rounded values in Euro and in the base currency in questions 33 and 34 of the consolidated reporting template for AIFM-specific information and in question 48 in Euro of the consolidated reporting template for AIF-specific information. AIFMs should also report the value of the exchange rate used for the conversion in question 37 of the consolidated reporting template for AIFM-specific information and in question 50 of the consolidated reporting template for AIF-specific information.

**Question 66 [last update 21 July 2015]:** Question 64 above clarifies that the procedure for first reporting of AIFs should be the same procedure as for first reporting of AIFMs as laid down in ESMA's guidelines on reporting obligations. This means that AIFMs should not report any information on AIFs for the reporting period during which the AIFs were created. However, should AIFMs include AIFs created during the reporting period in the total value of assets under management of the AIFM for that reporting period?

**Answer 66:** Yes. This means that the total value of assets under management at the level of the AIFM at the reporting date (question 33 of the [consolidated reporting template](#) for AIFM-specific information) will not be the sum of the values of assets under management of the AIFs reported for that reporting period.

**Question 67 [last update 02 December 2015]:** According to questions 54 to 56 and 210 to 217 of the [consolidated reporting template](#), AIFMs have to report on the jurisdictions of the three main funding sources (excluding units or shares of the AIF bought by investors) as well as on the aggregate amount of borrowing and cash financing. Should AIFMs include all liquidity that is made available to the AIF (including the cash received in the context of securities lending transactions and repurchase transactions), unless it originates from the payment of subscriptions related to units or shares of the AIF bought by investors?

**Answer 67:** Yes.

**Question 68 [last update 02 December 2015]:** According to questions 121 to 124 of the [reporting template for AIF-specific information](#), AIFMs have to categorise loans as either leveraged or other loans. ESMA guidelines provide that where a loan is syndicated the loan should be classified as 'other'. How should a leveraged syndicated loan be classified for the purpose of completion of these questions?

**Answer 68:** To ensure consistency of reporting all leveraged loans, whether syndicated or otherwise, should be disclosed as leveraged loans.

**Question 69 [last update 02 December 2015]:** According to question 285 of the [reporting template for AIF-specific information](#), AIFMs shall report information on collateralised/secured cash borrowing – via (reverse) repo. Should AIFMs report cash from repurchase agreements as cash borrowings?

**Answer 69:** Yes.

**Question 70 [last update 02 December 2015]:** Question 66 clarifies that newly created AIFs should be included in the total AUM of the AIFM at the reporting date (question 33 of the [reporting template for AIFM-specific information](#)). Should information on newly created AIFs also be included in questions 26 to 32 of the reporting template for AIF-specific information?

**Answer 70:** No. Information on the newly created AIF(s) should only be included in the total AUM of the AIFM as reported at question 33 of the reporting template for AIFM-specific information.

**Question 71 [last update 02 December 2015]:** According to [Article 2\(4\) of the implementing Regulation](#), AIFMs may exclude investments of AIFs in other AIFs they manage for the purpose of calculating the total value of assets under management. Does ESMA expect AIFMs to exclude such investments from the calculation of the total value of assets under management?

**Answer 71:** Yes. In order to ensure the comparability of the results at an EU level, it is important that AIFMs calculate their total value of assets under management in the same manner. In situations where feeder AIFs invest in master AIFs and where these are managed by the same AIFM, it is important to ensure that there is no duplication of assets under management.

**Question 72 [last update 02 December 2015]:** When reporting information on their investment strategies, should AIFMs report the investment strategy that corresponds to their portfolio of assets as at the reporting date or should they indicate the investment strategy that is disclosed to investors in the fund rules or other offering documents?

**Answer 72:** AIFMs should report the investment strategy that is disclosed to investors in the fund rules or other offering documents.

**Question 73 [last update 02 December 2015]:** How should AIFMs determine the geographical focus of assets in which they invest such as stocks, bonds or financial derivatives (questions 78 to 85 of the [consolidated template for AIF-specific information](#))?

**Answer 73:** AIFMs should take into account the domicile of the company/entity to which the AIFs have an exposure. For example, if an AIF invests in a stock of a company domiciled in Europe but traded in the US, the corresponding geographical area would be Europe and not North-America. Similarly, an AIF that invest in a bond issued in the US market by a company domiciled in the Europe should select Europe. For financial derivative instruments such as options, AIFMs should look at the financial instrument underlying the financial derivative instruments and apply the same approach as for stocks and bonds.

**Question 74 [last update 02 December 2015]:** Is information on gross and net investment returns, change in NAV, subscriptions and redemptions mandatory or optional?

**Answer 74:** This information is mandatory for [Article 24\(2\)](#) AIF reporting contents but, to enable the necessary functional flexibility, it is classified as optional from a technical standpoint. This information is optional from a technical standpoint because AIFMs only have to report this information for the months corresponding to the reporting period for which they report. For example, an AIFM that reports on quarterly basis will report in Q2 only information for April, May and June and not for January, February and March. Information on January, February and March would have been part of the report for Q1.

**Question 75 [last update 02 December 2015]:** When reporting information on leverage, should AIFMs report a ratio or a percentage?

**Answer 75:** AIFMs should report a percentage.

**Question 76 [last update 02 December 2015]:** When reporting the investment strategy of a feeder AIF, should AIFMs look through the master AIF?

**Answer 76:** ESMA expects that in most instances, feeder AIFs will have the same investment strategy as the master AIF unless the investments made by the feeder AIF in other assets make the resulting strategy different.

**Question 77 [last update 02 December 2015]:** Should AIFMs include master/feeder structures when answering questions 290 to 293 of the [consolidated template for AIF-specific information](#)?

**Answer 77:** No.

**Question 78 [last update 02 December 2015]:** Is information on liquidity profile mandatory or optional (questions 178 to 192 of the [reporting template for AIF-specific information](#))?

**Answer 78:** This information is mandatory.

**Question 79 [last update 02 December 2015]:** What information should AIFMs communicate when they report a total value of assets under management with a value of 0 at the AIFM level (question 33 of the [reporting template for AIFM-specific information](#)) or at the AIF level (question 48 of the [reporting template for AIF-specific information](#))?

**Answer 79:** AIFMs should use the assumption boxes of the reporting template to explain why the total value of assets under management equals 0. For example, this may be because the assets of the AIF have been liquidated, merged with or transferred to another AIF or because the management of the AIF has been transferred to another AIFM.

**Question 80 [last update May 2017]:** How should AIFMs report information on the breakdown between retail and professional investors (questions 119 and 120 of the reporting template for AIF-specific information) when this information is not available?

**Answer 80:** When the information is not available, AIFMs should report '0' for questions 119 and 120 and use the assumption boxes to indicate that the information is not available.

**Question 81 [last update July 2017]:** In a situation where an AIF purchases a loan in the secondary market, how should the AIF measure its exposure in relation to that loan?

**Answer 81:** In this case the notional value of the loan may overestimate the risk exposure. Therefore, the AIF should report the valuation of the loan, as it is reported in the calculation of its NAV. For example, if an AIF purchases a distressed and unlevered loan for €10 cash (without the use of leverage) and the notional amount of that loan (i.e. the outstanding principal) was €100, the AIF should report the amount it actually spent to acquire the loan i.e. €10, which corresponds to the maximum potential loss on the loan transaction, not the AIF's exposure with respect to that loan which would be €100 (i.e., the notional amount of such loan). During the life of the loan, the AIF should then measure the exposure in relation to that loan using the same valuation rules as the ones used for the calculation of its NAV.

**Question 82 [last update July 2017]:** In which currency should the NAV of the AIF (question 53 of the consolidated reporting template) be reported?

**Answer 82:** AIFMs should report the NAV in the base currency of the AIF.

**Question 83 [last update 4 December 2019]:** How should AIFMs report results of liquidity stress tests for closed-ended unleveraged AIFs that they manage?

**Answer 83 [last update 4 December 2019]:** Article 16(1) exempts closed-ended unleveraged AIFs from implementing liquidity risk management systems and from "conducting stress tests, under normal and exceptional liquidity conditions, which enable AIFMs to assess the liquidity risk of the AIFs and monitor the liquidity risk of the AIFs accordingly" (liquidity stress tests).

However, AIFMs need to report results of liquidity stress tests for all their AIFs as part of their reporting to competent authorities as particularly required in accordance with [Article 24\(2\) of the AIFMD](#), further specified by [Article 110\(2\)\(f\) of Commission Delegated Regulation \(EU\) No 231/2013](#), and integrated in field 280 of the AIFMD reporting template ([2013-1359 consolidated aifmd reporting template](#)).

For closed-ended unleveraged AIFs, given the mandatory character of the field, AIFMs should indicate the question is Not Applicable and at least report in this field the fact that the relevant fund is a closed-ended unleveraged AIF.

However, where an AIFM decides to conduct liquidity stress tests for unleveraged closed-ended AIFs, it should report the results of the liquidity stress tests in the same field.

**Question 84 [last update 28 May 2021] [QA 1021]:** Which risk is measured by NET DV01? How shall it be reported?

**Answer 84 [last update 28 May 2021]:** Net DV01 should be the value change in price (value) of a portfolio and measures the portfolio's sensitivity to a change in the yield curve. Assume an increase of 1bp in the risk-free rate curve (assume a parallel shift) at the end of the reporting period. The effect on the total net asset value of the AIF (taking into account all the positions (including derivative positions) of the portfolio) shall be reported as a monetary value in base currency for each maturity bucket (< 5 years, 5-15 years and >15 years) as specified in data fields 140-142. Report: (i) a negative value if the variation of the net asset value is negative; (ii) a positive value if the variation is positive and (iii) a zero if the AIF is neutral or not exposed at all to this risk. In case a measure of risk is not applicable for an AIF or when AIFM report a zero value, the reasons should be explained in the „Risk Measure Description" (data field 147). As indicated in the Guidelines, DV01 is defined as in ISDA definition.

For example, assume an AIF with NAV of 100M EUR encountering the following portfolio decline after a general increase of 1bp in the risk-free yield curve: 0.01% decline for maturity bucket <5 years, 0.02% decline for maturity bucket 5-15 years and 0.03% decline for maturity bucket >15 years. Then for these maturity buckets it should report, in base currency, respectively: "-10000", "-20000" and "-30000".

**Question 85 [last update 28 May 2021] [QA 1022]:** Which risk is measured by NET CS01? How shall it be reported?

**Answer 85 [last update 28 May 2021]:** Net CS01 measures the portfolio's sensitivity to a change in credit spreads. Assume a general increase in all credit spreads of 1bp at the end of the reporting period. The effect on the total net asset value of the AIF (taking into account all the positions (including derivative positions) of the portfolio) should be reported as a monetary value in base currency for each maturity bucket (< 5 years, 5-15 years and >15 years) as specified in data fields 140-142. Report: (i) a negative value if the variation of the net asset value is negative; (ii) a positive value if the variation is positive and (iii) a zero if the AIF is neutral or not exposed at all to this risk. In case a measure of risk is not applicable for an AIF or when AIFM report a zero value, the reasons should be explained in the "Risk Measure Description" (data field 147). As indicated in the Guidelines, CS01 is defined as in ISDA definition.

For example, assume an AIF with NAV of 100M EUR encountering the following portfolio decline after a general increase of 1bp in all credit spreads: 0.01% decline for maturity bucket <5 years, 0.02% decline for maturity bucket 5-15 years and 0.03% decline for maturity bucket >15 years. Then for these maturity buckets it should report, in base currency, respectively: "-10000", "-20000" and "-30000".

**Question 86 [last update 28 May 2021] [QA 1023]:** Which risk is measured by Net Equity Delta? How shall it be reported?

**Answer 86 [last update 28 May 2021]:** Net equity delta is used to analyse portfolio's sensitivity to movements in equity prices. Assume all equity prices the AIF is exposed to decline by 1% at the end of the reporting period. Report the effect on the total net asset value of the AIF (taking into account all the positions (including derivative positions) of the portfolio) as a monetary value in base currency. In the case of derivative positions, a decline of 1% in the value of the underlying should be considered, and not in the value of the derivative. Hence, it shall report: (i) a negative value if the variation of the net asset value is negative; (ii) a positive value if the variation is positive and (iii) a zero if the AIF is neutral or not exposed at all to this risk. In case a measure of risk is not applicable for an AIF or when AIFM report a zero value, the reasons should be explained in the "Risk Measure Description" (data field 147).

Example:

i. Assume at the quarter-end that the NAV sensitivity of an AIF to a 1% equity price decline is -0.5% and that its NAV is 100M EUR, then the figure to be reported under the field "net equity delta" would be "-500000".

ii. Assume the AIF is fully exposed to fixed-income instruments, then a zero would be reported under the field "net equity delta" and "Not applicable given AIF's predominant type" would be reported in the Risk Measure Description field (147).

## Section IV: Notification of AIFMs

Date last updated: 13 June 2023

**Question 1 [last update 27 June 2014]:** May an AIFM manage an AIF in a host MS under [Article 33 of the AIFMD](#) without having identified any existing AIF in that host MS beforehand?

**Answer 1 [last update 27 June 2014]:** Yes. The fact that an AIFM cannot identify a preexisting AIF in the host MS does not prevent an AIFM from managing an AIF in that host MS under Article 33 of the AIFMD. In practice, the creation of the first AIF in the host MS is usually conditional on the AIFM having previously notified the host MS's national competent authority under Article 33 of the AIFMD. Therefore, it may be necessary for an AIFM to first notify its wish to make use of the management passport under Article 33 in order to subsequently be in a position to create and manage AIFs in that host MS.

**Question 2 [last update 27 June 2014]:** When an AIFM wishes to manage an AIF in a host MS for the first time, but has not yet set up any AIF in that host MS, how should it comply with the requirement of [Article 33\(2\)\(b\) of the AIFMD](#) to identify the AIFs it intends to manage?

**Answer 2 [last update 27 June 2014]:** If the AIFM has no prior presence in the host MS it is sufficient for the AIFM to specify the types of strategy of the AIFs it intends to manage in the host MS. However, this is without prejudice to the obligation for the AIFM to communicate a programme of operations stating the services it intends to perform in the host MS.

**Question 3 [last update 26 March 2015]:** Should an AIFM that is already managing AIFs in a host Member State under Article 33 of the AIFMD and that wishes to manage a new AIF in that host Member State undertake a new notification under [Article 33\(2\) of the AIFMD](#)?

**Answer 3:** The AIFM should not undertake a new notification under [Article 33\(2\) of the AIFMD](#) every time it wishes to manage a new AIF established in a given Member State. The original Article 33(2) notification should be considered valid for all the AIFs it intends to manage in that given Member State. In such cases, an update in accordance with Article 33(6) should be sent to identify each new AIF to be managed under the original Article 33(2) notification. When the proposed new AIFs are of a different type from the ones specified in the original Article 33(2) notification, the AIFM should clarify this in the update submitted under Article 33(6).

**Question 4 [last update June 2017]:** An AIFM wants to manage AIFs domiciled in another Member State by way of the AIF management passport ([Article 33 of AIFMD](#)). In the programme of operations, how does the AIFM have to provide information on the AIFs it intends to manage?

**Answer 4:** Where specific AIFs cannot be identified at the time of the notification, the AIFs to be managed may be identified by their investment strategy. In that regard, ESMA sees merit in relying on the investment strategies contained in the reporting template for identification purposes (Annex IV of Commission Delegated Regulation (EU) No 231/2013). Where an AIFM has only been authorised to manage certain types of AIFs, it could also refer to the scope of its authorisation to identify the funds to be managed.

Where the AIFM is able to identify specific AIFs, these should be identified in the programme of operations by their name and national identifier (if available). Information on those funds should also include their investment strategies.

In accordance with Article 33(6) of AIFMD, all changes to the programme of operations have to be notified by the AIFM to the competent authorities in its home Member State. This includes changes to the programme of operations in cases where the AIFM intends to manage further AIFs (if specified by name) or types of AIFs (if specified by investment strategy) not previously listed in that document.

**Question 5 [last update 4 October 2018]:** An AIFM intends to manage an EU umbrella AIF on a cross-border basis by way of the AIF management passport ([Article 33 of AIFMD](#)). Does the AIFM have to identify all the compartments of the umbrella AIF in the notification?

**Answer 5 [last update 4 October 2018]:** Yes. In the notification, the AIFM has to identify the umbrella AIF, as well as the name and investment strategy of its compartments, to facilitate administrative procedure in home and host Member States.

Any change in the composition of an umbrella AIF that is managed on a cross-border basis has to be notified to the competent authorities pursuant to [Article 33\(6\)](#) of AIFMD.

**Question 6 [last update 13 June 2023] [QA 1072]:** When an AIFM intends to provide the activities and services for which it has been authorised in a host Member State, either directly or through a branch, may that AIFM passport in that host Member State only the other functions that an AIFM may additionally perform in the course of the collective management of an AIF, which are referred to in point (2) of [Annex I](#) to the AIFMD, without also passporting investment management functions?

**Answer 6: Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>111</sup>**

No. The AIFMD passporting regime is linked to the management of an EU AIF. Annex I lists the investment management functions which an AIFM shall at least perform when managing an AIF (point 1) and the other functions that an AIFM may additionally perform in the course of the collective management of an AIF (point 2).

<sup>111</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

The activities referred to in Annex I, point 2 are therefore ancillary to the activities referred to in Annex I, point 1 and cannot be exercised independently from those. That is also the case when AIFM passport their services in another Member State. Furthermore, pursuant to [Article 33\(2\), point \(b\)](#), AIFMD, an AIFM intending to manage EU AIFs established in another Member State is to communicate to the competent authorities of its home Member State a program of operations referring to the services it intends to provide and the EU AIF it intends to manage. That requirement cannot be interpreted otherwise than referring to investment management foremost whereas auxiliary services remain as such auxiliary and are to be performed only in addition to the management of an EU AIF.

## Section V: MiFID services under Article 6(4) of the AIFMD

Date last updated: 27 June 2014

**Question 1 [last update 27 June 2014]:** Can competent authorities in a Member State other than the home Member State of an AIFM accept passport notifications for the activities of the AIFM authorised under [Article 6\(4\) of the AIFMD](#)?

**Answer 1:** Yes. Article 92 of [Directive 2014/65/EU \(MiFID 2\)](#) modifies the provisions of the AIFMD in order to establish that an AIFM authorised to provide the MiFID investment services mentioned under Article 6(4) of the AIFMD has the right to provide these services on a cross-border basis under the authorisation granted by the competent authorities of its home Member State.

Member States must apply the measures referred to in Article 92 of MiFID 2 from 3 July 2015. However, the principle of sincere cooperation set out in Article 4(3) TFEU requires the Member States to facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. It is therefore recommended that competent authorities accept passport notifications for the activities of the AIFM authorised under Article 6(4) of the AIFMD even before 3 July 2015.

## Section VI: Depositaries

Date last updated: 20 July 2022

**Question 1 [last update 21 July 2014]:** Do the [cash monitoring duties](#) apply on a look-through basis to cash accounts which are not opened in the name of the AIF/AIFM, but in the name of financial and/ or legal structures established by the AIF or by the AIFM acting on behalf of the AIF for the purposes of investing in the underlying assets and which are controlled directly or indirectly by the AIF or by the AIFM acting on behalf of the AIF?

**Answer 1:** No, the cash monitoring requirements under Articles 85 and 86 of Commission Regulation (EU) No 231/2013 (the AIFMD Level 2 Regulation) do not apply to cash accounts opened in the name of companies in which the AIF/AIFM holds investments.

**Question 2 [last update 21 July 2014]:** Is it possible for the depositary to delegate to a third party (e.g. an administrator which is not an affiliate of the depositary) the cash flow reconciliation duties?

**Answer 2:** No. According to the provisions of [Article 21\(11\) of the AIFMD](#), the monitoring of the cash flow is an activity which cannot be delegated. For example, the depositary should not rely exclusively on the reconciliation processes performed by a third party, even where the depositary performs due diligence on those processes.

In line with the provisions of [recital 42 of the AIFMD](#), the only delegation which is permitted in relation to the monitoring of the cash flow is that of the depositary's supporting tasks, such as administrative or technical functions performed by the depositary as a part of its depositary tasks.

**Question 3 [last update 21 July 2014]:** How far down the distribution chain is the depositary to reconcile subscription flows?

**Answer 3:** The cash monitoring duties relate to any of the cash accounts – including accounts used for subscriptions and redemptions – referred to in [Article 21\(7\) of the AIFMD](#) (as implemented by Articles 85 to 87 of the AIFMD Level 2 Regulation): accounts opened in the name of the AIF, 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. The rules on reconciliations linked to subscriptions are further detailed in Article 93 of the AIFMD Level 2 Regulation.

**Question 4 [last update 21 July 2014]:** Does the obligation to verify that the AIF and AIFM comply with applicable laws and regulations in [Article 95 \(a\) of the AIFMD Level 2 Regulation](#) cover anti-money laundering rules, labour law and contracts of the AIF/AIFM with third parties which do not relate to the asset or risk management activities?

**Answer 4:** In general, the obligation to set up and implement appropriate procedures for the verifications required under Article 95(a) of the AIFMD Level 2 Regulation should be linked to the requirement in Article 21(9) of the AIFMD for the depositary to ensure oversight of the AIF's operations. The verifications required under Article 95(a) of the AIFMD Level 2 Regulation are meant to ensure that the AIF and/or the AIFM acting on behalf of the AIF comply with the applicable laws and regulations applying to the AIF including fund rules, instruments of incorporation (e.g. investment restrictions, leverage limits, etc.). They do not relate to the laws and regulations applying to these entities that do not have any direct relation with the instructions of the AIFM to the depositary (e.g. the application of the remuneration rules by the AIFM). This is without prejudice to the depositary voluntarily (or in agreement with the AIF/AIFM) performing more extensive verifications.

Therefore, the obligation to verify that the AIF and AIFM comply with applicable laws and regulations does not cover labour law or contracts with third parties unrelated to asset or risk management activities.

As for the compliance with the relevant anti-money laundering rules, the contract by which the depositary is appointed shall include information on the tasks and responsibilities of the parties to the contract in respect of obligations relating to the prevention of money laundering and the financing of terrorism ([Article 83\(1\)\(m\) of the AIFMD Level 2 Regulation](#)). This is without prejudice to the relevant anti-money laundering obligations applying to the depositary, AIF and AIFM under the EU legislation on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

**Question 5 [last update 21 July 2014]:** Is it correct to say that where derivative contracts contain a netting clause, derivatives should fall exclusively under the cash flow monitoring obligation of the depositary and that it is only in the absence of a netting clause – where the AIF/AIFM gets an ownership claim for the underlying – that the depositary is in a position to verify whether the AIF/AIFM has acquired ownership of the underlying asset according to [Article 90\(2\)\(c\) of Commission Regulation \(EU\) No 231/2013](#)?

**Answer 5:** No. [Recital 103 of the AIFMD Level 2 Regulation](#) gives examples of assets that are not financial instruments to be held in custody and specifically includes 'financial contracts such as derivatives' among these examples. Therefore, these assets are subject to the obligation to verify the ownership and maintain a record according to the provisions of [Article 90\(2\)\(c\) of the AIFMD Level 2 Regulation](#). This duty involves, inter alia, looking at the contract to assess what the AIF/AIFM is entitled to.

**Question 6 [last update 21 July 2014]:** Are holdings in collective investment undertakings to be held in custody or subject to record keeping?

**Answer 6:** Unless, in accordance with applicable national law, they are only directly registered with the issuer itself or its agent, in the name of the AIF or the AIFM acting on behalf of the AIF (in which case the provisions of Article 88(2) of the AIFMD Level 2 Regulation apply), units of collective investment undertakings (CIUs) should be held in custody and subject to the relevant provisions of the AIFMD.

**Question 7 [last update 21 July 2014]:** Within the cash monitoring duties of a depositary, what is the meaning of "close of business day"?

**Answer 7:** Given that the requirements relating to the monitoring of the AIF's cash flows apply to the depositary ([Article 86 of the AIFMD Level 2 Regulation](#)), the "close of business day" should be determined in relation to the jurisdiction where the depositary is established which, for EU AIFs, is also the home Member State of the AIF. This means that the identification of significant cash flows referred to under Article 86(c) of the AIFMD Level 2 Regulation should be made with reference to the close of business day in the jurisdiction where the depositary is established, but the relevant checks may be carried out after the close of business in the depositary's jurisdiction, typically the following business day.

**Question 8 [last update 1 October 2015]:** When assets of an AIF held in custody by the depositary of the AIF are provided by that depositary to a CSD or a third country CSD as defined under Regulation (EU) No 909/2014 (CSDR)

in order to be held in custody in accordance with [Article 21\(8\) of the AIFMD](#), does the CSD or third country CSD have to comply with the provisions on delegation set out under [Article 21\(11\) of the AIFMD](#)? **Answer 8:** Yes.

**Question 9 [last update 16 December 2015]:** Does the depositary's liability regime apply to those assets for which a depositary has safe-keeping duties on a look-through basis according to [Articles 89\(3\)](#), first sub-paragraph, and [90\(5\)](#), first sub-paragraph of the AIFMD Level 2 Regulation?

**Answer 9:** Yes. The look-through requirements under [Articles 89\(3\)](#), first sub-paragraph, and [90\(5\)](#), first sub-paragraph of the AIFMD Level 2 Regulation mean that the depositary has safe-keeping duties in relation to the relevant assets. The safe-keeping duties are described under [Article 21\(8\) of the AIFMD](#) and the depositary's liability regime set out under [Article 21\(12\) of the AIFMD](#) (and the relevant implementing provisions under the AIFMD Level 2 Regulation) apply to safekeeping activities. This means that for financial instruments held in custody to which the look-through requirements under [Article 89\(3\)](#), first sub-paragraph of the AIFMD Level 2 Regulation apply, the depositary is subject to the strict liability regime under [Article 21\(12\)](#), second sub-paragraph of the AIFMD. For other assets to which the look-through requirements under [Article 90\(5\)](#), first sub-paragraph of the AIFMD Level 2 Regulation apply, the depositary is subject to the liability regime under [Article 21\(12\)](#), third sub-paragraph of the AIFMD.

According to [Articles 89\(3\)](#), second sub-paragraph, and [90\(5\)](#), second sub-paragraph of the AIFMD Level 2 Regulation, the look-through provision does not apply to funds of funds or master-feeder structures provided they have a depositary which safe-keeps the fund's assets appropriately. Therefore, it is only for this type of investment that the liability regime should not apply to the depositary of the AIF as a consequence of the fact that the depositary is not subject to any safe-keeping duties in relation to those investments.

**Question 10 [last update 4 June 2019]:** The AIFMD sets out strict restrictions under which depositaries are allowed to delegate the safekeeping of assets of the AIF, whereas the delegation of depositary functions pursuant to [Article 21\(7\)](#) and [\(9\) of the AIFMD](#) (i.e. monitoring of the cash flow and oversight functions) is not permitted. [Recital 42](#) of the AIFMD states that "delegation of supporting tasks that are linked to its depositary tasks, such as administrative or technical functions performed by the depositary as a part of its depositary tasks, is not subject to the specific limitations and requirements set out in the AIFMD". What are 'supporting tasks that are linked to depositary tasks such as administrative or technical functions performed as part of the depositary tasks' and under which conditions would it be possible to entrust third parties with such tasks?

**Answer 10 [last update 4 June 2019]:** The answer refers to supporting tasks linked to the depositary tasks, such as administrative or technical functions performed as part of the depositary tasks, only. Supporting tasks that are linked to depositary tasks such as administrative or technical functions performed as part of the depositary tasks listed under [Article 21\(7\)](#) and [\(9\) of the AIFMD](#) could be entrusted to third parties where all of the following conditions are met:

1. the execution of the tasks does not involve any discretionary judgement or interpretation by the third party in relation to the depositary functions;
2. the execution of the tasks does not require specific expertise in regard to the depositary function; and
3. the tasks are standardised and pre-defined.

**Question 11 [last update 4 June 2019]:** May depositaries entrust third parties with the performance of tasks that would give them the ability to transfer assets belonging to AIFs?

**Answer 11 [last update 4 June 2019]:** Yes, where depositaries entrust tasks to third parties and give them the ability to transfer assets belonging to AIFs without requiring the intervention of the depositary, these arrangements are subject to the delegation requirements set out in [Article 21\(11\) AIFMD](#).

**Question 12 [last update 4 June 2019]:** Where the depositary of an AIF is a branch and the head office is established in a Member State other than the home Member State of the AIF, to which extent may the branch allocate its depositary functions (e.g. custody) to its head office in compliance with the establishment requirement set out in [Article 21\(5\) of AIFMD](#)?

**Answer 12 [last update 4 June 2019]:** The internal allocation of functions between the head office and the branches of a depositary shall not lead to situations that may represent a circumvention of the establishment

requirement under [Article 21\(5\) of the AIFMD](#). Therefore, the operational infrastructure and internal governance system of such branches must be adequate to carry out depositary functions autonomously from its head office and ensure compliance with national rules implementing the AIFMD.

**Question 13 [last update 4 June 2019]:** Where depositary functions are performed by a branch established in the home Member State of the AIF other than the home Member State of the depositary's head office, who is responsible for supervising the activities of the branch relating to depositary functions? Is it the competent authority of the Member State where the depositary's head office is established or the competent authority of the Member State where the branch is established?

**Answer 13 [last update 4 June 2019]:** The AIFMD, the CRD and the MiFID II do not grant any passport for depositary activities in relation to AIFs. Hence, branches located in the home Member State of the AIFs other than the home Member State of the depositary's head office may also be subject to local authorisation in order to perform depositary activities in relation to AIFs. Therefore, the competent authority of the Member State where the branch is established should be responsible for supervising the activities of the branch with regard to depositary functions in relation to AIFs. This includes the supervision of the allocation of depositary functions from the branch to its head office or vice versa to avoid any possible circumvention of the establishment requirement under [Article 21\(5\) of the AIFMD](#).

**Question 14 [last update 4 June 2019]:** Where a depositary delegates some of its functions to another legal entity which belongs to the same group, should this be considered a delegation for the purposes of the application of the depositary delegation rules under [Article 21\(11\) of the AIFMD](#)?

**Answer 14 [last update 4 June 2019]:** Yes. Legal entities within the same group of a depositary should be considered 'third parties' for the purpose of the depositary delegation rules under [Article 21\(11\) of the AIFMD](#).

**Question 15 [last update 20 July 2022] [QA 1024]:** According to [Article 89\(1\)\(c\) of Commission Delegated Regulation \(EU\) No 231/2013](#) as modified by Commission Delegated Regulation (EU) 2018/1618 and Article 13(1)(c) of Commission Delegated Regulation (EU) 2016/438 as modified by Commission Delegated Regulation (EU) 2018/1619 reconciliations are conducted as frequently as necessary between the depositary's internal accounts and records and those of any third party to whom safekeeping has been delegated. What does this mean for an AIF or UCITS with a weekly dealing frequency which trades on a daily basis?

**Answer 15: Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>112</sup>**

The reconciliation frequency depends not only on the dealing frequency of the relevant AIF or UCITS, but also on any trade which occurs even outside the dealing frequency. Therefore, if an AIF or UCITS with a weekly dealing frequency trades on a daily basis, daily reconciliations are required.

**Question 16 [last update 20 July 2022] [QA 1025]:** According to [Article 89\(1\)\(c\) of Commission Delegated Regulation \(EU\) No 231/2013](#) as modified by Commission Delegated Regulation (EU) 2018/1618 and Article 13(1)(c) of Commission Delegated Regulation (EU) 2016/438 as modified by Commission Delegated Regulation (EU) 2018/1619 reconciliations are conducted as frequently as necessary between the depositary's internal accounts and records and those of any third party to whom safekeeping has been delegated. What does this mean in case of use of a tri-party collateral manager, which is not the depositary?

**Answer 16: Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>113</sup>**

<sup>112</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

<sup>113</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of

In this case the tri-party collateral manager is appointed by the asset manager in accordance with [Article 20 of Directive 2011/61/EU](#) or in accordance with Article 13 of Directive 2009/65/EC; it also needs to be the delegate of the depositary in accordance with [Article 21\(11\) of Directive 2011/61/EU](#) or in accordance with Article 22a(2) of Directive 2009/65/EC. The tri-party collateral manager is required to transmit the end-of-day positions on a fund-by-fund basis or, if applicable, on a compartment-by-compartment basis. The information provided allows the depositary to record the end-of-day positions and allows it to comply with the provisions (a) of Article 98(2a)(a) (as inserted by Delegated Regulation (EU) 2018/1618) and in particular point (ii) thereof, and (b) with the provisions under Article 15(2a)(a) (as inserted by Delegated Regulation (EU) 2018/1619), and in particular point (ii) thereof. Thus, the information provided allows the depositary (for both Regulations) to verify that the quantity of the identified financial instruments recorded in the financial instruments accounts opened in its books matches the quantity of the identified financial instruments held in custody by the third party.

## Section VII: Calculation of leverage

Date last updated: 13 June 2023

**Question 1 [last update 21 July 2014]:** An AIF that is a private equity fund as referred to in [recital 78 of the AIFMD](#), controls a financial structure that is used to acquire non-listed companies or issuers. The financial structure raises debt to finance the acquisition of those assets. When calculating the exposure of the AIF, shall the AIFM include the debt raised at the level of the financial structure?

**Answer 1:** According to [Article 6\(3\) of Regulation 231/2013](#), exposure contained in any financial or legal structures controlled by an AIF shall be included in the calculation of the exposure where those structures are specifically set up to directly or indirectly increase the exposure at the level of the AIF. Therefore, debt raised by such a financial structure to finance the acquisition of assets shall be included in the calculation of the exposure where those structures are: (1) specifically set up to directly or indirectly increase the exposure at the level of the AIF and (2) the AIF controls such a structure. If these two conditions are fulfilled, the debt raised by the financial structure is to be included in the calculation of the exposure of the AIF.

Where the AIF does not have to bear losses beyond its investment in a financial structure that is used to acquire non-listed companies or issuers, the financial structure should not be considered as having been set up to directly or indirectly increase the exposure at the level of the AIF. In any case, these structures should not be used as a means to circumvent the provisions of the AIFMD on leverage.

**Question 2 [last update 21 July 2014]:** An AIF controls a financial structure that is used to acquire non-listed companies or issuers. When calculating the exposure of the AIF, shall the AIFM include the debt raised at the level of the non-listed companies or issuers?

**Answer 2:** No, provided that the AIF does not have to bear potential losses beyond its investment in the non-listed companies or issuers.

However, if the debt at the level of the non-listed companies or issuers exposes the AIF to potential losses beyond its investment in those non-listed companies or issuers, the debt shall be included in the calculation of the exposure of the AIF.

**Question 3 [last update 21 July 2014]:** An AIF controls a financial structure that acquires non-listed companies or issuers by raising debt. At the time of the acquisition, the non-listed companies or issuers were not leveraged. Subsequently, the non-listed companies or issuers raise debt to finance a dividend distribution enabling the financial structure to reimburse entirely its acquisition debt. When calculating the exposure of the AIF, shall the AIFM include the debt raised at the level of the non-listed companies or issuers?

**Answer 3:** No, provided that the AIF does not have to bear potential losses beyond its investment in the non-listed companies or issuers.

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the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

**Question 4 [last update 26 March 2015]:** When calculating the exposure of an AIF in accordance with the gross method under [Article 7\(a\) of the implementing Regulation](#), should AIFMs exclude the value of all cash held in the base currency of the AIF?

**Answer 4:** Yes. The exclusion of cash held in the base currency of the AIF applies to cash and also to cash equivalents that meet the requirements of [Article 7\(a\) of the implementing Regulation](#).

**Question 5 [last update 12 May 2015]:** Which positions should AIFMs take into account when calculating their exposure under the commitment approach pursuant to [Article 8 of the Implementing Regulation](#)?

**Answer 5:** AIFMs should take into account the absolute value of all the positions of their AIFs valued in accordance with Article 19 of the AIFMD and the criteria laid down in [paragraphs 2 to 9 of Article 8 of the Implementing Regulation](#). For derivative instruments, as required under Article 8(2)(a), AIFMs should convert each position into an equivalent position in the underlying assets using the methodologies set out in Article 10 (which refers to Annex II of the implementing Regulation) and points (4) to (9) and (14) in Annex I of the implementing Regulation.

**Question 6 [last update 29 March 2019]:** Should the calculation of leverage exposure of an AIF resulting from a short-term interest rate future be adjusted for the duration of the future, under the gross and the commitment methods?

**Answer 6 [last update 29 March 2019]:** No. The calculation of leverage exposure of an AIF resulting from a short-term interest rate future should not be adjusted for the duration of the future. Subparagraph (a) of paragraph (1) of Annex II of the Commission Delegated Regulation (EU) No 231/2013 sets out the method to be applied, when converting all interest rate futures into equivalent positions in the underlying asset in the process of calculation of exposure of the AIF, as the product of the number of contracts and the notional contract size. The duration of the financial instrument should not be considered for the purpose of that calculation.

This does not, however, preclude AIFMs managing AIFs that, in accordance with their core investment policy, primarily invest in interest rate derivatives from applying duration netting rules under the commitment method, in accordance with [paragraph \(9\) of Article 8 of the Commission Delegated Regulation \(EU\) No 231/2013](#).

**Question 7 [last update 29 March 2019]:** How frequently should an AIFM calculate the leverage of each AIF that it manages?

**Answer 7 [last update 29 March 2019]:** An AIFM should calculate the leverage of each AIF that it manages as often as is required to ensure that the AIF is capable of remaining in compliance with leverage limits at all times. Consequently, leverage should be calculated at least as often as the NAV is calculated, or more frequently if required. Circumstances which may lead to increased frequency of leverage calculation include material market movements, changes to portfolio composition and any other factors the AIFM believes require calculation of leverage more frequently than NAV in order for the AIF to remain in compliance with leverage limits at all times. [\[Article 6 of the Commission Delegated Regulation \(EU\) No 231/2013\]](#).

**Question 8 [last update 13 June 2023] [QA 1073]:** When calculating the leverage of an AIF whose core investment policy is to invest in real estate directly or indirectly, shall the AIFM include the exposure contained in financial or legal structures involving third parties controlled by that AIF as referred to in [Article 6\(1\) and \(3\) of Delegated Regulation \(EU\) 231/2013](#)?

**Answer 8: Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>114</sup>**

Yes. Under [Article 6\(3\) of Delegated Regulation \(EU\) 231/2013](#), an AIFM must include the exposure contained in financial or legal structures involving third parties controlled by the AIF when calculating the leverage of such

<sup>114</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

AIF, where these structures are specifically set up to directly or indirectly increase the exposure at the level of the AIF. For instance, financial or legal structures involving third parties (eg. special purpose vehicles controlled by the AIF), put in place to acquire real estate assets, which obtain leverage for that purpose, directly or indirectly create leverage at the level of the AIF investing in real estate.

The exemption referred to in the second sentence of Article 6(3) of Delegated Regulation (EU) 231/2013 for AIFs whose core investment policy is to acquire control of non-listed companies or issuers, applies solely to non-listed companies (mostly venture capital and private equity funds), provided that the AIF or the AIFM acting on behalf of the AIF does not have to bear potential losses beyond its investment in the respective company or issuer. Therefore, that exemption should not apply to AIFs, which acquire real estate assets indirectly through non-listed companies, as such non-listed companies are being utilised by the AIF with the purpose of implementing the AIF's investment policy, which is the acquisition of real estate assets.

## Section VIII: Delegation

Date last updated: 20 July 2022

**Question 1 [last update 30 September 2014]:** An AIFM manages multiple AIFs. When assessing whether any delegation of portfolio management and/or risk management by the AIFM results in the AIFM becoming a letter-box entity as referred to in [Article 20 of the AIFMD](#), should the assessment be made at the level of the AIFM or at the level of each AIF?

**Answer 1:** The provisions on letter-box entities in [Article 82 of the implementing Regulation](#) apply in relation to the management of a particular AIF and not in relation to a group of AIFs. The assessment should therefore be carried out at the level of each individual AIF.

**Question 2 [last update 16 November 2016]:** Where the AIFM does not itself perform the functions set out in [Annex I of the AIFMD](#), does this release the AIFM from its responsibility to ensure compliance of the relevant function(s) with the AIFMD?

**Answer 2:** No. Where a third party performs a function stated in Annex I of the AIFMD, this function should be considered as having been delegated by the AIFM to the third party. Therefore, the AIFM should be responsible for ensuring compliance with the requirements on delegation set out in [Article 20 of the AIFMD](#) and the principle expressed in [Article 5\(1\)](#) of the Directive according to which the single AIFM appointed for an AIF is responsible for ensuring compliance with the AIFMD. For the avoidance of doubt, this applies to all functions stated in point 1 and point 2 of Annex I of the AIFMD.

**Question 3 [last update 16 November 2016]:** Can an externally-managed AIF itself perform the investment management functions set out in point 1 of [Annex I](#) or functions set out in point 2 of [Annex I of the AIFMD](#) or would it be possible that the external AIFM delegates the performance of these functions to the governing body or any other internal resource of the externally-managed AIF?

**Answer 3:** No. Externally-managed AIFs are not regulated as AIFM. The performance of the functions stated in Annex I of the AIFMD is only permitted for AIFs which are internally-managed pursuant to Article 5(1)(b) of the AIFMD. Where the AIF appoints an external AIFM pursuant to [Article 5\(1\)\(a\)](#), the external AIFM is through its appointment as AIFM of the AIF responsible for providing the functions stated in Annex I of the AIFMD. The external AIFM may delegate to third parties the task of carrying out functions on its behalf in accordance with [Article 20 of the AIFMD](#). The AIF is, however, not a 'third party' in accordance with [Article 20\(1\) of the AIFMD](#).

**Question 4 [last update 20 July 2022] [QA 1026]:** When the marketing of an AIF or a UCITS is not performed by the AIFM or UCITS management company but by a third party distributor, does the responsibility for ensuring that marketing communications comply with the requirements set out in Article 4(1) of Regulation (EU) 2019/1156 lie with the AIFM or the UCITS management company where there is a contractual relationship between the AIFM or the UCITS management company and the third party distributor? Conversely, does the responsibility for ensuring that marketing communications comply with the requirements set out in Article 4(1) of Regulation (EU) 2019/1156 still lie with the AIFM or the UCITS management company in case there is no contractual relationship with the third party distributor? [Question 1.5 of the FAQ CBDF – marketing communications published by CSSF \(Appendix XVII\)](#)

**Answer 4: Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>115</sup>**

Marketing is one of the functions included in the management of funds, and therefore subject to the provisions on delegation (Article 13 of Directive 2009/65/EC and [Article 20 of Directive 2011/61/EU](#)), which themselves govern the conditions for that delegation under the principle of full responsibility of fund managers.

Article 1 of Regulation (EU) 2019/1156 specifies that the aim of this Regulation is to establish uniform rules on the publication of national provisions concerning marketing requirements for collective investment undertakings and on marketing communications addressed to investors. These requirements are laid down in Article 4 of this Regulation, and are further clarified in ESMA Guidelines.

Fund managers are responsible for the compliance with Article 4 of Regulation (EU) 2019/1156, irrespective of who is the actual entity marketing the fund, and of the relationship it has with the third party distributor (whether it is contractual or not).

**Section IX: Calculation of the total value of assets under management**

Date last updated: 3 June 2016

**Question 1 [last update 11 November 2014]:** Should AIFMs include short derivative positions in the calculation of the total value of assets under management?

**Answer 1:** Yes. According to [Article 2\(3\) of the implementing Regulation](#), AIFMs should convert derivative instrument positions (both long and short) into an equivalent position in the underlying assets and the absolute value of that equivalent position should then be used for the calculation of the total value of assets under management.

**Question 2 [last update 21 July 2015]:** Should AIFMs include short non-derivative positions for the calculation of the total value of assets under management?

**Answer 2:** Yes. According to [Article 2\(1\)\(b\) of the implementing Regulation](#), AIFMs should include assets acquired through leverage. Where a short sale occurs with assets being received, AIFMs should include the assets received in the calculation of the total value of assets under management.

**Question 3 [last update 3 June 2016]:** Should "committed capital" be taken into account when calculating the total value of assets under management (AuM) pursuant to [Article 3\(2\) of AIFMD](#) and [Article 2 of Commission Regulation \(EU\) No 231/2013](#)?

**Answer 3:** Generally, no. As a general rule, committed capital does not contribute to the actual assets of the AIF for which it was pledged, as long as it has not been drawn down by the AIFM. However, Article 2 of Commission Regulation (EU) No 231/2013 makes reference to national valuation rules as well as to rules on valuation contained in the AIF rules or articles of incorporation. Committed capital should therefore be taken into account in the calculation of total AUM if national rules foresee this.

**Section X: Additional own funds**

Date last updated: 3 June 2016

**Question 1: [last update 26 March 2015]:** Should AIFMs exclude investments by AIFs in other AIFs they manage for the calculation of additional own funds under [Article 9\(3\) of the AIFMD](#)?

**Answer 1:** Yes.

<sup>115</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

**Question 2: [last update 26 March 2015]:** Should AIFMs exclude investments by AIFs in other AIFs they manage for the calculation of additional own funds to cover potential liability risks arising from professional negligence under [Article 9\(7\) of the AIFMD](#)?

**Answer 2:** No, because investments in other AIFs managed by the same AIFM increase the operational risk.

**Question 3 [last update 3 June 2016]:** Should "committed capital" be taken into account when calculating the additional own funds requirement pursuant to [Articles 9\(3\) and 9\(7\) of AIFMD](#) and [Article 14\(2\) of Commission Regulation \(EU\) No 231/2013](#)?

**Answer 3:** As a general rule, committed capital does not contribute to the actual assets of the AIF for which it was pledged, as long as it has not been drawn down by the AIFM.

**Question [last update 18 June 2024] [QA 2227]:** Are internally managed AIFs and self-managed UCITS investment companies required to maintain initial capital and additional own funds, respectively, pursuant to Article 9 of AIFMD and Articles 7 and 29 of the UCITS Directive, that are kept separate from the collective investment undertaking's assets, meaning that the initial capital and the additional own fund should not be included in the fund's net asset value (NAV)?

**Answer:** Yes. Internally managed AIFs and self-managed UCITS investment companies shall adopt procedures and systems to ensure compliance at all times with the requirements related to own funds under the UCITS and AIFM Directives.

As explained in recital 23 of AIFMD, minimum capital requirements imposed on AIFMs pursuant to Article 9 aim to "ensure the continuity and the regularity of the management of AIFs provided by an AIFM and to cover the potential exposure of AIFMs to professional liability in respect of all their activities". Article 11(c) of AIFMD provides that the competent authorities of the home Member State of the AIFM may withdraw the authorisation issued to an AIFM where that AIFM no longer meets the conditions under which authorisation was granted, including as regards own funds. Recital 9 and Article 29 of the UCITS Directive mirror AIFMD requirements.

Article 31 of the UCITS Directive and Article 18 of AIFMD demonstrate the differences in affectation and purpose between an investment company's own funds and its assets, as they require investment companies to have adequate internal control mechanisms, including rules for the holding or management of investments in financial instruments in order to invest their own funds, which should be separate from assets of the investment company that should be invested according to the instruments of incorporation and the investment policy of that investment company.

As a result, an investment company's own funds should be neither invested in accordance with the funds' investment strategy nor distributed to the redeeming investors, but instead they should be preserved to cover exposures from the investment company's professional liability and they should always remain within the limits of the minimum capital requirements.

On the contrary, the assets of UCITS and AIFs should be invested according to the UCITS' or AIF's investment policy and objectives (Article 4(1)(a), 18(1) of AIFMD, Article 60(2) of Commission Delegated Regulation 231/2013, Article 1(2)(a), 5(2), 51(2) and 30 of UCITS D, Article 9(2) of Commission Directive 2010/43/EU).

## Section XI: Scope

Date last updated: 16 December 2022

**Question 1 [last update 26 March 2015]:** According to [Article 36\(1\) of the AIFMD](#), Member States may allow an authorised EU AIFM to market to professional investors, in their territory only, units or shares of EU feeder AIFs which have a non-EU master AIF managed by a non-EU AIFM provided that the EU AIFM managing the EU feeder AIF fulfils certain conditions as set out in Article 36(1) (a) to (c). Does the non-EU AIFM managing the non-EU master AIF also have to be authorised under the AIFMD?

**Answer 1:** According to Article 36(2) of the AIFMD, Member States may impose stricter rules on the AIFM in respect of the application of Article 36 of the AIFMD. Therefore, whether the non-EU AIFM managing the non-EU master AIFs has to be authorised under the AIFMD depends on the national law of the Member State transposing Article 36 of the AIFMD.

**Question 2 [last update 17 December 2021] [QA 1027]:** Are managers of undertakings investing in crypto-assets subject to the AIFMD?

**Answer 2 [last update 17 December 2021]:** It is important to assess on a case-by-case basis whether the relevant undertaking meets the definition of an 'AIF' as legally defined in Article 4(1)(a) of the AIFMD. In this context, market participants and NCAs should pay attention to the guidance provided in the ESMA Guidelines on key concepts of the AIFMD (ESMA/2013/611).

Collective investment undertakings raising capital from a number of investors to invest in crypto-assets in accordance with a defined investment policy for the benefit of those investors will qualify as 'AIF' in accordance with Article 4(1)(a) of the AIFMD. As the AIFMD does not provide for a list of eligible or non-eligible assets, AIFs may in principle invest in any traditional or alternative assets as long as the AIFM can ensure compliance with the AIFMD. However, more specific investment and risk diversification requirements for AIFs investing in crypto-assets as well as limitations regarding the target investors of such AIFs may exist at national level.

In this context, ESMA reminds market participants and investors of the high risks involved in investments in crypto-assets as previously stated in the joint ESMA, EBA and EIOPA warning from February 2018 (ESMA50-164-1284).<sup>116</sup> Market participants and investors should therefore be alert to the high risks of buying and/or holding these assets, including the possibility of losing all their money.

**Question 3 [last update 16 December 2022] [QA 1028]:** Are managers of special purpose acquisition companies ("SPACs") subject to the AIFMD?

**Answer 3 [last update 16 December 2022]:** SPACs are not yet legally defined in Union law.

In its Public Statement (ESMA32-384-5209)<sup>117</sup> ESMA has described SPACs as shell companies that are admitted to trading on a trading venue with the intention to acquire a business. ESMA has also listed the three stages of the typical life-cycle of a SPAC: (i) the Initial Public Offering ("IPO"); (ii) the SPAC searches for a target company to acquire and (iii) the business combination with the target company, typically through a merger ("business combination").

However, the structure of SPAC transactions is complex and there are significant variations between the general structuring of relevant vehicles and concrete modalities of their transactions.

In light of this, it is important to assess on a case-by-case basis:

- whether SPACs meet the definition of an "AIF" as legally defined in Article 4(1)(a) of the AIFMD, and
- whether SPACs qualify as a "holding company" in accordance with Article 4(1)(o) of the AIFMD.

This assessment should take into account the specific features and characteristics of the individual structure of the SPAC and it should be based on substance, not form, paying close attention to the guidance provided in the ESMA Guidelines on key concepts of the AIFMD (ESMA/2013/611).

ESMA also notes that during the life-cycle of a SPAC, there might be circumstances which may be relevant when assessing if a SPAC qualifies as AIF, as follows:

- a SPAC does not raise capital through the IPO with a view to investing it in accordance with a defined investment policy;
- all, or substantially all, the proceeds of the IPO are used for the business combination;
- following the business combination, the SPAC has a general commercial or industrial purpose as defined in the ESMA Guidelines on key concepts of the AIFMD.

The occurrence of some or all of these circumstances may indicate that a SPAC is not an AIF as it might not meet all the elements described in the ESMA Guidelines on key concepts of the AIFMD.

<sup>116</sup> [https://www.esma.europa.eu/sites/default/files/library/esma50-164-1284\\_joint\\_esas\\_warning\\_on\\_virtual\\_currenciesl.pdf](https://www.esma.europa.eu/sites/default/files/library/esma50-164-1284_joint_esas_warning_on_virtual_currenciesl.pdf)

<sup>117</sup> [https://www.esma.europa.eu/sites/default/files/library/esma32-384-5209\\_esma\\_public\\_statement\\_spacs.pdf](https://www.esma.europa.eu/sites/default/files/library/esma32-384-5209_esma_public_statement_spacs.pdf)

## Section XII: Impact of Regulation (EU) 648/2012 (EMIR)<sup>118</sup> on AIFMD

Date last updated: 24 May 2017

**Question 1 [last update 19 July 2016]:** For OTC financial derivative transactions that are centrally cleared and subject to the reporting obligation of EMIR, can AIFMs rely on the valuation provided by the central counterparty (CCP)?

**Answer 1:** No. The AIFMD framework requires AIFMs to have in place a process for proper and independent verification of the value of the OTC financial derivative transactions, even if they are centrally cleared. The valuation provided by the CCP can only serve as a point of reference for the verification performed by the AIFM. Nevertheless, the AIFM should be able to justify any deviation from the valuation provided by the CCP.

**Question 2 [last update May 2017]:** Where an AIF is subject to the clearing obligation of Article 4(1) of EMIR, can it make use of the exemption for intragroup transactions (Article 4(2) of EMIR)?

**Answer 2:** ESMA is of the view that in the case of AIFs the exemption for intragroup transactions should be construed narrowly, and that in most cases it will not be possible for the exemption to be used. An AIF can only make use of the exemption for intragroup transactions if it has been established to form part of the same group (as defined in Article 2(16) of EMIR) as the counterparty to the OTC derivative contract and if it fulfils all the criteria for intragroup transactions set out in Article 3(2)(a)(i)-(iv), (b), or (d) of EMIR.

Article 3(2)(a)(iii) of EMIR requires both counterparties to be included in the same consolidation on a full basis. In addition, they have to be subject to appropriate centralised risk evaluation, measurement and control procedures, as well as fulfil other specific requirements set out in Article 3(2) of EMIR.

An exemption to the clearing obligation based on Article 4(2) of EMIR can only be granted after a thorough case-by-case assessment, which will have to take into account whether the AIF has been established to form part of the same group as the counterparty to the OTC derivative contract and whether the AIF fulfils all the criteria set out in Article 3(2)(a), (b), or (d) of EMIR.

Where an AIF is granted an intragroup exemption for the clearing obligation, it follows that the AIF will not be considered a distinct entity and will not be treated separately for other purposes under EMIR either, in particular for the purpose of the bilateral margining thresholds calculation. Therefore, the aggregate month-end average notional amount referred in Article 28(1) of [Commission Delegated Regulation \(EU\) 2016/2251](#) shall be calculated at the group level (including the relevant AIF).

## Section XIII: Impact of Regulation (EU) 2015/2365 (SFTR)<sup>119</sup> on AIFMD

Date last updated: 5 October 2017

**Question 1 [last update 6 October 2016]:** Article 13 of [Regulation \(EU\) 2015/2365](#) on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012, requires UCITS management companies, UCITS investment companies, and AIFMs to provide information to investors on the use made of SFTs and total return swaps in the annual report of each UCITS/AIF under management, as well as in each half-yearly report for UCITS. As Article 13 applies from 13 January 2017, which report should be the first to include this disclosure?

**Answer 1:** The information should be included in the next annual or half-yearly report to be published after 13 January 2017 which may relate to a reporting period beginning before that date.

**Question 2 [last update 5 October 2017]:** Pursuant to Article 13 of [SFTR](#), UCITS management companies, UCITS investment companies, and AIFMs ("UCITS/AIF managers") shall inform investors on the use they make of SFTs and total return swaps in annual (UCITS and AIFs) and half-yearly (UCITS only) reports. The information on SFTs and total return swaps shall include the data provided for in Section A of the Annex to SFTR.

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<sup>118</sup> [Regulation \(EU\) No 648/2012](#) of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("European Markets Infrastructure Regulation").

<sup>119</sup> [Regulation \(EU\) 2015/2365](#) of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012.

Should this data be reported as aggregate data (with respect to the whole of the reporting period) or based on a snapshot (taken at the end of the reporting period)?

**Answer 2:** The table below explains how each data item in Section A of the Annex to the SFTR should be reported. All data items should be reported as a snapshot, with the exception of the following:

- Data on reuse of collateral
  - o Cash collateral reinvestment returns to the collective investment undertaking.
- Data on return and cost for each type of SFTs and total return swaps
  - o broken down between the collective investment undertaking, the manager of the collective investment undertaking and third parties (e.g. agent lender) in absolute terms and as a percentage of overall returns generated by that type of SFTs and total return swaps

For each of the data items firms should not artificially alter their practices in a way that would lead to the reporting being misleading.

The guidance provided by this Q&A is without prejudice to further work that ESMA intends to carry out in relation to the disclosure obligations for UCITS and AIFs under SFTR.

| Heading  | Sub-item   | How to report   |
|--|--|---|
| Global data  | The amount of securities and commodities on loan as a proportion of total lendable assets defined as excluding cash and cash equivalents   | Snapshot  |
|  | The amount of assets engaged in each type of SFTs and total return swaps expressed as an absolute amount (in the collective investment undertaking's currency) and as a proportion of the collective investment undertaking's assets under management (AUM). | Snapshot  |
| Concentration data   | Ten largest collateral issuers across all SFTs and total return swaps (break down of volumes of the collateral securities and commodities received per issuer's name);   | Snapshot  |
|  | Top 10 counterparties of each type of SFTs and total return swaps separately (Name of counterparty and gross volume of outstanding transactions).  | Snapshot  |
| Aggregate transaction data for each type of SFTs and total return swaps separately to be broken down according to the below categories | Type and quality of collateral;  | Snapshot  |
|  | Maturity tenor of the collateral broken down in the following maturity buckets: less than one day, one day to one week,  | Snapshot. All outstanding/existing collateral at the end of the reporting |

|  |   |  |
|--|---|--|
|  | one week to one month, one to three months, three months to one year, above one year, open maturity;  | period should be aggregated according to their maturity tenor. That aggregation should be broken down in the mentioned maturity buckets.   |
|  | Currency of the collateral;   | Snapshot. Currency of the existing collateral at the end of the reporting period.  |
|  | Maturity tenor of the SFTs and total return swaps broken down in the following maturity buckets: less than one day, one day to one week, one week to one month, one to three months, three months to one year, above one year, open transactions; | Snapshot. All outstanding/existing SFTs at the end of the reporting period should be aggregated according to their maturity tenor. That aggregation should be broken down in the mentioned maturity buckets. |
|  | Country in which the counterparties are established;  | Snapshot. Country where the counterparties of existing SFTs as of the end of the reporting period are established.   |
|  | Settlement and clearing (e.g., tri-party, Central Counterparty, bilateral).   | Snapshot   |
| Data on reuse of collateral  | Share of collateral received that is reused, compared to the maximum amount specified in the prospectus or in the disclosure to investors;  | Snapshot   |
|  | Cash collateral reinvestment returns to the collective investment undertaking.  | See explanation below table  |
| Safekeeping of collateral received by the collective investment undertaking as part of SFTs and total return swaps | Number and names of custodians and the amount of collateral assets safe-kept by each of the custodians  | Snapshot   |
| Safekeeping of collateral granted by the collective investment undertaking as part of SFTs and total return swaps  | The proportion of collateral held in segregated accounts or in pooled accounts, or in any other accounts  | Snapshot   |
| Data on return and cost for each type of SFTs and total return swaps   | broken down between the collective investment undertaking, the manager of the collective investment undertaking and third parties (e.g. agent lender) in absolute terms and as a percentage of overall  | See explanation below table  |

|  |   |  |
|--|---|--|
|  | returns generated by that type of SFTs and total return swaps |  |
|--|---|--|

Regarding the field "Cash collateral reinvestment returns to the collective investment undertaking", during the year the fund receives a certain amount of cash as collateral for SFTs which is invested and produces a return. All SFTs have a given duration (normally short term) and there may be several SFTs that are carried out on a number of occasions with repeated investments and divestments of cash. Due to the possible concatenation of the operations, there may be a certain amount of cash collateral which is constantly invested for the whole year and produces a return. One interpretation is that the SFTR requires managers to disclose at least the overall sum of the returns earned by the fund from all the investment operations made during the year with cash collateral. This sum may only be an income flow that covers the whole year and therefore the distinction between aggregate vs snapshot (i.e. flow vs stock data) is not meaningful, because it could be calculated in only one way. One alternative would be to state that this is "aggregate" by definition. Another alternative would be to require the disclosure of the cash collateral investment return, calculated as the sum of the cash flows received for the investment of SFTs cash collateral over the yearly average amount of cash collateral investments.

The same reasoning applies to the field "Data on return and cost for each type of SFTs and total return swaps/broken down between the collective investment undertaking, the manager of the collective investment undertaking and third parties (e.g. agent lender) in absolute terms and as a percentage of overall returns generated by that type of SFTs and total return swaps". The manager has to sum the inflows and outflows generated by all the operations during the year and disclose the two total amounts; again, there appears to be only one way to calculate the data required and the disclosure of rate of returns (gross and net of cost) could be required if deemed more appropriate.

## Section XIV: Branches

Date last updated: July 2018

**Question 1 [last update 23 July 2018]:** What are the supervisory responsibilities of competent authorities in host Member States when an alternative investment fund manager provides investment services through a branch established in the host Member State?

**Answer 1:** Under both the UCITS and the AIFM Directives, supervisory powers of competent authorities in relation to branches of UCITS management companies or alternative investment fund managers (AIFMs) established in a Member State that is not the home Member State are shared. The competent authority of the Member State in which the branch is located (host Member State) is responsible for the supervision of the branch's compliance with conduct rules referred to in Article 17(5) of the [UCITS Directive](#) and [Article 45\(2\) of the AIFMD](#) and the competent authority of the Member State in which the UCITS management company or the alternative investment fund manager is established (home Member State) is responsible for the supervision of the other requirements provided under the relevant applicable framework.<sup>120</sup>

Neither the UCITS Directive nor the AIFMD provides for an explicit framework for the allocation of supervisory responsibilities and powers for those cases where UCITS management companies or AIFMs are authorised to carry out investment services set out in Article 6(3) of the [UCITS Directive](#) and [Article 6\(4\) of the AIFMD](#) and have branches providing those services in other Member States. ESMA is of the view that responsibilities of home and host Member States should be identified similarly to, and consistently with, the general framework established for the provision of activities pursued by UCITS management companies and AIFMs through branches as well as with the MiFID II framework regulating the supervision on the provision of investment services across the EU. This approach is in line with the division of responsibilities provided under the MiFID II framework. In accordance with Article 35(8) of MiFID II, the competent authority of the host Member State has the responsibility for ensuring that the services provided by the branch of an investment firm or a credit institution in its territory comply with the MiFID II requirements under Articles 24 ("General principles and information to clients") and 25 ("Assessment of suitability and appropriateness and reporting to clients") of [MiFID II](#), which also apply to UCITS management companies and AIFMs providing investment services.

**Question [last update 18 June 2024] [QA 711]:** When an AIFM sets up a branch in another Member State for the sole purpose of carrying out any activity referred to in point (2)I of Annex I to the AIFMD, such as real estate

<sup>120</sup> See Article 17(4) and (5) of [UCITS Directive](#) and [Article 45\(1\) and \(2\) of the AIFMD](#). On this subject, see also "Notification frameworks and home-host responsibilities under UCITS and AIFMD", an [ESMA Thematic Study among National Competent Authorities](#).

administration activities, does the establishment of the branch have to be notified by the AIFM to the competent authorities of its home Member State pursuant to Article 33 (2) and (3) of the AIFMD?

**Answer:** No. Article 33 (1)(a), (2) and (3) AIFMD requires an EU-authorized AIFM to notify the competent authorities of its home Member State when it intends, either directly or by establishing a branch, to manage EU AIFs established in another Member State.

Point 1 of Annex I to AIFMD lists the investment management functions which an AIFM must at least perform when managing an AIF and which must be notified to the competent authorities of the AIFM's home Member State when they are carried out in another Member State either directly or through a branch.

The functions listed in point 2 of Annex I AIFMD may be additionally performed by an AIFM in the course of the collective management of an AIF. These functions are ancillary to the activities referred to in point 1 of Annex I to AIFMD and cannot be exercised independently from those.

Therefore, when an AIFM intends to carry out in another Member State solely the functions referred to in point 2 of Annex I to AIFMD either directly or through establishing a branch, a notification under Article 33(2) and (3) AIFMD is not required.

However, the AIFM may still need to provide information to the competent authorities of its home Member State under different legal bases (e.g. Article 7(2)(c) on the requirement to provide upon authorisation a program of activity setting out the organisational structure of the AIFM).

## Section XV: ESMA's guidelines on performance fees in UCITS and certain types of AIFs

Date last updated: 20 May 2022

**Question 1 [last update 30 March 2021] [QA 961]:** Based on paragraphs 40<sup>121</sup> and 41<sup>122</sup> of the guidelines on performance fees in UCITS and certain types of AIFs ("Guidelines on performance fees"), should performance fees be paid only at the end of the performance reference period of 5 years?

**Answer 1 [last update 30 March 2021]:** No. The Guidelines on performance fees do not prevent to pay performance fees during the performance reference period of 5 years and/or in the first years of a fund's existence, in case the fund has not existed for 5 years.

By way of example, if on the crystallisation date of the fund (e.g. at the end of the second year of existence of the fund), the fund has overperformed the reference indicator and there is a positive accrual of performance fees those can be paid. In this case, the accrual will be crystallised in the payment of the performance fees to the management company.

On the contrary, if on the crystallisation date of the fund (e.g. at the end of the third year of existence of the fund) the fund has underperformed the reference indicator and as a consequence there are no accrued performance fees, this underperformance is brought forward for the purpose of the calculation of performance fees the following year. In this way, compensation of negative performances is ensured over the years during a reference period of 5 years.

Example:

- **Crystallisation date: end of the second year of existence of the fund**

Performance of the fund: 10%

Performance of the reference indicator: 5%

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<sup>121</sup> Paragraph 40) of the Guidelines on performance fees states that "In case the fund employs a performance fee model based on a benchmark index, it should be ensured that any underperformance of the fund compared to the benchmark is clawed back before any performance fee becomes payable. To this purpose, the length of the performance reference period, if this is shorter than the whole life of the fund, should be set equal to at least 5 years."

<sup>122</sup> Paragraph 41) of the Guidelines on performance fees states that "Where a fund utilises a HWM model, a performance fee should be payable only where, during the performance reference period, the new HWM exceeds the last HWM. The starting point to be considered in the calculations should be the initial offering price per share. For the HWM model, in case the performance reference period is shorter than the whole life of the fund, the performance reference period should be set equal to at least five years on a rolling basis. In this case, performance fee may only be claimed if the outperformance exceeds any underperformances during the previous five years and performance fees should not crystallise more than once a year."

Overperformance: 5%  
Performance fees can be paid to the management company

• **Crystallisation date: end of the second year of existence of the fund**

Performance of the fund: 10%  
Performance of the reference indicator: 10%  
Overperformance: 0%  
No crystallisation of performance fees

• **Crystallisation date: end of the third year of existence of the fund**

Performance of the fund: 5%  
Performance of the reference indicator: 10%  
Underperformance: -5% (this underperformance should be taken into account in the subsequent calculation of performance fees)  
Not only performance fees cannot be paid but the underperformance of -5% should be brought forward to the following year and clawed back before any performance fee can be paid (see below)

• **Crystallisation date: end of the fourth year of existence of the fund**

Performance of the fund: 8%  
Performance of the reference indicator: 5%  
Overperformance: 3%  
Underperformance from year 3 -5%  
Global net performance: -2%  
Not only performance fees cannot be paid but the underperformance of -2% should be brought forward to the following year and clawed back before any performance fee can be paid

This should not prevent NCAs to require funds to apply stricter rules (e.g. to crystallise fees only after 5 years or to apply reference periods longer than 5 years), bearing in mind that any specific provision applying at national level in addition to the provisions set out in the guidelines should not jeopardise the rules regarding funds' cross border distribution<sup>123</sup> and the split of competences between the home and host competent authority<sup>124</sup> to this regard.

**Question 2 [last update 30 March 2021] [QA 962]:** Paragraphs 40)<sup>125</sup> and 41)<sup>126</sup> of the Guidelines on performance fees recommend that the length of the performance reference period<sup>25</sup> (if this is shorter than the whole life of the fund) should be set equal to at least 5 years. How should the performance reference period be set for the first time in light of the application date of the guidelines?

**Answer 2 [last update 30 March 2021]:** Managers of any funds already compliant with paragraphs 40) and 41) of the Guidelines on performance fees before the application date of the guidelines should look at the past 5 years/whole life of the fund for the purpose of setting the performance reference period (i.e. they should not reset the performance reference period after the application date of the guidelines).

In all the other cases, managers should apply the performance reference period starting from the beginning of the financial year following 6 months from the application date of the Guidelines (i.e. the performance reference period should start at the beginning of the financial year following 5 July 2021; by way of example, if the financial year of the fund starts on 1 September 2021, the period 1 September 2021 – 1 September 2022 should be considered as the first year of the performance reference period).

**Question 3 [last update 30 March 2021] [QA 1029]:** Are ELTIFs in scope of the Guidelines on performance fees?

<sup>123</sup> See Chapter XI of the UCITS Directive.

<sup>124</sup> See Chapter XII of the UCITS Directive

<sup>125</sup> See footnote 111.

<sup>126</sup> See footnote 112.

**Answer 3 [last update 30 March 2021]:** The Guidelines on performance fees apply to managers of UCITS and, in case Member States allow AIFMs to market to retail investors in their territory units or shares of AIFs they manage in accordance with Article 43 of the AIFMD, they also apply to AIFMs of those AIFs, except for:

a) closed-ended AIFs; and

b) open-ended AIFs that are EuVECAs (or other types of venture capital AIFs), EuSEFs, private equity AIFs or real estate AIFs.

Therefore, ELTIFs marketed to retail investors that do not have a closed-ended structure, within the meaning of Article 1(2) of the Delegated Regulation 694/2014<sup>127</sup>, and are not venture capital/private equity or real estate AIFs are in scope of the guidelines.

**Question 4 [last update 28 May 2021] [QA 1030]:** Are registered AIFMs referred to in Article 3(2) of the AIFMD subject to ESMA's Guidelines on performance fees while marketing to retail investors units or shares of AIFs they manage?

**Answer 4 [last update 28 May 2021]:** The Guidelines on performance fees do not apply to registered AIFMs referred to in Article 3(2) of the AIFMD. Such registered AIFMs are only subject to the requirements referred to in that Article, which are outside the scope of the Guidelines. However, Member States may decide to impose stricter requirements on registered AIFMs and to allow them to market AIFs to retail investors in their territory, in accordance with Articles 3(3) and 43(1) of the AIFMD. In such cases, National Competent Authorities may also decide to apply the Guidelines to registered AIFMs.

**Question 5 [last update 20 May 2022] [QA 963]:** Based on paragraph 40<sup>128</sup> of the Guidelines on performance fees, how should the performance reference period<sup>129</sup> for the benchmark model<sup>130</sup> be set?

**Answer 5 [last update 20 May 2022]:** Paragraph 40) of the guidelines recommends that:

- i. any underperformance of the fund compared to the benchmark index should be clawed back before any performance fee becomes payable; and
- ii. the length of the performance reference period, if this is shorter than the whole life of the fund, should be set equal to at least 5 years.

In order to comply with the above recommendations, it should be ensured that any underperformance is brought forward for a minimum period of 5 years before a performance fee becomes payable, i.e. fund managers should look back at the past 5 years for the purpose of compensating underperformances.

In case the fund has overperformed the benchmark index, the fund manager should be able to crystallise performance fees.

The following example illustrates the principles above (please note that the two tables below relate to the same example, the first one illustrated through a graphical representation, while the second one displayed in numerical terms):

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<sup>127</sup> Article 1(2) of the Delegated Regulation 694/2014 states that "An AIFM of an open-ended AIF shall be considered to be an AIFM which manages an AIF the shares or units of which are, at the request of any of its shareholders or unitholders, repurchased or redeemed prior to the commencement of its liquidation phase or wind-down, directly or indirectly, out of the assets of the AIF and in accordance with the procedures and frequency set out in its rules or instruments of incorporation, prospectus or offering documents.

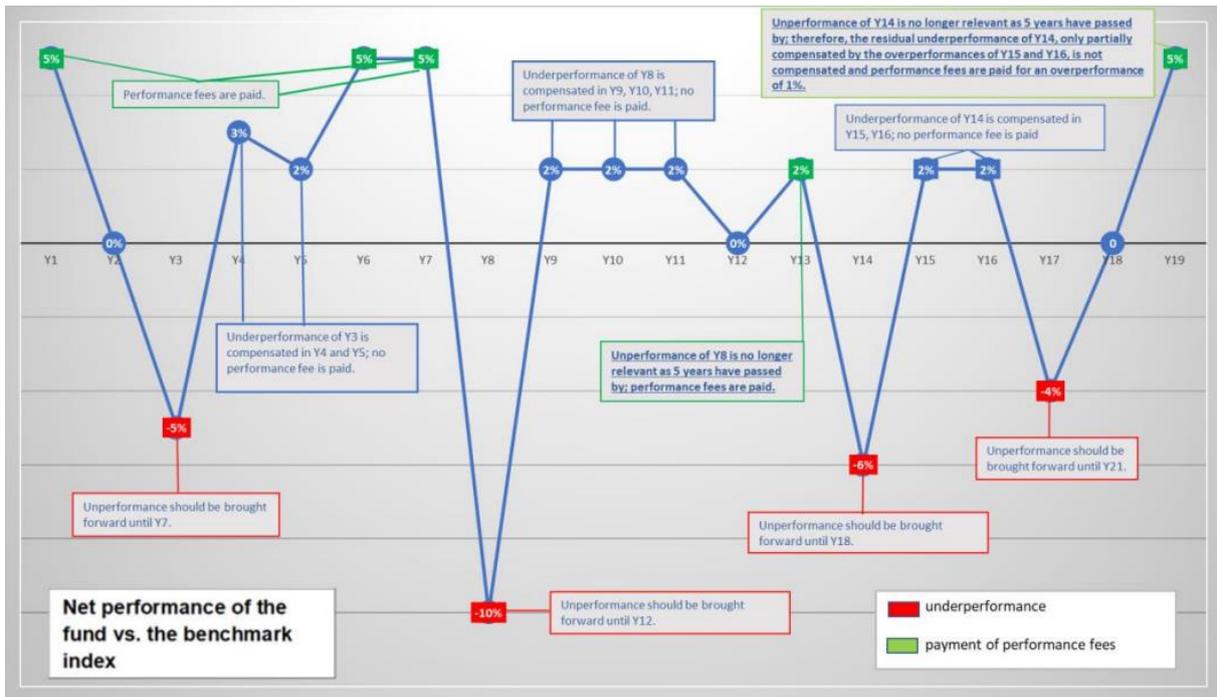
A decrease in the capital of the AIF in connection with distributions according to the rules or instruments of incorporation of the AIF, its prospectus or offering documents, including one that has been authorised by a resolution of the shareholders or unitholders passed in accordance with those rules or instruments of incorporation, prospectus or offering documents, shall not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type.

Whether an AIF's shares or units can be negotiated on the secondary market and are not repurchased or redeemed by the AIF shall not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type".

<sup>128</sup> See footnote 111.

<sup>129</sup> See footnote 117.

<sup>130</sup> This is defined as a performance fee model whereby the performance fees may only be charged on the basis of outperforming the reference market index. See the definitions Section of the Guidelines on performance fees.



|     | Net performance | Underperformance to be compensated in the following year | Payment of performance fees |
|-----|-----------------|--|-----------------------------|
| Y1  | 5%              | 0%   | YES                         |
| Y2  | 0%              | 0%   | NO                          |
| Y3  | -5%             | -5%  | NO                          |
| Y4  | 3%              | -2%  | NO                          |
| Y5  | 2%              | 0%   | NO                          |
| Y6  | 5%              | 0%   | YES                         |
| Y7  | 5%              | 0%   | YES                         |
| Y8  | -10%            | -10%   | NO                          |
| Y9  | 2%              | -8%  | NO                          |
| Y10 | 2%              | -6%  | NO                          |
| Y11 | 2%              | -4%  | NO                          |
| Y11 | 2%              | -4%  | NO                          |

|     |     |                    |     |
|-----|-----|--------------------|-----|
| Y12 | 0%  | 0% <sup>131</sup>  | NO  |
| Y13 | 2%  | 0%                 | YES |
| Y14 | -6% | -6%                | NO  |
| Y15 | 2%  | -4%                | NO  |
| Y16 | 2%  | -2%                | NO  |
| Y17 | -4% | -6%                | NO  |
| Y18 | 0%  | -4% <sup>132</sup> | NO  |
| Y19 | 5%  | 0%                 | YES |

The following are additional examples aimed at further clarifying the mechanism of compensation of underperformances:

- i. in the case the net performance of the fund in Y18 was equal to 2% (instead of 0%), the underperformance to be carried forward to the following year (Y19) would be equal to -4%. This is in light of the fact that during Y18, the underperformance of -2% coming from Y14 should still be compensated and, in addition to that, the performance of -4% coming from Y17 should be brought forward to the following year.
- ii. in the case the net performance of the fund in Y18 was equal to 5% (instead of 0%), the underperformance to be carried forward to the following year (Y19) would be equal to -1%. This is in light of the fact that the residual underperformance coming from Y17 that was not yet compensated (-1%) should be brought forward to the following year (Y19).
- iii. in the case the net performance of the fund in Y18 was equal to 7% (instead of 0%), the net performance of the fund would compensate the underperformance of -6% coming from Y17. The positive accrual of performance fees for the 1% difference would therefore be crystallised in the payment of the performance fees to the management company. There would be no underperformance to be carried forward to Y19.

This is in line with the principle in the guidelines that underperformance in a given year (e.g. Y14) should still be compensated during a period which includes the fifth year following that underperformance (Y18), while not be brought forward to the sixth year (Y19).

**Question 6 [last update 28 May 2021] [QA 1031]:** How should the performance reference period<sup>133</sup> be set in case of a merger where the receiving AIF is a newly established fund with no performance history and it is in effect a continuation of the merging AIF?<sup>134</sup>

**Answer 6 [last update 28 May 2021]:** In order to ensure that the merger is not conducted with the aim of resetting the performance reference period, in the case of a merger where the receiving AIF is a newly

<sup>131</sup> The underperformance of Y12 to be taken forward to the following year (Y13) is 0% (and not -4%) in light of the fact that the residual underperformance coming from Y8 that was not yet compensated (-4%) is no longer relevant as the 5-year period has elapsed (the underperformance of Y8 is compensated until Y12).

<sup>132</sup> The underperformance of Y18 to be taken forward to the following year (Y19) is 4% (and not -6%) in light of the fact that the residual underperformance coming from Y14 that was not yet compensated (-2%) is no longer relevant as the 5-year period has elapsed (the underperformance of Y14 is compensated until Y18).

<sup>133</sup> See footnote 117.

<sup>134</sup> Based on the scope section of the guidelines, "In case Member States allow AIFMs to market to retail investors in their territory units or shares of AIFs they manage in accordance with Article 43 of the AIFMD, the guidelines also apply to AIFMs of those AIFs, except for: (a) closed-ended AIFs; and (b) open-ended AIFs that are EuVECAs (or other types of venture capital AIFs), EuSEFs, private equity AIFs or real estate AIFs".

established fund with no performance history and the competent authority of the receiving AIF assesses that the merger does not substantially change the AIF's investment policy, the performance reference period of the merging AIF should continue applying in the receiving AIF.

**Question 7 [last update 16 July 2021] [QA 1032]:** In case the authorised AIFM has delegated the portfolio management function to different delegated portfolio managers, would it be admissible to pay a performance fee to those delegated portfolio managers who have overperformed during the performance reference period, despite a global underperformance of the fund during the same performance reference period?

**Answer 7 [last update 16 July 2021]:** No. Based on paragraph 37 of the guidelines, performance fees:

- should be paid only where positive performance has been accrued during the performance reference period;
- could be paid in case the fund has overperformed the reference benchmark but had a negative performance.

The above also applies in case of delegation by the authorised AIFM to different delegated portfolio managers. Therefore, in case of a global underperformance of the fund, performance fees should not be paid to those delegated portfolio managers who have overperformed.

**Question 8 [last update 16 July 2021] [QA 1033]:** In case of creation of a new compartment/share class in an existing AIF in the course of its financial year or in case of creation of a new AIF, can performance fees be crystallised after less than 12 months from the date of creation of such a new AIF/compartment/share class?

**Answer 8 [last update 16 July 2021]:** No. Performance fees, if any, should be crystallised after at least 12 months from the creation of a new AIF/compartment/share class. Moreover, paragraph 35 of the guidelines foresees that the crystallisation date should be the same for all share classes of a fund that levies a performance fee.

**Question 9 [last update 20 May 2022] [QA 967]:** Paragraphs 40<sup>135</sup> and 41<sup>136</sup> of the Guidelines on performance fees recommend that the length of the performance reference period (if this is shorter than the whole life of the fund) should be set equal to at least 5 years. Is this requirement applicable to the hurdle rate model?

**Answer 9 [last update 20 May 2022]:** Yes, as paragraph 42 of the guidelines<sup>137</sup> clarifies that the only exception to the application of the 5-year performance reference period is "*the fulcrum fee model and other models which provide for a symmetrical fee structure*".

**Question [last update 24 May 2024] [QA 2174]:** Where a manager applies an additional reference indicator to the performance fee model (e.g.: a hurdle rate on top of the High-Water Mark model or the benchmark model), should the minimum performance reference period be applied to the additional reference indicator?

**Answer [last update 24 May 2024]:** The minimum performance reference period in accordance with paragraph 40-42 of the Guidelines should be applied to the performance fee model. However, the manager is not required to apply the minimum performance reference period to the additional reference indicator, considering that (a) the final combination (i.e.: the performance fee model plus the additional reference indicator) does not result in increased fees for investors compared to the use of the performance fee model alone and (b) the performance fee model (excluding the additional reference indicator) is consistent with the fund's investment objectives, strategy and policy, in line with Guideline 2. In line with paragraph 46 of guidelines, appropriate disclosure should be provided in the prospectus.

**Question [last update 24 May 2024] [QA 2176]:** Can the manager of a Fund of Funds (FoF) charge performance fees?

<sup>135</sup> See footnote 111.

<sup>136</sup> See footnote 112.

<sup>137</sup> Paragraph 42 of the Guidelines states that "The performance reference period should not apply to the fulcrum fee model and other models which provide for a symmetrical fee structure, as in these models the level of the performance fee increases or decreases proportionately with the investment performance of the fund".

**Answer [last update 24 May 2024]:** In line with paragraph 18 of the Guidelines, the manager of a FoF should be able to demonstrate to the NCA that the performance fee model of a fund it manages constitutes a reasonable incentive for the manager and is aligned with investors' interests.

Against this background, as a general principle, where the investment policy of a FoF requires the active management of the FoF and the determination of the allocation in the underlying funds has a material impact on the FoF performance, performance fees for the manager of the FoF could be considered as justified.

The assessment on how performance fees are justified in light of the investment policy of the FoF should be reflected in the fund documentation, including the fund rules or the instruments of incorporation and may be reviewed, where needed, by the NCA on a case-by-case basis.

## Section XVI: Exemptions

Date last updated: 10 March 2023

**Question 1 [last update 10 March 2023] [QA 697]:** Article 3(2) AIFMD states the following: "Without prejudice to the application of Article 46, only paragraphs 3 and 4 of this Article shall apply to the following AIFMs:

- (c) AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million; or
- (d) AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management in total do not exceed a threshold of EUR 500 million when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF".

How should the notion of "substantive direct or indirect holding" in Article 3(2) of the AIFMD be interpreted. In particular, is there a quantitative threshold above which the criterion of substantive direct or indirect holding could be considered as met, and, if yes, what this threshold would be?

**Answer 1: Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation<sup>138</sup>**

As mentioned in Article 3(2)(a) AIFMD, the notion of "substantive direct or indirect holding" refers to situations where the AIFM manages the portfolios of AIFs through its direct or indirect holding in a company. This covers, for instance, situations whereby the AIFM de facto has the power to impose decisions on the AIF portfolio composition, its asset allocation or its risk management.

Article 3(2)(a) AIFMD does not set a quantitative threshold. The notion of "substantive direct or indirect holding" shall be assessed on a case-by-case basis by AIFMs supervisors.

## Section XVII: Marketing

Date last updated: 26 May 2023

**Question 1 [last update 26 May 2023] [QA 707]:** Are non-EU AIFMs allowed to carry out pre-marketing activities pursuant to Article 30a of the AIFMD?

**Answer 1 [last update 26 May 2023]:** No, Article 30a of the AIFMD does not cover pre-marketing activities by non-EU AIFMs. Therefore, non-EU AIFMs should not be allowed to carry out pre-marketing activities pursuant to the AIFMD. However, national laws, regulations and administrative provisions may allow non-EU AIFMs to carry-

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<sup>138</sup> The answers provided by the European Commission clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudice the position that the European Commission might take before the Union and national courts.

out pre-marketing activities at national level and where this is the case, non-EU AIFMs do not benefit from a passport allowing them to carry out these activities in other Member States.

In line with recital 12 of Directive (EU) 2019/1160, such national laws, regulations and administrative provisions should not in any way disadvantage EU AIFMs vis-à-vis non-EU AIFMs.

## Appendix XV: FAQ AIFM published by CSSF

### Frequently Asked Questions

[\(version 22, April 2024\)](#)

concerning the Luxembourg Law of 12 July 2013 on alternative investment fund managers as well as the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage transparency and supervision.

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## CONTEXT

The following Frequently Asked Questions (FAQs) aim at highlighting some of the key aspects of the AIFMD regulation from a Luxembourg perspective. The FAQs are therefore primarily addressed to managers of alternative investment funds (AIFMs) and alternative investment funds (AIFs) that are established in Luxembourg.

The present FAQs are to be read in conjunction with the questions and answers ESMA has published with respect to the application of the AIFMD Regulation. These questions and answers, which will also be updated from time to time, are available on the following website:

[ESMA updates AIFMD Q&As \(europa.eu\)](https://www.esma.europa.eu/press-material/press-conferences-and-events/updates/aifmd-q&as)

In addition to the ESMA questions and answers, the European Commission has published answers to questions received in relation to the transposition of Directive 2011/61/EU on Alternative Investment Fund Managers. These questions and answers may be accessed on the dedicated webpage for Questions on Single Market Legislation of the European Commission:

<http://ec.europa.eu/yqol/index.cfm?fuseaction=legislation.show&lid=9>

*This document will be updated from time to time and the CSSF reserves the right to alter its approach to any matter covered by the FAQs at any time. You should regularly check the website of the CSSF in relation to any matter of importance to you to see if questions have been added and/or positions have been altered.*

## I. Definitions:

|                                    |   |
|------------------------------------|---|
| <b>Above-threshold AIFM:</b>       | AIFM that manages portfolios of AIFs whose assets under management in total exceed the thresholds under Article 3(2) of the Law of 2013   |
| <b>AIF(s):</b>                     | Alternative Investment Fund(s)  |
| <b>AIFM(s):</b>                    | Alternative Investment Fund Manager   |
| • <b>External AIFM</b>             | External AIFM refers to the legal person appointed by the AIF or on behalf of the AIF and which through this appointment is responsible for managing the AIF  |
| • <b>Internal AIFM</b>             | Internal AIFM refers to a structure where the legal form of the AIF permits an internal management and where the AIF's governing body has chosen not to appoint an external AIFM  |
| <b>AIFMD or AIFM Directive:</b>    | Directive 2011/61/EU of the European Parliament and of Council of 8 June 2011 on Alternative Investment Fund Managers   |
| <b>AIFMD-CDR:</b>                  | Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision |
| <b>AIFMD Depositary Agreement:</b> | Agreement covering the appointment of the depositary of a given AIF as required by Article 19(2) of the Law of 2013 and complying with the requirements of Article 83 of AIFMD-CDR  |

|   |  |
|---|--|
| <b>Authorised AIFM:</b>                               | (i) AIFM that manages portfolios of AIFs whose assets under management in total exceed the thresholds under Article 3(2) of the Law of 2013 or (ii) AIFM that manages portfolios of AIFs whose assets under management in total do not exceed the thresholds under Article 3(2) of the Law of 2013, but has chosen to opt in under the Law of 2013 on the basis of Article 3(4) of that law, and that are in both cases authorised under the Law of 2013   |
| <b>Below-threshold AIFM:</b>                          | AIFM that manages portfolios of AIFs whose assets under management in total do not exceed the thresholds under Article 3(2) of the Law of 2013   |
| <b>Chapter 15 ManCo(s):</b>                           | Management companies authorised under Chapter 15 of the Law of 2010  |
| <b>Chapter 16 ManCo(s):</b>                           | Management companies authorised under Chapter 16 of the Law of 2010  |
| <b>Circular CSSF 19/716:</b>                          | Circular CSSF 19/716 as amended by the Circular CSSF 20/743 on the provision in Luxembourg of investment services or performance of investment activities and ancillary services in accordance with Article 32-1 Law of 1993   |
| <b>ESMA:</b>  | European Securities and Markets Authority  |
| <b>ESMA Opinion on Reporting under Article 24(5):</b> | ESMA Opinion on the Collection of information for the effective monitoring of systemic risk under Article 24(5), first sub-paragraph, of the AIFMD ( <a href="#">ESMA/2013/1340</a> )  |
| <b>ESMA Reporting Guidelines:</b>                     | The ESMA Guidelines on reporting obligations under Articles 3(3)(d) and 24(1), (2) and (4) of the AIFMD ( <a href="#">ESMA/2014/869</a> )  |
| <b>IFM(s):</b>  | Investment fund managers   |
| <b>Investment Firm(s):</b>                            | Entity(ies) having been authorised under Part I, Chapter 2, Section 2, Subsection I of the Law of 1993   |
| <b>Law of 1915:</b>                                   | Law of 10 August 1915 on commercial companies  |
| <b>Law of 1993:</b>                                   | Law of 5 April 1993 on the financial sector  |
| <b>Law of 2004:</b>                                   | Law of 15 June 2004 relating to the investment company in risk capital («SICARs»)  |
| <b>Law of 2007:</b>                                   | Law of 13 February 2007 relating to specialised investment funds («SIFs»)  |
| <b>Law of 2010:</b>                                   | Law of 17 December 2010 relating to undertakings for collective investment («UCIs»)  |
| <b>Law of 2013:</b>                                   | Law of 12 July 2013 regarding alternative investment fund managers, transposing Directive 2011/61/EU of the European Parliament and of Council of 8 June 2011 on Alternative Investment Fund Managers  |
| <b>Loan Origination:</b>                              | Loan origination by an AIF is the process, initiated by its AIFM or, where applicable, by the AIF itself, of actively creating/granting/extending a loan as part of its investment policy. For the purpose of section 22 of part II of these FAQs, this concept refers to, and may comprise all relevant steps in the origination process, that is, among others, receiving and processing loan applications, performing the credit assessment and borrower selection, setting the characteristics of a specific loan (e.g., pricing (interest rates and fees), type of documentation, collateral requirements), monitoring, servicing and provisioning. Thus, the AIF becomes the original lender and the lending process is part of its investment policy. |

|  |   |
|--|---|
| <b>Loan Participation/Acquisition:</b> | <p>Loan participation/acquisition by an AIF is the process, initiated by its AIFM or, where applicable, by the AIF itself, of purchasing/acquiring all or parts of an existing loan or package of loans (whether fully drawn or not) on the secondary market from a third party after its origination. It also refers to any other way for the AIF to acquire loans as an investment apart from loan origination (such as e.g. participation (or sub-participation) in syndicated loans, consortiums, club deals). Loan participation/acquisition is thus only relating to parts of the overall loan process, while loan origination encompasses in particular the process of the initial granting and pricing of the loan.</p> <p>There are instances though, where these delimitations/distinctions become difficult and a close and careful case-by-case analysis is warranted.</p>  |
| <b>Marketing:</b>                      | A direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the EU  |
| <b>MiFID:</b>                          | Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU  |
| <b>MiFID rules:</b>                    | <ul style="list-style-type: none"> <li>• Law of 30 May 2018 on markets in financial instruments and transposing Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU;</li> <li>• Regulation (EU) No 600/2014 on markets in financial instruments (MiFIR)</li> <li>• Grand-ducal Regulation of 30 May 2018 on the protection of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits;</li> <li>• Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU 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; and</li> <li>• relevant delegated acts, implementing acts as well as guidelines and FAQs</li> </ul> |
| <b>Other Assets:</b>                   | Other assets as per Article 19(8)(b) of the Law of 2013   |
| <b>PRIIPs KID:</b>                     | Key investor document for packaged retail and insurance-based investment products   |
| <b>PRIIPs Regulation:</b>              | Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products   |
| <b>Product Law(s):</b>                 | The Luxembourg investment fund laws under which regulated AIFs can be established in Luxembourg, i.e. part II of the Law of 2010, the Law of 2004 and the Law of 2007   |

|                               |   |
|-------------------------------|---|
| <b>Professional investor:</b> | An investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to Directive 2004/39/EC  |
| <b>Registered AIFM:</b>       | AIFM that manages portfolios of AIFs whose assets under management in total do not exceed the thresholds under Article 3(2) of the Law of 2013 and who has not chosen to opt in as Authorised AIFM under the Law of 2013 on the basis of Article 3(4) of that law |
| <b>Retail investor:</b>       | An investor who is not a professional investor  |
| <b>UCI(s):</b>                | Undertakings for collective investment  |
| <b>UCITS Directive:</b>       | Directive 2009/65/EU 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)                   |
| <b>UCITS KIID:</b>            | Key investor information document within the meaning of Article 159 of the Law of 2010  |

## II. Questions and answers:

### 1. Scope: To whom does the regime resulting from the Law of 2013 apply?

10 January 2014

#### [↪ Art. 2 AIFM Law](#)

The main objective of the Law of 2013 is to regulate AIFMs and not directly AIFs. However, it is first necessary to identify the entities that should be qualified as AIFs before identifying AIFMs.

#### A) What is the definition of an AIF?

#### [↪ Art. 4 AIFM Law](#)

An AIF is any collective investment vehicle, including investment compartments thereof, which in accordance with the definition under Article 1(39) of the Law of 2013 in case of Luxembourg AIFs respectively under Article 4 (1)a) of the AIFMD in case of AIFs established in another EU Member State or in a third country (i) 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) does not require authorisation pursuant to Article 2(1) of the Law of 2010, respectively Article 5 of the UCITS Directive).

It is recommended that each collective investment vehicle performs a self-assessment to determine whether or not it falls within the definition of an AIF within the meaning of the Law of 2013.

It is the responsibility of the management body of any collective investment vehicle to self-assess if it has to be considered as an AIFM under the Law of 2013 or not.

#### B) Does the concept of AIF cover only regulated entities?

No.

The concept of AIF covers AIFs established in Luxembourg, in another EU Member State or in a third country irrespective of whether such AIF is a regulated or a non-regulated entity.

As far as Luxembourg entities are concerned, the following entities do qualify as AIF:

- all undertakings for collective investment established under part II of the Law of 2010;
- specialised investment funds established under the Law of 2007 if they fulfil the criteria under Article 1(39) of the Law of 2013;
- SICARs established under the Law of 2004 if they fulfil the criteria under Article 1(39) of the Law of 2013;
- any entity not regulated under the Law of 2010, the Law of 2007 or the Law of 2004 that also meets the criteria of Article 1(39) of the Law of 2013.

### C) What is the definition of an AIFM?

An AIFM means any legal person whose regular business is managing one or more AIF(s) in accordance with the definition under Article 1(46) of the Law of 2013. It should be noted that it is the responsibility of any legal person whose regular business is the management of one or more AIFs to self-assess if it is to be considered as an AIFM under the Law of 2013.

The Law of 2013 applies to both External AIFMs and Internal AIFMs.

### D) Which entities established in Luxembourg may potentially be considered as AIFMs?

The following entities may potentially be considered as AIFMs:

- (a) Chapter 15 ManCos under the Law of 2010;
- (b) Chapter 16 ManCos (Article 125-1 and Article 125-2) under the Law of 2010;
- (c) internally managed UCIs under part II of the Law of 2010;
- (d) internally managed SIFs under the Law of 2007;
- (e) internally managed SICARs under the Law of 2004;
- (f) any Luxembourg entity going to adopt the status of a « *gestionnaire de fonds d'investissement alternatifs* » regulated under the Law of 2013. This status has to be adopted by 1° any Luxembourg entity providing management services to AIFs which are not regulated under any of the Product Laws and 2° any internally managed Luxembourg entity qualifying as AIF which is not regulated under any of the Product Laws.

### E) Internal versus External AIFM: how to determine the AIFM with respect to AIFs structured as FCP or as limited partnership?

#### Art. 4 AIFM Law

AIFMs may either be an External AIFM or, where the legal form of the AIF permits an internal management, an Internal AIFM.

- I. With respect to AIFs structured as a FCP, the legal form of the AIF-FCP does not permit an internal management. AIFs structured as a FCP therefore in all instances have to appoint an External AIFM.
  - (A) FCP with a Chapter 16 Manco:
    - A Chapter 16 Manco falling under the provisions of Article 125-1 of the Law of 2010 can act as External AIFM of an AIF structured as an FCP provided that the assets of the AIFs under management of the management company in total do not exceed the thresholds under Article 3(2) of the Law of 2013. The Chapter 16 Manco is in this event required to register as a Registered AIFM. The Chapter 16 Manco can also appoint an External AIFM (authorised or registered as the case may be) for the AIFs structured as FCP for which it is the management company.
    - A Chapter 16 Manco subject to Article 125-2 of the Law of 2010 is required to obtain an authorisation as Authorised AIFM. Such Chapter 16 Manco can, individually for each AIF

structured as an FCP for which it is the designated management company, decide to act as the External AIFM or decide to designate another External AIFM (authorised or registered as the case may be). It is understood that such Chapter 16 ManCo has to act as Authorised AIFM for at least one AIF.

(B) FCP with a Chapter 15 ManCo:

A Chapter 15 ManCo can, in addition to the services it provides in such capacity, also act as AIF management company for AIFs structured as FCP. Such Chapter 15 ManCo can in this event, individually for each AIF structured as an FCP for which it is the management company, decide to act as the External AIFM or decide to designate another External AIFM (authorised or registered as the case may be).

In the event the Chapter 15 ManCo decides to act as External AIFM for an FCP it manages and depending on the thresholds provided for under the Law of 2013, such Chapter 15 ManCo:

- can apply for a registration under the provisions of Article 3(3) of the Law of 2013, provided that the assets of the AIFs it manages in its capacity of External AIFM do not exceed one of the thresholds provided for under Article 3(2) of the Law of 2013; or

- must apply for authorisation as Authorised AIFM under the provisions of chapter II of the Law of 2013 when the assets of the AIFs it manages in its capacity as External AIFM do exceed one of the thresholds provided for under Article 3(2) of the Law of 2013 or when it decides to opt for the status as Authorised AIFM in accordance with Article 3(4) of the Law of 2013. IF the Chapter 15 ManCo has received the authorisation referred to in this paragraph, it has to act as Authorised AIFM for at least one AIF.

A Chapter 15 ManCo appointing an External AIFM for all the AIFs it manages is not subject to the provisions of the Law of 2013.

II. With respect to AIFs structured as a limited partnership, a distinction has to be operated with respect to the different types of limited partnership under the provisions of the Law of 1915.

(A) With respect to AIFs structured as limited partnership established as either a *société en commandite par action* or as a *société en commandite simple*.

The AIFM of such AIF is in principle an External AIFM, who can be the managing general partner or the *gérant* or any other External AIFM designated by the *gérant* of the limited partnership. A limited partnership can also opt to qualify as an Internal AIFM in case the purpose of the *gérant* is limited to the *gérance* of the given limited partnership.

(B) With respect to AIFs structured as limited partnership established as a *société en commandite spéciale*

Such AIF cannot qualify as Internal AIFM but necessarily has to appoint an External AIFM. The External AIFM can be the general partner or the *gérant* or an external AIFM appointed by the *gérant*.

**F) In whose name will the registration as Registered AIFM or the authorisation as Authorised AIFM be done with respect to AIFs structured as FCP or as limited partnership?**

[↪ Art. 3\(3\) AIFM Law](#) | [↪ Art. 6 AIFM Law](#)

With respect to a *fonds commun de placement* and a *société en commandite spéciale*, registration as Registered AIFM or the authorisation as Authorised AIFM will be done in the name of the legal entity appointed as the External AIFM.

Regarding a *société en commandite par action* or a *société en commandite simple*, the registration as Registered AIFM or the authorisation as Authorised AIFM will be done in the name of the *société en commandite par action*

or in the name of the *société en commandite simple*, when it qualifies as Internal AIFM, or in the name of the legal entity appointed as the External AIFM, when such External AIFM has been appointed.

**G) Which steps Luxembourg entities qualifying as AIFM have to undertake to be compliant with the Law of 2013?**

Luxembourg entities qualifying as AIFMs are subject to either an authorisation or a registration regime. Please refer to 2. and 3. below for further clarification.

## **2. Authorisation regime applicable to AIFMs**

**18 June 2013**

**A) Which entities fall under the AIFM authorisation regime?**

[↪ Art. 5 AIFM Law](#)

Any Luxembourg entities qualifying as AIFM fall under the authorisation regime and have to be authorised under Chapter 2 of the Law of 2013, unless they can benefit from the registration regime referred to under point 3 below.

With respect to Chapter 16 ManCos, only Chapter 16 ManCos subject to Article 125-2 of the Law of 2010 are eligible to be authorised under Chapter 2 of the Law of 2013.

**B) Where do Luxembourg AIFMs introduce their authorisation application?**

[↪ Art. 6\(1\) AIFM Law](#)

The authorisation application as AIFM has to be filed with the CSSF, the CSSF being the competent authority for the authorisation and for the supervision of Luxembourg AIFMs.

**C) Which documents and information need to be included in the authorisation file to be submitted to the CSSF?**

[↪ Art. 6 AIFM Law](#)

Details regarding the application file for authorisation as AIFM are available for download on the website of the CSSF.

## **3. Registration regime applicable to AIFMs**

**18 June 2013**

**A) Which entities fall under the registration regime?**

[↪ Art. 3\(2\) AIFM Law](#) | [↪ Art. 3\(3\) AIFM Law](#)

As a derogation from the authorisation regime, Luxembourg entities qualifying as Below-threshold AIFMs are subject to the registration regime under Article 3(3) of the Law of 2013, i.e. AIFMs whose AIFs' assets under management do not in total exceed the following thresholds:

- (i) EUR 100 million, including assets acquired through use of leverage;
- (ii) EUR 500 million, when the portfolio of assets managed consists of AIFs that are not leveraged and have no redemption rights exercisable during a period of 5 years following the date of the initial investment in each AIF.

**B) Where do Luxembourg AIFMs introduce their registration application?**

[↪ Art. 3\(3\) AIFM Law](#)

The registration application has to be filed with the CSSF.

**C) Which documents and information need to be included in the registration file to be submitted to the CSSF?**

[↪ Art. 3\(3\) AIFM Law](#)

Details regarding the application file for registration as AIFM are available for download on the website of the CSSF.

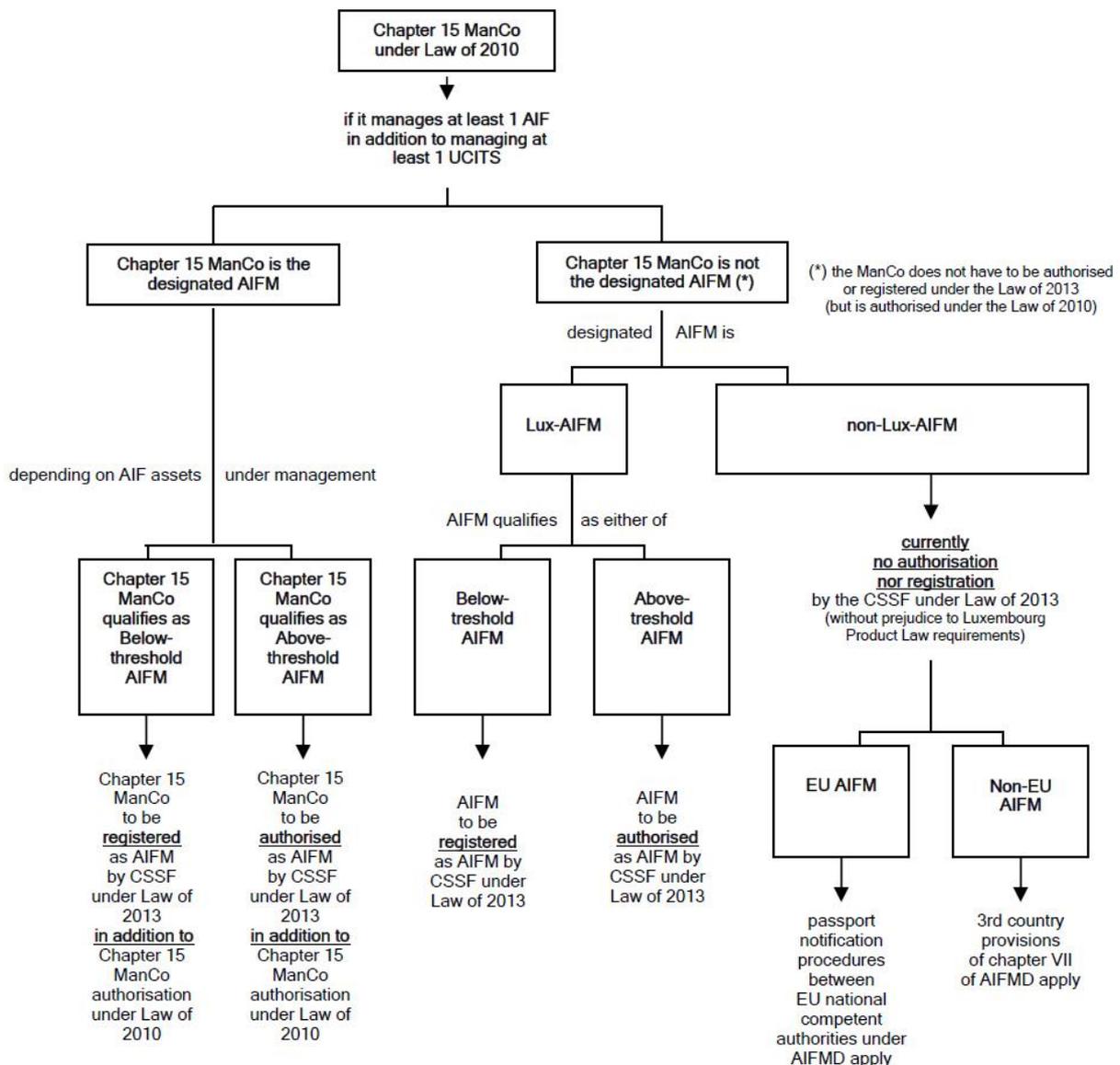
**4. Which steps have to be considered by a Luxembourg entity in order to determine its status under the Law of 2013?**

18 June 2013

Remark: The charts under sections 4.a to 4f. below reflect the steps Luxembourg entities have to undertake from a Luxembourg perspective with respect to AIFMD related authorisations or registrations, i.e. those to be undertaken under the Law of 2013 with respect to the CSSF. They consequently disregard requirements that can potentially apply under the national laws, transposing the AIFMD, of other EU Member States or of any third-countries.

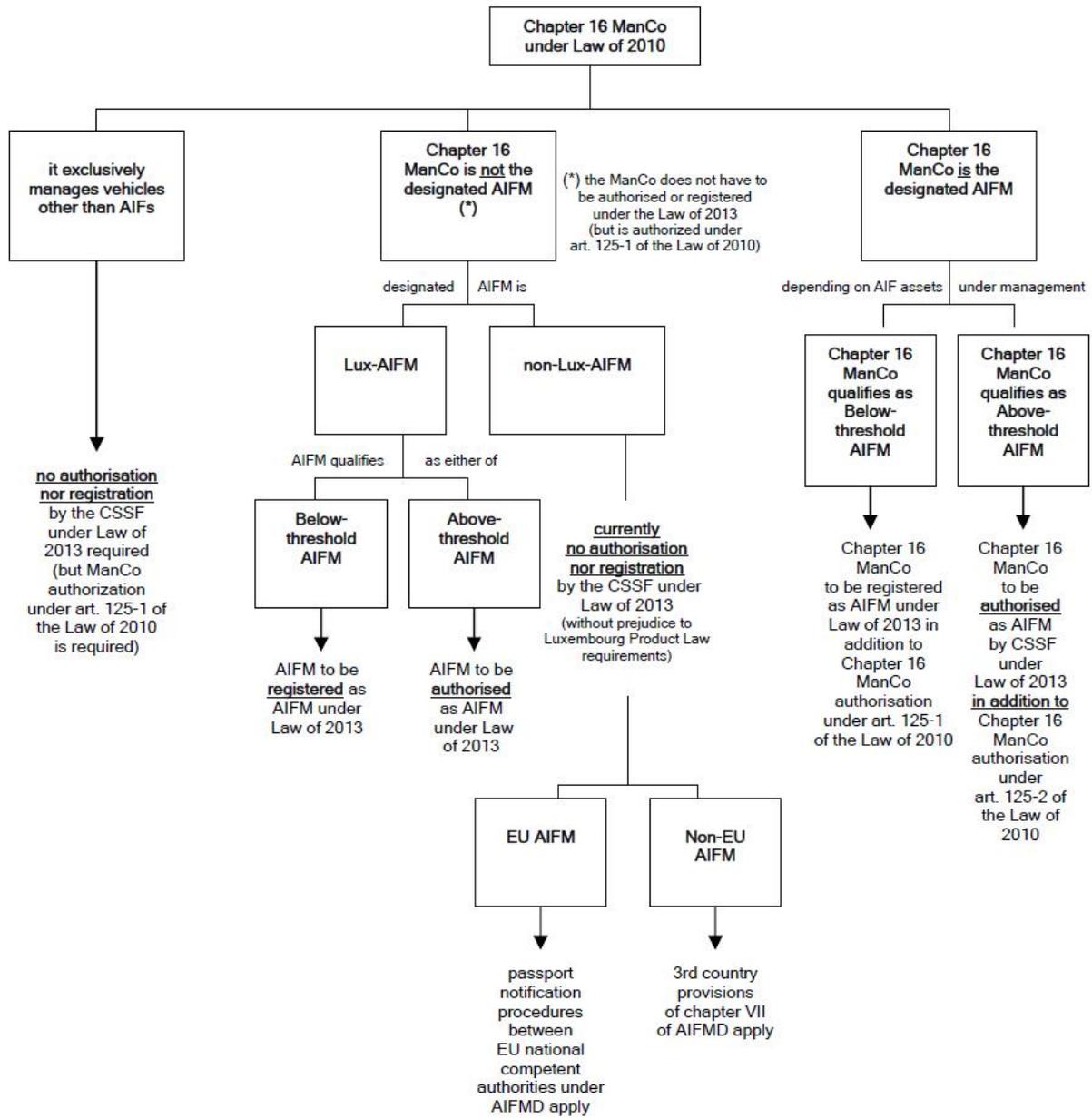
**A) Chapter 15 ManCo**

Art. 4 AIFM Law



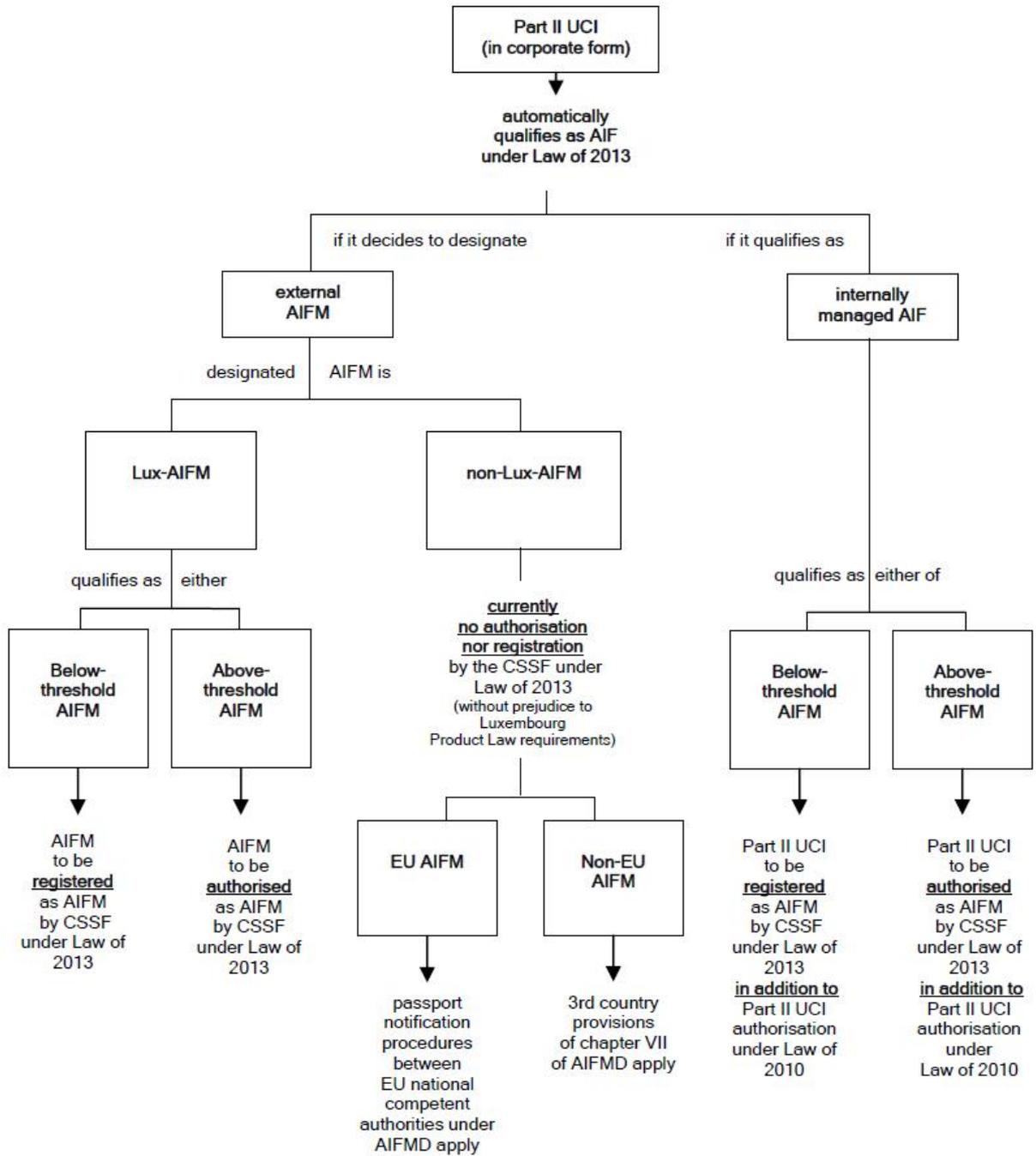
B) Chapter 16 ManCo

Art. 4 AIFM Law



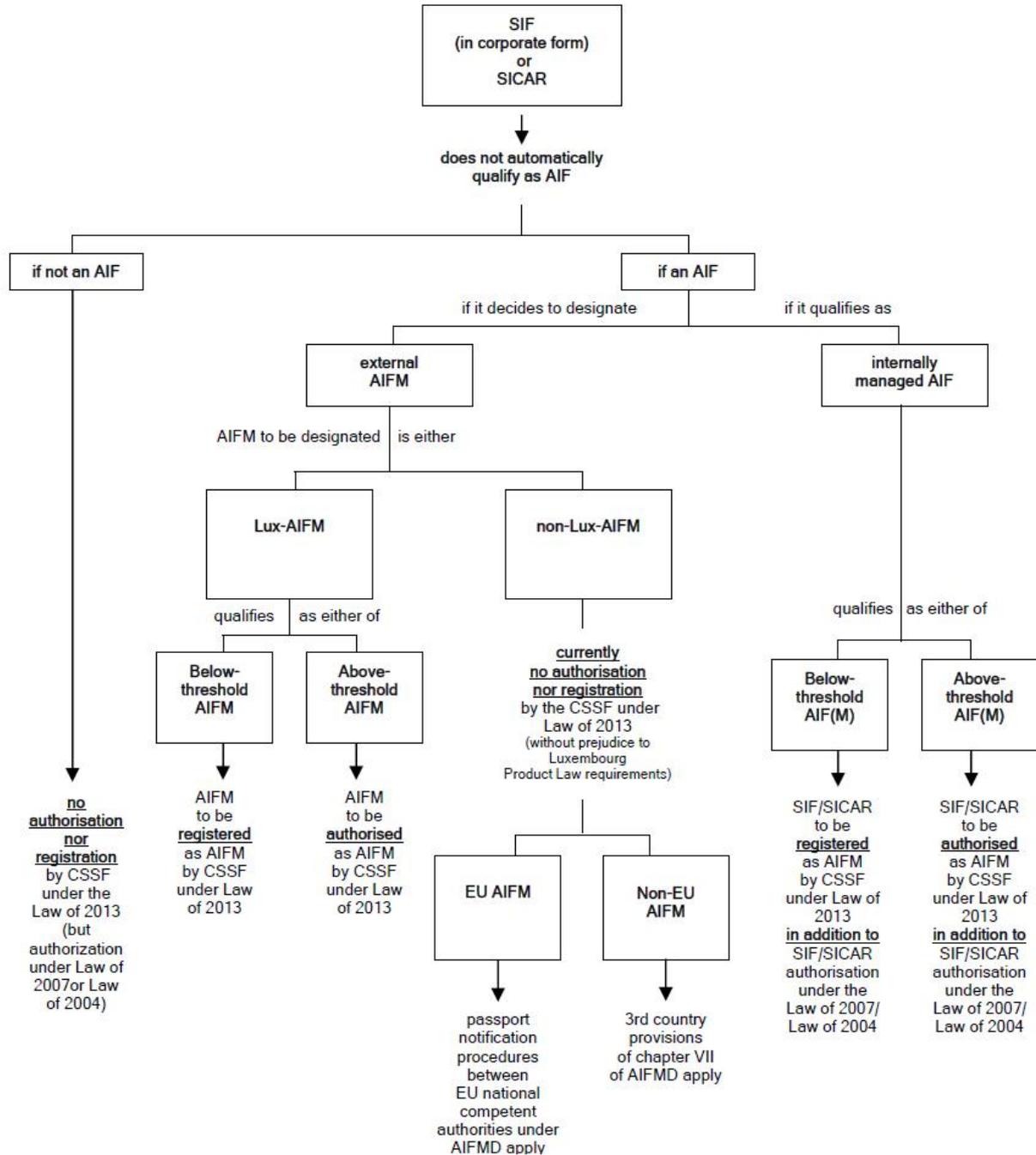
C) UCIs established in corporate form under part II of Law of 2010 (Part II UCI)

Art. 4 AIFM Law



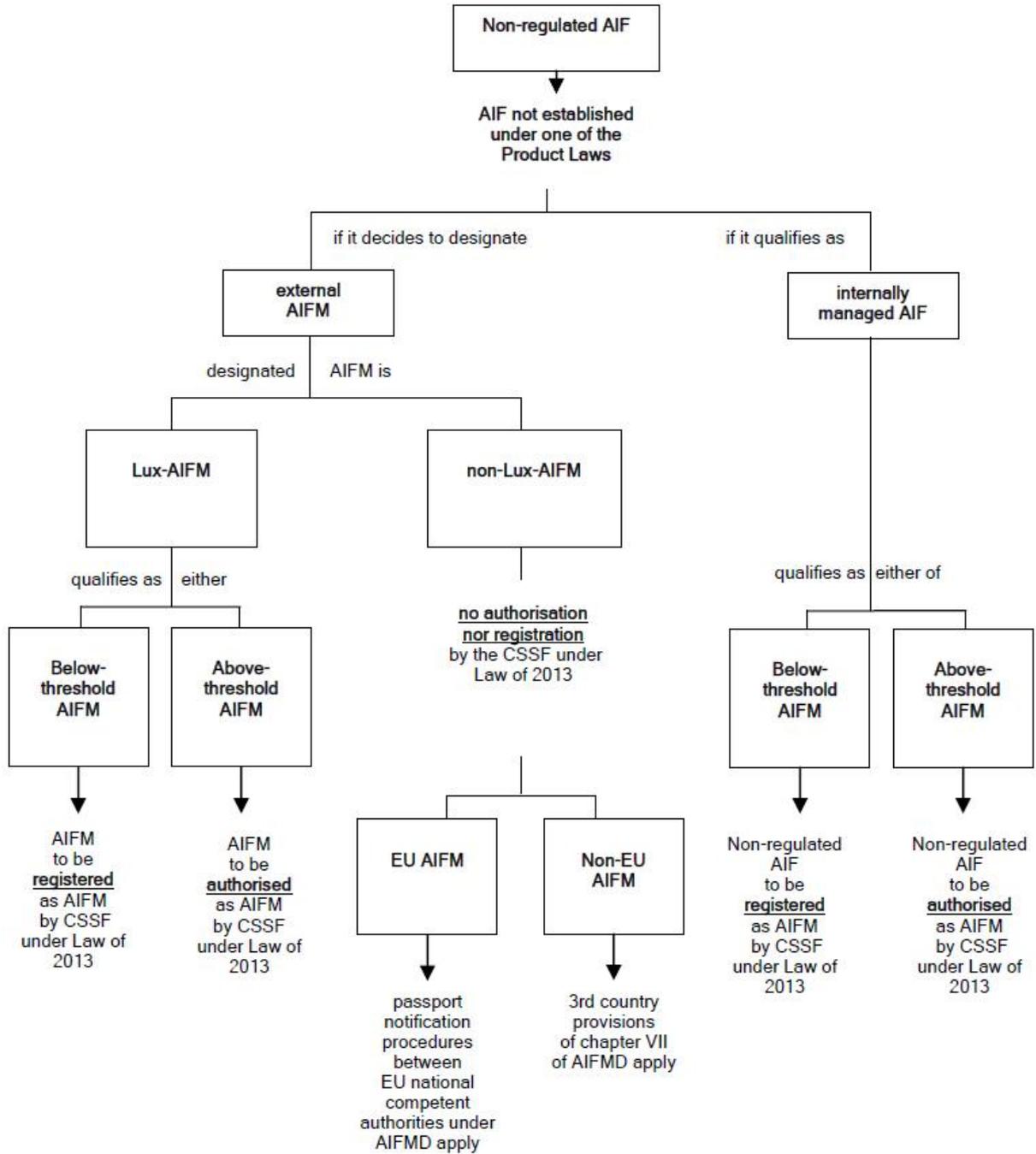
**D) Specialised Investment Funds (SIF) established in corporate form under the Law of 2007 or investment companies in risk capital (SICAR) under the Law of 2004**

Art. 4 AIFM Law



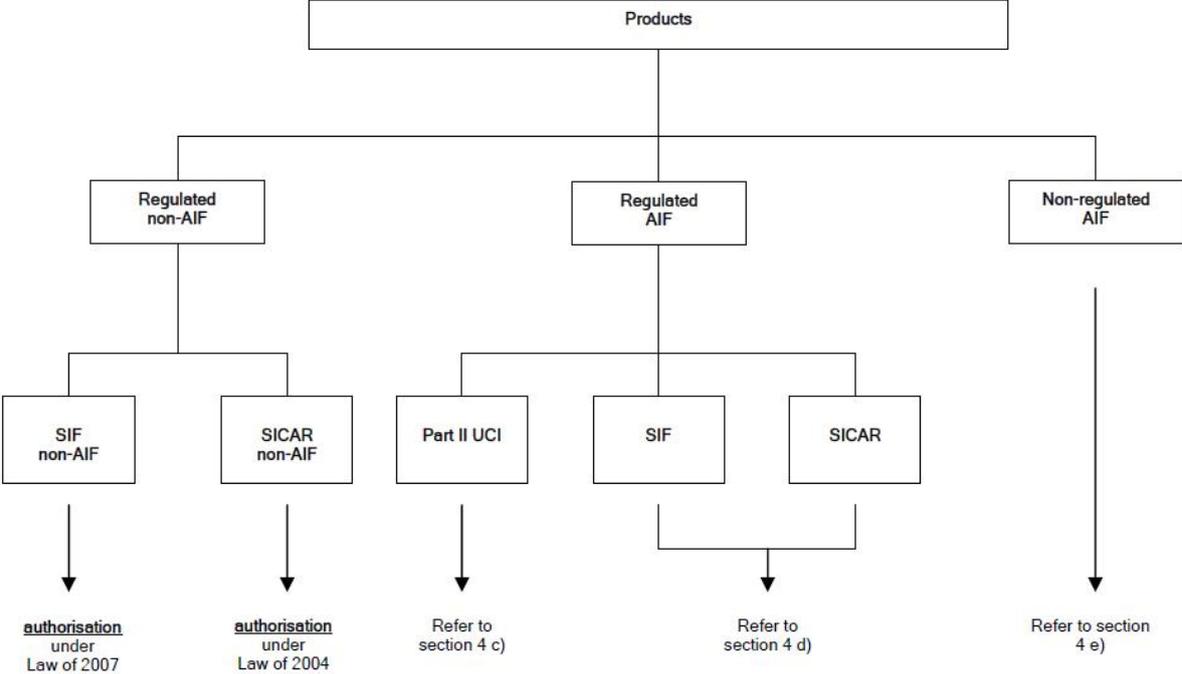
E) Law of 2013 impact on non-regulated AIF

Art. 4 AIFM Law



**F) Product overview**

[Art. 4 AIFM Law](#)



**5. Is the status of a credit institution or an investment firm under the Law of 1993 compatible with an AIFM status under the Law of 2013?**

10 August 2015

**A) Can credit institutions or investment firms established under the Law of 1993 obtain an AIFM authorisation under Chapter II of the Law of 2013?**

[Art. 5 AIFM Law](#)

Credit institutions:

No. Credit institutions cannot combine the status of credit institution under the Law of 1993 and the one of authorised AIFM under the Law of 2013.

However, credit institutions may manage AIF assets on the basis of a delegation arrangement between the AIFM of such AIF and the credit institution in accordance with the provisions of Article 5(8) of the Law of 2013.

Investment firms:

No. Investment firms cannot combine the status of investment firm under the Law of 1993 and the one of authorised AIFM under the Law of 2013.

However, investment firms may manage AIF assets on the basis of a delegation arrangement between the AIFM of such AIF and the investment firm in accordance with the provisions of Article 5(8) of the Law of 2013.

**B) Can credit institutions or investment firms established under the Law of 1993 obtain an AIFM registration under Article 3 (3) of the Law of 2013?**[↪ Art. 3 AIFM Law](#)Credit institutions:

Yes. Credit institutions can combine the status of credit institution under the Law of 1993 and the one of registered AIFM under the Law of 2013.

Investment firms:

Yes. Investment firms can combine the status of investment firm under the Law of 1993 and the one of registered AIFM under the Law of 2013, as long as their authorisation under the Law of 1993 covers the possibility to manage third-party assets.

**6. Must AIFs adopt a specific legal form?****18 June 2013**[↪ Art. 2\(1\) AIFM Law](#)

The Law of 2013 does not provide for any specific mandatory legal forms that an AIF to be established needs to adopt. AIFs can be regulated products, under which scenario such AIFs have to be established under, and in accordance with, the provisions of one of the Luxembourg Product Laws, or can take the form of unregulated AIFs.

Regulated AIFs must hence adopt one of the legal forms prescribed by the relevant Product Law, i.e. the Law of 2010 for part II funds, the Law of 2007 for SIFs and the Law of 2004 for SICARs.

**7. Delegation requirements****18 June 2013****A) Which regulatory texts are to be taken into consideration for the purpose of ensuring that an AIFM is not to be considered as a letter-box entity under the Law of 2013?**[↪ Art. 18 AIFM Law](#)

The following regulatory texts shall be used by Luxembourg authorised AIFMs for the purpose of ensuring that they are not considered as a letter-box entity under the Law of 2013:

- the provisions of [Article 82 of the AIFMD-CDR](#) which specify the conditions under which an AIFM shall be deemed to have delegated its functions to the extent that it becomes a letter-box entity, with the consequence that it can no longer be considered to be the manager of the AIF;
- the principles laid down in section 7 of Circular CSSF 12/546 which specify the delegation rules with respect to Chapter 15 ManCos and self-managed UCITS under the Law of 2010; these principles apply by analogy to Luxembourg AIFMs delegating investment management functions.

**B) Can the two functions portfolio management and/or risk management be delegated?**[↪ Art. 18 AIFM Law](#)

An AIFM may delegate the two functions (i.e. portfolio management and/or risk management), in the understanding that an AIFM may not delegate both functions in whole at the same time, subject, however, always to complying with the requirements of [Article 82 of the AIFMD-CDR](#). Portfolio management and risk management are multi-faceted functions consisting of various core activities and may in that respect be partially delegated.

## **8. Entry into force of the provisions of the Law of 2013 and transitional provisions applicable to Luxembourg AIFMs and Luxembourg AIFs**

**10 January 2014**

**A) Can applications for the authorisation or registration as AIFM be submitted to the CSSF before the entry into force of the Law of 2013?**

[↪ Art. 58\(1\) AIFM Law](#)

Yes.

AIFM applications can be submitted to the CSSF since 1 March 2013 (See question 2c).

**B) What transitional provisions are applicable to AIFMs created on or after 22 July 2013?**

There are no transitional provisions applicable to entities which intend to perform activities of managing AIFs and which did not exist and performed such activities prior to 22 July 2013.

These entities have to apply for authorisation or registration as AIFM and have to obtain such authorisation or registration prior to starting their activities. An AIFM application template is available on the website of the CSSF.

**C) What transitional provisions are applicable to existing AIFMs and AIFs?**

[↪ Art. 58\(1\) AIFM Law](#)

Article 58(1) of the Law of 2013 provides that any person performing activities under this Law before 22 July 2013 shall take all necessary measures to comply with the provisions of this law and shall have until 22 July 2014 to submit an application for authorisation with the CSSF.

It is considered that in relation to this transitional provision, a distinction is to be operated between the regime applicable to the AIFMs and the impact of this provision on AIFs established under one of the Luxembourg Product Laws.

### (i) Transitional provisions for AIFMs:

Article 58 of the Law of 2013 introduces different transitional provisions which apply to entities that existed prior to 22 July 2013 and which perform activities captured by the Law of 2013 prior to that date (i.e. entities that in principle qualify as AIFMs under the Law of 2013 but which existed and performed AIFM activities prior to 22 July 2013).

According to those transitional provisions all entities, which technically qualify as AIFMs as of the date the Law of 2013 enters into force but which existed and exercised management activities within the meaning of the Law of 2013 prior to 22 July 2013 and which exceed the thresholds of Article 3 (2) of the Law of 2013, are required to submit a duly completed application for authorisation as AIFM by 22 July 2014 at the latest. Such entities shall during that transitional period take all necessary measures (i.e. expend their best efforts) to comply (as from the earlier of (i) the moment of their authorisation as AIFM by the CSSF or (ii) 22 July 2014) with the obligations under the Law of 2013 regarding general principles, operating conditions, organisational requirements, conflicts of interest, remuneration, risk management, liquidity management rules, securitisation rules, valuation and delegation rules). From the moment an AIFM is authorised by the CSSF under the Law of 2013, it has to ensure, in accordance with Article 4 of the Law of 2013, that the AIFs it manages take all necessary measures to comply with the product aspects introduced by the relevant Product Law (i.e. annual report, valuation rules, disclosure to investors, depositary rules).

Notwithstanding the provisions of the preceding paragraph, entities which need an authorisation as AIFM under the Law of 2013 are invited to submit to the CSSF, as soon as possible and by 1st April 2014 at the latest, an application file.

**(ii) Transitional provisions for AIFs:**

The Law of 2013 also introduces modifications to the different Product Laws which reflect the product aspects of the AIFMD at the level of the different Luxembourg Product Laws. In this context the Law of 2004, the Law of 2007 and the Law of 2010 include specific transitional provisions for collective investment undertakings / investment vehicles established under those laws prior to 22 July 2013. On the basis of those transitional provisions all collective investment undertakings / investment vehicles established under one of the Product Laws prior to 22 July 2013 and which qualify as AIF under the Law of 2013, as well as any collective investment undertaking / investment vehicles established under one of those Product Laws between 22 July 2013 and 22 July 2014 that qualifies as AIF, can appoint an AIFM which benefits from the transitional provisions applicable to AIFMs under Article 58(1) of the Law of 2013 (Article 61(1) of the AIFMD) explained above when they qualify as externally managed AIF. Once an AIF has appointed an AIFM authorised by the CSSF, that AIF has to take all necessary measures to comply with the product aspects introduced by the relevant Product Law (i.e. annual report, valuation rules, disclosure to investors, depositary rules).

Notwithstanding the provisions of the preceding paragraph, any collective investment undertaking/investment vehicle qualifying as AIF established under one of the Product Laws, which benefits from the transitional provisions, are invited to submit to the CSSF, as soon as possible and by 1st April 2014 at the latest, a file containing information as regards its compliance with the AIFMD product rules (i.e. annual report, valuation rules, disclosure to investors, depositary rules) by 22 July 2014.

**D) Do the transitional provisions apply to multiple compartments AIFs?****Art. 58(1) AIFM Law**

Yes.

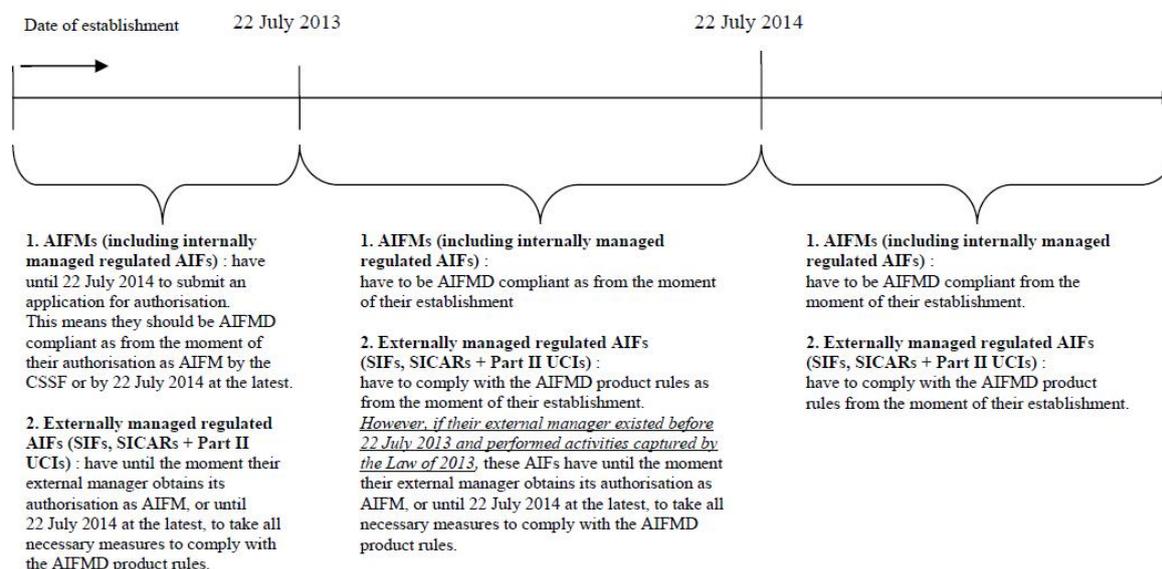
The availability of the transitional provisions under the Law of 2013 also applies to any new sub-fund created under a multiple compartment AIF that was established under one of the Product Laws prior to 22 July 2013.

**E) Can EU AIFMs and non-EU AIFMs continue to market non-Luxembourg AIFs under the existing Luxembourg placement rules until 22 July 2014?**

Yes, marketing under the existing Luxembourg placement rules will continue to be permitted until 22 July 2014 and will not be affected by the Law of 2013.

**F) Time-line concerning transitional provisions**

**18 June 2013**

**Art. 58 AIFM Law**

## 9. Scope of authorised activities of AIFMs – what functions AIFMs are allowed to perform?

18 June 2013

### A) Does an AIFM necessarily have to perform all functions listed under Annex I of the Law of 2013 and the non-core services listed under Article 5(4)(a) and (b) of the Law of 2013?

[↪ Art. 5 AIFM Law](#) | [↪ Art. 18 AIFM Law](#) | [↪ Annex I AIFM Law](#)

Mandatory functions:

An AIFM must be capable of providing, and take responsibility for, the investment management functions under section (1) of Annex I (i.e. portfolio management and risk management) in order to obtain AIFM authorisation under the Law of 2013, with the possibility to delegate to third parties the task of carrying out certain functions on its behalf in accordance with Article 18 of the Law of 2013.

An AIFM has the option to perform part or all of the functions listed under section (2) of Annex I of the Law of 2013. Each fund structure is to be assessed on a case-by-case basis when considering which functions have been attributed to the AIFM and therefore can also be subject to delegation by the AIFM.

Furthermore, in accordance with the provisions under Article 5(5)(a) of the Law of 2013, an AIFM may not exclusively provide the ancillary services under Article 5(4), including the function of management of portfolios in accordance with mandates given by investors on a discretionary basis, of the same law.

With respect to the performance of non-core service in accordance with Article 5(4)(a) and (b) of the Law of 2013 (e.g. provision of investment advice, safe-keeping and administration in relation to shares or units of collective investment schemes and/or reception and transmission of orders in relation to financial instruments), an AIFM may perform part or all of those services provided it is authorised to do so on the basis of the AIFMD authorisation granted to that AIFM by the CSSF in accordance with Chapter II of the Law of 2013.

Ancillary services:

AIFMs can provide ancillary services listed under Article 5(4)(b) of the Law of 2013 to the extent that it has been specifically authorised to provide such services under the AIFM authorisation obtained in accordance with the procedure under Chapter II of the Law of 2013.

### B) Can AIFMs provide domiciliary services to SOPARFIs on an ancillary basis?

[↪ Art. 5 AIFM Law](#) | [↪ Annex I AIFM Law](#)

AIFMs are permitted to provide SOPARFI domiciliary services to the extent that such SOPARFI either (i) qualifies as an AIF and that the AIFM is the designed manager of that SOPARFI/AIF or (ii) such SOPARFI is a subsidiary controlled by an AIF.

### C) Can AIFMs perform investment management functions for non-AIFs?

[↪ Art. 5\(2\) to 5\(5\) AIFM Law](#)

AIFMs can provide ancillary services listed under Article 5(4)(b) of the Law of 2013 to the extent that it has been specifically authorised to provide such services under the AIFM authorisation obtained in accordance with the procedure under Chapter II of the Law of 2013.

## 10. Depositary aspects

19 June 2013

### A) As of when does a depositary of an AIF has to comply with the depositary requirements as per the Law of 2013?

[↪ Art. 19 AIFM Law](#) | [↪ Art. 58\(1\) AIFM Law](#)

#### 1) In relation to AIFs with an External AIFM:

A depositary must, in relation to a given AIF managed by an External AIFM, comply with the depositary requirements provided for under the Law of 2013 and AIFMD-CDR at the latest as of the following date:

- in relation to an AIF established after 22 July 2013 the External AIFM of which does not provide services covered by the Law of 2013 on 22 July 2013 (e.g. an AIFM established after the 22 July 2013) as of the date of inception of the AIF;
- in relation to an AIF established before 22 July 2013 the External AIFM of which does provide services covered by the Law of 2013 on 22 July 2013 (i.e. an AIFM benefiting from the transitional provisions under Article 58(1) of the Law of 2013 and/or the relevant transitional provisions under the Product Law under which the AIF has been established), by 22 July 2014 at the latest;
- in relation to an AIF established after 22 July 2013 the External AIFM of which does provide services covered by the Law of 2013 on 22 July 2013 (i.e. an AIFM benefiting from the transitional provisions under Article 58(1) of the Law of 2013 and/or the relevant transitional provisions under the Product Law under which the AIF has been established), by 22 July 2014 at the latest.

#### 2) In relation to AIFs with an Internal AIFM:

In relation to any internally managed AIF, a depositary must comply with the depositary requirements provided for under the Law of 2013 and AIFMD-CDR as from the date the AIF obtains the required authorisation as AIFM.

#### 3) Requirement to have an AIFMD Depositary Agreement in place:

At the date as of which a depositary must, in relation to a given AIF, comply with the depositary requirements provided for under the Law of 2013 and AIFMD-CDR as per points 1) and 2) above, an AIFMD Depositary Agreement must be in place between the AIF or the management company of the AIF (i.e. in relation to any AIF established under one of the Product Laws and constituted in accordance with contract law, i.e. a common fund managed by a management company) and the depositary.

This will require the AIFM/AIF to replace the depositary agreement not compliant with the requirements of [Article 83 of AIFMD-CDR](#) by an AIFMD Depositary Agreement as per the deadlines outlined under point 1) and 2) above.

### B) What are 'objective reasons' and conditions for a depositary to be in a position to discharge itself of liability towards a third-party holding in custody a financial instrument, in relation to a loss of a financial instrument held in custody by such third party within the meaning of Article 19(13) of the Law of 2013?

[↪ Art. 19\(13\) AIFM Law](#)

Article 19 of the Law of 2013 distinguishes between objective reasons for the delegation of safekeeping functions (Article 19(11)) and objective reasons to contract a discharge of liability (Article 19(13)).

With respect to the discharge of liability under Article 19(13) of the Law of 2013, which permits a depositary to discharge itself of the liability for the loss of a financial instrument held in custody by a third party, a written contract between the AIF (or the AIFM acting on behalf of the AIF) and the depositary must provide for the discharge of liability and establish the objective reason(s) for the contracting of such discharge.

The definition of objective reason for discharge of liability is a matter of professional judgment, based on the criteria set forth in [Article 102\(1\) AIFMD-CDR](#). It will depend on the facts of the case in question by taking into account particular aspects able to constitute an objective reason, and which can e.g. be related to:

- the investment policy and strategy of the AIF;
- the types of counterparties used by the AIFM on behalf of the AIF;
- the sub-custody network used for safekeeping of the financial instruments as per Article 88 of AIFMD-CDR.

In the particular circumstances, defined in [Article 102\(3\) AIFMD-CDR](#), the depositary shall be deemed to have objective reasons for the contracting of discharge of its liability.

**C) Monitoring of the AIFs cash flows – Is a look-through approach to be applied to cash accounts which are not opened in the name of the AIF/M but in the name of companies (e.g. real estate holding companies) in which the AIF/M holds investments?**

[Art. 19\(7\) AIFM Law](#)

[Article 89\(3\)](#) and [Article 90\(5\) of the AIFMD-CDR](#) explicitly state that safe-keeping duties related to financial instruments and other assets are subject to a look-through obligation with regard to ownership verification and other duties for assets held by underlying legal structures which are directly or indirectly controlled by the AIFM/AIF.

With respect to the monitoring of the AIFs cash flow, [Article 86 of the AIFMD-CDR](#) solely requires effective and proper monitoring of cash accounts opened in the name of the AIF.

**D) Cash flow reconciliation - Article 86 (b), (c) and (f) AIFMD-CDR – In case an authorised third party (administrator, transfer agent or other third party) performs cash flow reconciliations, can the depositary leverage this reconciliation for monitoring purposes under Article 86 AIFMD-CDR?**

[Art. 19\(7\) AIFM Law](#) | [Art 19\(8\) AIFM Law](#) | [Art 19\(11\) AIFM Law](#)

Pursuant to Article 19(11) of the Law of 2013, only safe-keeping functions of Article 19(8) of the Law of 2013 can be delegated: cash flow monitoring, however, can thus not be delegated.

The depositary therefore has to implement a procedure for reconciliation of cash flows. In this context, the depositary may rely on material tasks executed by a third party with respect to cash flow monitoring for the execution of its own obligations or may use information received with respect to cash flow reconciliations performed by a third party, provided that the depositary obtains all information it needs to comply with its own cash monitoring obligation and has performed an adequate due diligence of the reconciliation processes performed by the third party.

The concept of third party in this context also includes other divisions or services of the entity appointed as depositary of an AIF in the sense of Article 19(1) of the Law of 2013, provided that a functional and hierarchical separation of the performance of the depositary functions is ensured.

**E) How should the depositary maintain records and segregated accounts of financial instruments that can be held in custody for AIFs managed by an AIFMD having appointed a third party (e.g. prime broker, collateral safekeeping agent)?**

[Art. 19\(8\) AIFM Law](#)

In accordance with the provisions of [Article 89\(1\) AIFMD-CDR](#), the depositary has to maintain records and segregated accounts in relation to the safekeeping of financial instruments that can be held in custody (as defined under Article 19(8) of the Law of 2013 and [Article 88 AIFMD-CDR](#)).

With respect to those of the financial instruments sub-custodied by the depositary with a third-party (e.g. prime broker or collateral safekeeping agent), the depositary can rely on the books of the third-party so to meet its obligations in terms of records and segregated accounts, provided that the depositary has a daily access to the

records and segregated accounts maintained by the third-party and that the depositary has performed a due diligence on the third-party ensuring that the records and segregated accounts of the third-party are maintained in accordance with the provisions of the Law of 2013 and the AIFMD-CDR.

**F) How should the depositary perform record keeping of "other assets"?**

[↪ Art. 19\(8\)b AIFM Law](#)

The depositary can maintain a record in systems operated by the depositary or use records of third parties provided that the depositary performs an ongoing due diligence on the third party and has access to all information satisfactory to the depositary in order to comply with its obligations.

The concept of third party in this context also includes other divisions or services of the entity appointed as depositary of an AIF in the sense of Article 19(1) of the Law of 2013, provided that a functional and hierarchical separation of the performance of the depositary functions is ensured.

**G) How should the look-through be performed?**

[↪ Art. 19\(8\) AIFM Law](#)

According to [Article 89\(3\)](#) and [Article 90\(5\) of AIFMD-CDR](#), a look-through shall apply to underlying assets held by the AIF or the AIFM on behalf of the AIF, which are controlled directly or indirectly by the AIF or the AIFM acting on behalf of the AIF.

The definition of a controlled entity is a matter of professional judgment and will depend on the specific structure in question. The AIF or the AIFM should provide the depositary with all the required information to confirm whether the underlying entity is directly or indirectly controlled or not.

**H) [Article 88 \(2\) AIFMD-CDR](#) provides that financial instruments which, in accordance with applicable law, are only directly registered in the name of the AIF with the issuer itself or its agent, such as a registrar or a transfer agent, shall not be held in custody. Under what circumstances can financial instruments be directly registered in the name of the AIF, or the AIFM on behalf of the AIF, with the issuer or an agent of the issuer and therefore qualify as other assets in the sense of [Article 19\(8\)\(b\) of the Law of 2013](#)?**

[↪ Art. 19\(8\) AIFM Law](#)

Financial instruments can be directly registered in the name of the AIF, or the AIFM on behalf of the AIF, with the issuer or an agent of the issuer in the following circumstances:

- when the law applicable to the issuer explicitly requires those financial instruments to be registered directly in the name of the AIF, or the AIFM on behalf of the AIF, with the issuer or an agent of the issuer; or
- when the law applicable to the issuer does not prohibit an AIF to register its investment directly in the name of the AIF, or the AIFM on behalf of the AIF, with the issuer or an agent of the issuer, provided that the AIF or the AIFM and the depositary agree to register the financial instruments in the name of the AIF or the AIFM on behalf of the AIF.

As for any other assets in the sense of [Article 19\(8\)\(b\) of the Law of 2013](#), [Article 90\(2\)\(c\) AIFMD-CDR](#) requires that the depositary ensures that there are procedures in place so that the assets directly registered in the name of the AIF, or the AIFM on behalf of the AIF, with the issuer or an agent of the issuer, cannot be assigned, transferred, exchanged or delivered without the depositary having been informed of such transaction and that the depositary has access without undue delay to documentary evidence of each transaction and position with the issuer or the agent of the issuer.

**I) For which AIF can professional depositaries of assets other than financial instruments ("PDAOFI") act as depositary?**

**10 August 2015**

[↪ Art. 19 \(3\) AIFM Law](#) | [↪ Art. 24 AIFM Law](#)

A PDAOFI may, in accordance with the provisions of Article 26-1(1) of the Law of 1993, be appointed as depositary for AIFs:

- which have no redemption right that can be exercised during five years as from the date of the initial investments, and
- which pursuant to their main investment policy, generally do not invest in assets which shall be held in custody pursuant to Article 19(8)(a) of the Law of 2013 or which generally invest in issuers or non-listed companies in order to eventually acquire control thereof in accordance with Article 24 of the Law of 2013.

**J) When acting as appointed depositary for eligible AIFs (as specified under 10.i)), is the PDAOFI also responsible for the safekeeping of the assets which are financial instruments in the sense of Article 19(8)(a) of the Law of 2013?**

[↪ Art. 19 \(3\) AIFM Law](#) | [↪ Art. 19\(8\) AIFM Law](#)

Yes. When being appointed as depositary for a given AIF, a PDAOFI is subject to the provisions of Article 19 of the Law of 2013. As such, and in accordance with the single-depositary rule as specified under Article 19(1) of the said law, the PDAOFI is also in charge of the safekeeping of assets as defined under Article 19(8)(a) of the Law of 2013 (i.e. for financial instruments that can be held in custody).

In relation to the safekeeping of financial instruments that can be held in custody, the PDAOFI will have to delegate the custody of those assets to an eligible delegate in accordance with the provisions of Article 19(11) of the Law of 2013. It follows from these provisions (i.e. Article 19(11)d)iii)) that the account(s) with the delegate can be opened in the name of the PDAOFI, acting on behalf of its clients/AIFs (with the specification that the assets belong to the clients/AIFs of the PDAOFI), or in the name of the PDAOFI, acting on behalf of a particular client/AIF (with the indication of the name of the client/AIF of the PDAOFI) or directly in the name of the client/AIF of the PDAOFI. In the latter case, it must be ensured that the positions opened in the name of the investing AIF cannot be assigned, transferred, exchanged or delivered unless the PDAOFI has received prior notification and that the PDAOFI has access without undue delay to the information which evidences each transaction and each position. The duty of restitution of those assets in case of a loss of such financial instruments that can be held in custody lies with the PDAOFI, subject to the provisions of Article 19(13) of the Law of 2013 (i.e. discharge of liability by the PDAOFI with transfer of the duty of restitution to the delegate) and subject also to the provisions of Article 19(12) second paragraph of the Law of 2013 (i.e. discharge of liability when "the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary").

It is to be noted that when an AIF has appointed a PDAOFI as its single-depositary, any cash of such AIF has to be held with an entity as specified under Article 19(7) of the Law of 2013 and that the cash of the AIF has to be booked in cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF with such entity. No cash of the AIF can be held directly with the PDAOFI itself.

**K) Can a PDAOFI act as a delegate for the safekeeping of assets other than financial instruments for any type of AIF**

Yes. When safekeeping assets other than financial instruments in the capacity as a delegate of the appointed depositary of a given AIF, no restrictions in terms of the types of AIF for which the PDAOFI may provide safekeeping services (see section 10.i) above) apply. The PDAOFI can, in such scenario, consequently provide safekeeping of assets other than financial instruments for any type of AIF.

## 11. AIFMD marketing passport: Marketing in the EU of EU AIFs (included AIFs set up in Luxembourg) by AIFMs established in Luxembourg

10 January 2014

**A) Which are the regulatory provisions applicable to Luxembourg Authorised AIFMs which intend to market EU AIFs in the EU to professional investors?**

[↪ Art. 29 AIFM Law](#) | [↪ Art. 30 AIFM Law](#)

The following regulatory provisions are applicable to Luxembourg Authorised AIFMs which intend to market EU AIFs in the EU to professional investors:

- the provisions of Article 29 of the Law of 2013 which specify the conditions applicable to Luxembourg Authorised AIFMs marketing in Luxembourg units or shares of EU AIFs they manage to professional investors. It is to be noted that in relation to the marketing in Luxembourg of Luxembourg AIFs managed by the Luxembourg Authorised AIFM, the provisions of Article 29 only apply to non-regulated AIFs (i.e. not established under one of the Product Law(s));
- the provisions of Article 30 of the Law of 2013 which specify the conditions applicable to Luxembourg Authorised AIFMs marketing to professional investors in another EU Member State units or shares of EU AIFs they manage.

**B) Are Luxembourg Authorised AIFMs allowed to market non-regulated EU AIFs in the EU?**

[↪ Art. 30 AIFM Law](#)

Yes.

Luxembourg Authorised AIFMs are allowed to market in the EU (including in Luxembourg) units or shares of EU AIFs, irrespective of whether such AIFs are regulated or non-regulated entities. It should nevertheless be noted that the marketing in other EU Member States might in some cases be subject to specific restrictions applicable in that EU Member State.

**C) To what type of investors is the marketing of EU AIFs by a Luxembourg Authorised AIFM permitted?**

[↪ Art. 30 AIFM Law](#) | [↪ Art. 46 AIFM Law](#)

Luxembourg Authorised AIFMs are permitted to market units or shares of EU AIFs only to professional investors, except where an EU Member State allows the marketing of EU AIFs to retail investors in its territory.

**D) Does the Luxembourg legislation allow Luxembourg Authorised AIFMs to market EU AIFs to retail investors in its territory?**

[↪ Art. 29\(5\) AIFM Law](#) | [↪ Art. 46 AIFM Law](#)

With respect to the marketing of Luxembourg regulated AIFs, only AIFs established under part II of the Law of 2010 can be marketed to any type of retail investors in the territory of Luxembourg, while the scope of eligible investors of AIFs established under the Law of 2004 (SICAR-AIFs) and the Law of 2007 (SIF-AIFs) only covers well-informed investors as defined in these laws. With respect to non-regulated Luxembourg AIFs the marketing is limited to professional investors.

With respect to the marketing of non-Luxembourg EU AIFs pursuant to Article 46 of the Law of 2013, Luxembourg Authorised AIFMs are allowed to market to retail investors in the territory of Luxembourg units or shares of EU AIFs they manage, when the following conditions are fulfilled:

- the concerned EU AIFs must be subject in their home Member State to a permanent supervision performed by a supervisory authority set up by law in order to ensure the protection of investors;

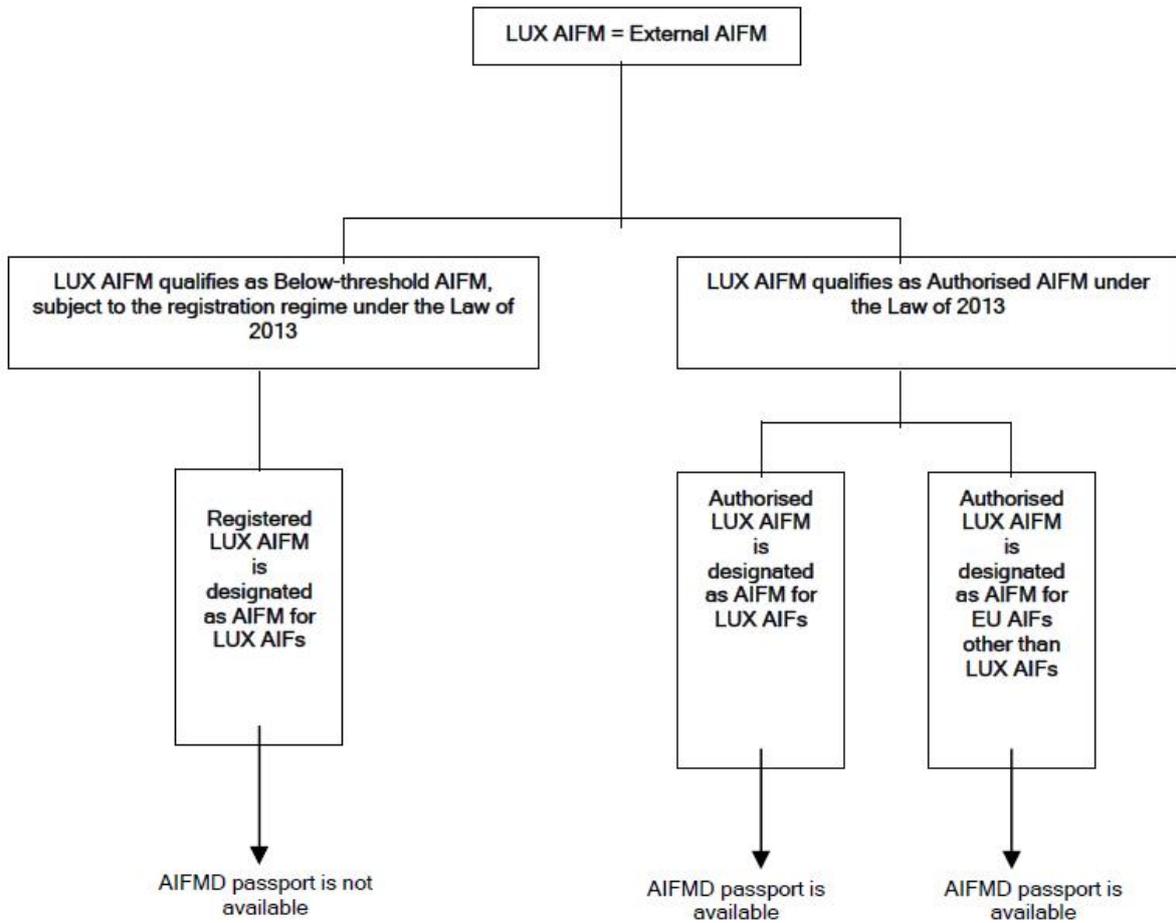
- EU AIFs established in a Member State other than Luxembourg must furthermore be subject in their home Member State to regulations offering a level of protection for investors as well as to a prudential supervision considered by the CSSF as equivalent to that provided for in Luxembourg legislation.

Please note that Article 100 (concerning foreign UCIs) in conjunction with Article 59 (appointment of a Luxembourg paying agent) and Article 129 (prior authorisation by the CSSF) of the Law of 2010 also apply to such non-Luxembourg EU AIFs.

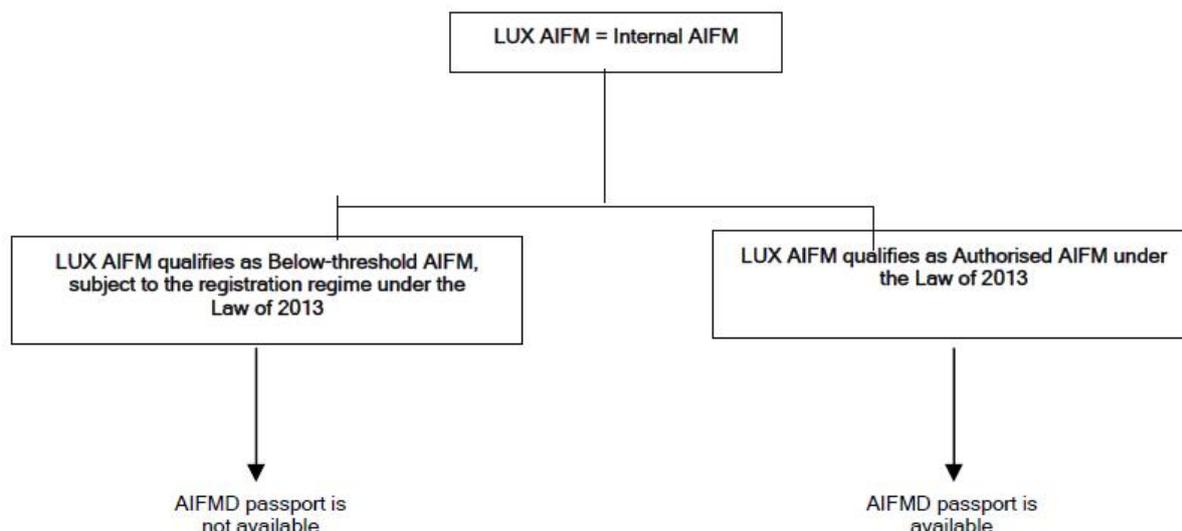
**E) What are the different scenarios available for AIFMs established in Luxembourg with respect to the marketing of EU AIFs in the EU under the AIFMD marketing passport?**

[↪ Art. 29 AIFM Law](#) | [↪ Art. 30 AIFM Law](#)

1° Luxembourg AIFM is an External AIFM



2° Luxembourg AIFM is an Internal AIFM



**12. AIFMD marketing passport: Marketing in Luxembourg of EU AIFs (including Luxembourg AIFs) by AIFMs established in another EU Member State**

10 January 2014

Preliminary remarks:

Luxembourg AIFs which are regulated AIFs established under one of the Product Laws are automatically authorised for marketing in the territory of Luxembourg. With respect to Luxembourg non-regulated AIFs the marketing is limited to professional investors.

In order to market EU AIFs in Luxembourg the AIFMs established in another EU Member State have to be authorised AIFMs.

As pointed out in point 8.e), the marketing of EU AIFs in Luxembourg by EU AIFMs under the existing Luxembourg placement rules will continue to be permitted until 22 July 2014 and will not be affected by the Law of 2013.

**A) Which are the regulatory provisions applicable to AIFMs authorised in another EU Member State which intend to market EU AIFs to professional investors in Luxembourg?**

[Art. 31 AIFM Law](#)

The provisions of Article 31 of the Law of 2013 specify the conditions applicable to AIFMs authorised in another EU Member State which intend to market in Luxembourg to professional investors units or shares of EU AIFs they manage.

**B) Are AIFMs authorised in another EU Member State allowed to market non-regulated EU AIFs to professional investors in Luxembourg?**

[Art. 31 AIFM Law](#)

Yes.

AIFMs authorised in another EU Member State are allowed to market in Luxembourg units or shares of EU AIFs, irrespective of whether such AIFs are regulated or non-regulated entities.

**C) To what type of investors is the marketing in Luxembourg of EU AIFs by an AIFM authorised in another EU Member State permitted?**

[↪ Art. 31 AIFM Law](#) | [↪ Art. 46 AIFM Law](#)

AIFMs authorised in another EU Member State are permitted to market units or shares of EU AIFs only to professional investors in Luxembourg.

Moreover, it is also possible to market to retail investors as mentioned under point 12.d) hereafter.

**D) Does the Luxembourg legislation allow authorised EU AIFMs to market EU AIFs to retail investors in its territory?**

[↪ Art. 29 AIFM Law](#) | [↪ Art. 31 AIFM Law](#) | [↪ Art. 46 AIFM Law](#)

With respect to the marketing of Luxembourg regulated AIFs, only AIFs established under part II of the Law of 2010 can be marketed to any type of retail investors in the territory of Luxembourg, while the scope of eligible investors of AIFs established under the Law of 2004 (SICAR-AIFs) and the Law of 2007 (SIF-AIFs) only covers well-informed investors as defined in these laws. With respect to non-regulated EU AIFs the marketing is limited to professional investors.

Pursuant to Article 46 of the Law of 2013, EU AIFMs authorised in another EU Member State are allowed to market to retail investors in the territory of Luxembourg units or shares of EU AIFs they manage, when the following conditions are fulfilled:

- the concerned EU AIFs must be subject in their home Member State to a permanent supervision performed by a supervisory authority set up by law in order to ensure the protection of investors;
- EU AIFs established in a Member State other than Luxembourg, must furthermore be subject in their home Member State to regulations offering a level of protection for investors as well as to a prudential supervision considered by the CSSF as equivalent to that provided for in Luxembourg legislation.

Please note that Article 100 (concerning foreign UCIs) in conjunction with Article 59 (appointment of a Luxembourg paying agent) and Article 129 (prior authorisation by the CSSF) of the Law of 2010 also apply to such non-Luxembourg EU AIFs.

**13. AIFMD marketing passport: General conditions applicable to Luxembourg Authorised AIFMs marketing EU AIFs in the EU**

10 January 2014

Preliminary remark: Only Authorised AIFMs can benefit from the marketing passport under the Law of 2013 and/or the AIFMD.

**A) Where do Luxembourg Authorised AIFMs have to introduce the notification file in relation to the marketing of EU AIFs (including Luxembourg AIFs) to professional investors in another EU Member State?**

[↪ Art. 30\(2\) AIFM Law](#)

The CSSF is the competent authority for the notification process. Luxembourg Authorised AIFMs which intend to market to professional investors in another EU Member State Luxembourg and/or non-Luxembourg EU AIFs they manage have to introduce a notification file with the CSSF.

**B) Where do Luxembourg Authorised AIFMs have to introduce the notification file in relation to the marketing of non-Luxembourg EU AIFs to professional investors in Luxembourg?**

[↪ Art. 29\(2\) AIFM Law](#)

The CSSF is the competent authority for the notification process. Luxembourg Authorised AIFMs which intend to market in Luxembourg to professional investors non-Luxembourg EU AIFs they manage have to introduce the

notification file with the CSSF.

**C) Which documents and information need to be included in the notification file to be submitted to the CSSF?**

1) In relation to marketing of non-Luxembourg EU AIFs to professional investors in Luxembourg:

[↪ Art. 29\(2\) AIFM Law](#) | [↪ Annex III AIFM Law](#)

The notification file shall include the following documents and information as set out in Annex III of the Law of 2013:

- (a) A notification letter, including a programme of operations identifying the AIFs the AIFM intends to market and information on where the AIFs are established;
- (b) the AIF rules or instruments of incorporation;
- (c) identification of the depositary of the AIF;
- (d) a description of, or any information on, the AIF available to investors;
- (e) information on where the master AIF is established if the AIF is a feeder AIF;
- (f) any additional information referred to in Article 21(1) of the Law of 2013 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.

2) In relation to marketing of EU AIFs (including Luxembourg AIFs) to professional investors in another EU Member State:

[↪ Art. 30\(2\) AIFM Law](#) | [↪ Annex IV AIFM Law](#)

In addition to the documents and information referred to under 1), the notification file, as set out in Annex IV of the Law of 2013, must also include the indication of the EU Member State in which the AIFM intends to market the units or shares of the AIF to professional investors.

**D) Marketing approval process: When may a Luxembourg Authorised AIFM start marketing the AIFs identified in the notification file?**

1) In relation to marketing in Luxembourg:

[↪ Art. 29\(3\) AIFM Law](#)

Within 20 working days following receipt of a complete notification file, the CSSF shall inform the Luxembourg Authorised AIFM whether it may start marketing the AIFs identified in the notification file. The CSSF shall prevent the marketing of the AIFs only if the AIFM's management of the AIFs does not or will not comply with the Law of 2013 or the AIFM otherwise does not or will not comply with the Law 2013. In the case of a positive decision, the Luxembourg Authorised AIFM may start marketing the AIFs in Luxembourg from the date of the CSSF's notification to that effect.

Where the concerned AIF is an AIF established in an EU Member State other than Luxembourg, the CSSF shall also inform the competent authorities of the AIF, that the Luxembourg Authorised AIFM may start marketing units or shares of the AIF in Luxembourg.

2) In relation to marketing in another EU Member State:[↪ Art. 30\(3\) AIFM Law](#)

The CSSF shall, no later than 20 working days after the date of receipt of the complete notification file, transmit the complete notification file to the competent authorities of the EU Member State where it is intended that the AIFs be marketed. Such transmission shall occur only if the AIFM's management of the AIFs complies with and will continue to comply with the Law of 2013 and if the AIFM otherwise complies with the Law of 2013. The CSSF shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy. Upon transmission of the notification file, the CSSF shall directly notify the Luxembourg Authorised AIFM about the transmission. The Luxembourg Authorised AIFM may start marketing the AIFs in the host EU Member State as of the date of that notification.

Where the concerned AIF is an AIF established in an EU Member State other than Luxembourg, the CSSF shall also inform the competent authorities of the AIF about the Member State(s) in which the Luxembourg Authorised AIFM may start marketing the units or shares of the AIF.

**E) Must a Luxembourg Authorised AIFM inform the CSSF about changes in the information included in the initial notification file?**[↪ Art. 29\(4\) AIFM Law](#) | [↪ Art. 30\(4\) AIFM Law](#)

Yes.

All material changes to the information included in the initial notification file must be notified to the CSSF at least 1 month before implementing the change as regards any changes planned by the Luxembourg Authorised AIFM, or immediately after an unplanned change has occurred.

Where the Luxembourg Authorised AIFM has been authorised to market AIFs in an EU Member State other than Luxembourg, the CSSF shall, without delay, inform the competent authorities of the host Member State of the AIFM about any changes to the initial notification file.

**F) Under what conditions does the notification procedure also cover the marketing in the EU of feeder AIFs?**[↪ Art. 29\(1\) AIFM Law](#) | [↪ Art. 30\(1\) AIFM Law](#)

Luxembourg Authorised AIFMs may market in the EU units or shares of EU AIFs qualifying as feeder AIFs, subject to the condition that the master AIF is also an EU AIF which is managed by an authorised EU AIFM.

**G) When does the EU marketing passport under the AIFMD become available for Luxembourg Authorised AIFMs?**[↪ Art. 29 AIFM Law](#) | [↪ Art. 30 AIFM Law](#)

The EU marketing passport under the AIFMD is available from the 22 July 2013 on. From this date Luxembourg Authorised AIFMs may benefit from the possibility to market EU AIFs to professional investors in the EU upon the fulfilment of the notification procedure.

**14. Reporting aspects**

**18 July 2014**

Preliminary remark: The reporting aspects covered by the FAQs on reporting aspects hereafter are to be read in conjunction with the [ESMA Reporting Guidelines](#) and the ESMA Opinion on Reporting under Article 24(5).

**A) Reporting periods – general requirements**

[Art. 22 AIFM Law](#) | [Appendix XIII \(ESMA Guidelines on reporting obligations\) V. Reporting periods](#) | [Appendix XIV \(Q&A published by ESMA\) Section III Reporting](#)

The [ESMA Reporting Guidelines](#) recommend that reporting periods of AIFMs be aligned with calendar years. Depending on the frequency of the reporting as prescribed by [Article 110\(3\) of the AIFMD-CDR](#) AIFMs shall transmit their reporting in accordance with the following table (yyyy stands for the respective year).

| Frequency   | Reporting period start date(s) | Reporting period end date(s) | Deadline for transmission for AIF that are not fund of funds | Deadline for transmission for AIF that are fund of funds |
|-------------|--------------------------------|------------------------------|--|--|
| quarterly   | 01/01/yyyy                     | 31/03/ yyyy                  | 30/04/ yyyy  | 15/05/ yyyy  |
|             | 01/04/yyyy                     | 30/06/ yyyy                  | 31/07/ yyyy  | 15/08/ yyyy  |
|             | 01/07/ yyyy                    | 30/09/ yyyy                  | 31/10/ yyyy  | 15/11/ yyyy  |
|             | 01/10/ yyyy                    | 31/12/ yyyy                  | 31/01/( yyyy +1)   | 15/02/( yyyy +1)   |
| half-yearly | 01/01/ yyyy                    | 30/06/ yyyy                  | 31/07/ yyyy  | 15/08/ yyyy  |
|             | 01/07/ yyyy                    | 31/12/ yyyy                  | 31/01/( yyyy +1)   | 15/02/( yyyy +1)   |
| annually    | 01/01/ yyyy                    | 31/12/ yyyy                  | 31/01/( yyyy +1)   | 15/02/( yyyy +1)   |

**B) Reporting periods – first reporting**

[Art. 22 AIFM Law](#) | [Appendix XIII \(ESMA Guidelines on reporting obligations\) VII. Procedure for first reporting](#)

As per [paragraph 12 of chapter VII. of the ESMA Reporting Guidelines](#) "AIFMs should start reporting as from the first day of the following quarter after they have information to report until the end of the first reporting period. For example, an AIFM subject to half-yearly reporting obligations that has information to report as from 15 February would start reporting information as from 1 April to 30 June."

Depending on the frequency of the reporting as prescribed by [Article 110\(3\) of the AIFMD-CDR](#), AIFMs shall transmit their first reporting in accordance with the following table (yyyy stands for the respective year). The information in the table hereafter illustrates the timing for a first reporting for an AIFM authorised on 15 February of a given year and is applicable as long as there is no shift in the obligation for the frequency of the reporting of that AIFMD.

| Authorisation date | # | Quarterly reporting             | Half-yearly reporting           | Annual reporting                |
|--------------------|---|---------------------------------|---------------------------------|---------------------------------|
| 15/02/yyyy         | 1 | 01/04/yyyy - 30/06/yyyy         | 01/04/yyyy - 30/06/yyyy         | 01/04/yyyy- 31/12/yyyy          |
|                    | 2 | 01/07/yyyy - 30/09/yyyy         | 01/07/yyyy - 31/12/yyyy         | 01/01/(yyyy+1) – 31/12/(yyyy+1) |
|                    | 3 | 01/10/yyyy - 31/12/yyyy         | 01/01/(yyyy+1) – 30/06/(yyyy+1) | 01/01/(yyyy+2) – 31/12/(yyyy+2) |
|                    | 4 | 01/01/(yyyy+1) – 31/03/(yyyy+1) | 01/07/(yyyy+1) – 31/12/(yyyy+1) | 01/01/(yyyy+3) – 31/12/(yyyy+3) |

On the basis of the above table, an Authorised AIFMs subject to half-yearly reporting obligations and having received its authorisation on 15 February of a given year has to submit its first reporting covering the period of 1st April to 30 June on 31 July of the same year at latest (15 August of the same year at latest where the AIF is a fund of funds). The next reporting following the initial one then has to be done on 31 January of the following year at latest (15 February of the following year at latest where the AIF is a fund of funds) for the period of the 1 July to 31 December of the current year.

Registered AIFMs have to report according to the last column since they are subject to annual reporting obligations.

As per [paragraph 11 of the ESMA Reporting Guidelines](#), any AIFM that has been authorised or registered and has received confirmation from the CSSF concerning their authorisation or registration, but has no information to report for the respective reporting period has to submit a reporting file using a special field. If an AIFM has not yet any AIF to report, an AIFM file has to be sent to the CSSF, indicating that the AIFM has not information to report yet. If a specific AIF has not yet been launched although the AIF has been authorised by the CSSF, the AIFM has to send an AIF file for this specific AIF indicating that the AIF has not information to report yet.

**C) As of which date is an AIFM considered to be an Authorised AIFM or a Registered AIFM?**

[Art. 3\(3\) AIFM Law](#) | [Art. 6 AIFM Law](#)

AIFMs are informed of the effective date of their status as Authorised AIFM or as Registered AIFM by the CSSF. This date is to be taken into consideration for the determination of applicable reporting obligations.

**D) As of when do Authorised AIFMs and Registered AIFMs which have been authorised or registered before 23 July 2014 have to file their first reports with the CSSF? Depending on their respective reporting frequency, what will be the start date of the initial reporting period?**

**17 March 2014**

[Appendix XIII \(ESMA Guidelines on reporting obligations\) VII. Procedure for first reporting](#)

Preliminary remark: The answer under point 14.d) is in principle also applicable to AIFMs that benefit from the transitional provisions under Article 58 (1) of the Law of 2013, unless they opt to report under Article 22(1), (2) and (4) of the Law of 2013 in advance of their authorisation (see point 14.e) hereafter).

**I. Authorised AIFMs**

[Art. 6 AIFM Law](#) | [Art. 22 AIFM Law](#) | [Art. 58\(1\) AIFM Law](#)

**1° AIFMs authorised between 22 July 2013 and 30 June 2014**

- Requirement: AIFMs which have been authorised between 22 July 2013 and 30 June 2014 are required to submit the first reporting according to the following table which is applicable as long as there is no shift in a reporting frequency of the AIFMD reporting<sup>139</sup>:

| Reporting Frequency | Reporting period start date(s) | Reporting period end date(s) | Deadline for transmission for AIF that are not fund of funds | Deadline for transmission for AIF that are fund of funds |
|---------------------|--------------------------------|------------------------------|--|--|
| quarterly           | 01/07/2014                     | 30/09/2014                   | 31/10/2014   | 15/11/2014   |
| half-Yearly         | 01/07/2014                     | 31/12/2014                   | 31/01/2015   | 15/02/2015   |
| annually            | 01/07/2014                     | 31/12/2014                   | 31/01/2015   | 15/02/2015   |

- Option: AIFMs which have been authorised between 22 July 2013 and 30 June 2014 have the option to submit the reporting for earlier periods as those mentioned in the table above. In this case the ESMA Reporting Guidelines rules as set out under answer 14.b) above apply.

<sup>139</sup> In the case of changes in the frequency of the reporting obligations AIFMs are invited to consult paragraph IX ("Procedures when AIFMs are subject to new reporting obligations") of the ESMA Reporting Guidelines.

2° AIFMs authorised between 1st and 22 July 2014

AIFMs which have been authorised between 1st and 22 July 2014 are required to submit the first reporting - covering the period from 1st October 2014 to 31 December 2014 - for 31 January 2015 at latest (15 February 2015 at latest where the AIF is a fund of funds) whatever its reporting frequency is.

**29 December 2014**

The requirements under point 2° above are also applicable to AIFMs established before the 22 July 2014 and having been granted their authorisation between the 1st October 2014 and the 31 December 2014.

**II. Registered AIFMs**

[↪ Art. 3\(3\) AIFM Law](#) | [↪ Art. 22 AIFM Law](#) | [↪ Art. 58\(1\) AIFM Law](#)

1° Registered AIFMs that have received confirmation regarding their registration in 2013

- Requirement: AIFMs that have received confirmation regarding their registration in 2013 are required to report for 31 January 2015 at latest (15 February 2015 at latest where the AIF is a fund of funds) covering the period of 1st January 2014 up to 31 December 2014.
- Option: An AIFM that has submitted a request for registration and has received confirmation from the CSSF regarding its status as Registered AIFM with an effective date before 1st October 2013, has the option to submit the reporting for earlier periods as those mentioned above. In this case the [ESMA Reporting Guidelines](#) rules as set out under answer 14.b) apply.

2° Registered AIFMs that have received confirmation regarding their registration in 2014

Registered AIFMs that have received confirmation regarding their registration in 2014 are required to submit their first reporting according to the following table:

| Confirmation regarding their registration received in | Reporting period start date(s) | Reporting period end date(s) | Deadline for transmission for AIF that are not fund of funds | Deadline for transmission for AIF that are fund of funds |
|---|--------------------------------|------------------------------|--|--|
| Q1 2014   | 01/04/2014                     | 31/12/2014                   | 31/01/2015   | 15/02/2015   |
| Q2 2014   | 01/07/2014                     | 31/12/2014                   | 31/01/2015   | 15/02/2015   |
| Q3 2014   | 01/10/2014                     | 31/12/2014                   | 31/01/2015   | 15/02/2015   |
| Q4 2014   | 01/01/2015                     | 31/12/2015                   | 31/01/2016   | 15/02/2016   |

Any of the above mentioned AIFMs has to contact the CSSF in order to get identifiers for reporting purposes.

**E) Reporting requirements applicable to AIFMs benefiting from the transitional provisions under Article 58(1) of the Law of 2013?**

[↪ Art. 22 AIFM Law](#) | [↪ Art. 58\(1\) AIFM Law](#)

AIFMs that benefit from the transitional provisions under Article 58(1) of the Law of 2013 have the option to submit or not to submit the reporting requested under Article 22(1), (2) and (4) of the Law of 2013 in advance of their authorisation.

If the AIFM opts to report, it has to submit its reporting with the frequency and for the reporting periods described under the answer to question 14.b) above.

AIFMs that opt to report in advance of their authorisation have to contact the CSSF in order to get identifiers for reporting purposes.

**F) Does the CSSF require reporting on more frequent basis than foreseen in the AIFMD-CDR?**

[↪ Art. 22 AIFM Law](#)

No.

For the time being the CSSF does not request information to be reported on a more frequent basis than foreseen in the AIFMD-CDR.

**G) In both AIFM and AIF reports, some fields are formatted to be filled-in with free text elements. In which language(s) these free text fields may be provided to CSSF?**

[↪ Art. 22 AIFM Law](#)

The only acceptable language for the entire AIFMD reporting is English.

**H) Acceptable means of communication regarding the reporting required under the Law of 2013?**

[↪ Art. 22 AIFM Law](#)

AIFMD reporting is possible only by using the channels that have been accepted by the CSSF, i.e. for the moment "e-file" and "SOFIE".

**I) Do the requirements under Article 20(2) of the Law of 2013 apply to Registered AIFMs and Authorised AIFMs?**

[↪ Art. 3\(3\) AIFM Law](#) | [↪ Art. 20\(2\) AIFM Law](#)

Article 20 (2) only applies to Authorised AIFMs, notwithstanding any specific rules under a Product Law applicable to a given AIF.

**J) Do annual reports as required under Article 20(1) of the Law of 2013 have to be made available for all AIFs by authorised AIFMs when their authorisation date is prior to the end of their fiscal year?**

[↪ Art. 6 AIFM Law](#) | [↪ Art. 20 AIFM Law](#)

Yes.

Authorised AIFMs have to ensure that an annual report based on the elements described in Article 20(2) of the Law of 2013 is made available in respect of all those AIFs where the AIFMs' authorisation date is prior to the end of the relevant AIFs fiscal year.

This also applies to Authorised AIFMs having been authorised during 2013 for the fiscal year ending in 2013.

**K) Do annual reports covered under Article 20(2) of the Law of 2013 have to be submitted to the CSSF in conformity with the naming conventions as laid down in Circular CSSF 11/509 and the procedure as described in Circular CSSF 08/371?**

[↪ Art. 20 AIFM Law](#)

Yes.

Only annual reports respecting the naming conventions and the format as set out in [Circular CSSF 11/509](#) and the [Circular CSSF 08/371](#) are accepted.

**L.1) Which provisions does an annual report to be provided by an AIFM under Article 20 of the Law of 2013 have to comply with?**

[↪ Art. 20 AIFM Law](#)

For the presentation of the annual report and especially for the Article 20 (1) (a) a balance-sheet or a statement of assets and liabilities; and (b) an income and expenditure account for the financial year, AIFMs have to comply with the requirements under scheme B of the Law of 2010 (for part II funds) and on the annex of the Law of 2007 (for SIFs, where applicable) and on [Article 104 of the AIFMD Level II Regulation](#).

**L.2) Which accounting standards are accepted under Article 20(3) of the Law of 2013 for preparing the accounting information in the annual report of an AIF managed by an Authorised AIFM established in Luxembourg?**

**30 June 2021**

No longer applicable

**M) Does the CSSF require the AIFMs to provide the additional information set out in [ESMA Opinion on Reporting under Article 24\(5\)](#)?**

[↪ Art. 22\(5\) AIFM Law](#)

Yes.

The CSSF will require from AIFMs all information indicated in the ESMA Opinion on Reporting under Article 24(5).

**N) Do the reporting requirements under [Article 24\(1\), \(2\) & \(4\) of the AIFMD](#) also apply to non-EU AIFMs?**

[↪ Art. 45 AIFM Law](#)

Yes.

The reporting requirements do also apply to non-EU AIFMs during the period before introduction of the passport for non-EU AIFMs expected to be available for 2015 (hereafter referred to as the transitional period). The reporting requirements by non-EU AIFMs during the transitional period are addressed in points 14.o) to 14.q) hereafter.

**10 August 2015**

**O) When does a non-EU AIFM have to report to the CSSF under the requirements of [Article 24\(1\), \(2\) & \(4\) of the AIFMD](#)?**

[↪ Art. 45 AIFM Law](#)

Based on the provisions of Article 45 of the Law of 2013, a non- EU AIFM will have to report to the CSSF under the requirements of Article 24(1), (2) & (4) of the AIFMD only in the case where this non-EU AIFM is marketing AIFs to professional investors in [Luxembourg](#) and as long as the passport regime is not available to non-EU AIFMs (see also section 18 hereafter).

Additionally, a non-EU AIFM that manages or markets a feeder AIF (whether EU or non-EU) in Luxembourg will also have to report to the CSSF under the requirements of Article 24(1), (2) and (4) of the AIFMD for the non-EU master AIF(s) of such feeder, even if the non-EU master AIF(s) is (are) not marketed in the EU.

This requirement only applies if the non-EU AIFM manages both the feeder AIF and the non-EU master AIF. The CSSF requires in such case that non-EU AIFMs submit a separate AIF reporting file for each concerned non-EU master AIF.

**P) In a configuration where a non-EU AIFM is marketing AIFs to professional investors in Luxembourg and in other Member States of the EU, should the reporting to the CSSF under the requirements of Article 24(1), (2) & (4) of the AIFMD contain data for all AIFs marketed by the non- EU AIFM in all the EU Member States or only the data for those AIFs that are marketed in Luxembourg?**

[↪ Art. 45 AIFM Law](#)

When a non-EU AIFM is marketing AIFs to professional investors in Luxembourg and in other Member States of the EU, the reporting to the CSSF under the requirements of Article 24(1), (2) & (4) of the AIFMD, should only cover the data for:

- those AIFs that are marketed in Luxembourg and
- those non-EU master AIFs that must be reported to the CSSF as per question 14.o) above.

**18 July 2014**

**Q) From what date on does a non-EU AIFM that markets AIFs to professional investors in Luxembourg have to report to the CSSF under the requirements of Article 24(1), (2) & (4) of the AIFMD?**

[↪ Art. 45 AIFM Law](#)

As mentioned under section 18. hereafter, non-EU AIFMs which intend to market AIFs to professional investors in Luxembourg in accordance with the provisions of Article 45 of the Law of 2013, must inform the CSSF prior to any marketing activity.

Non-EU AIFMs shall in principle take the date of the information form provided to the CSSF for the marketing in Luxembourg (see section 18. hereafter) as the start date for their reporting requirements under Article 24(1), (2) & (4) of the AIFMD.

The reporting frequency and the reporting periods for non-EU AIFMs are the same as those applicable to Luxembourg AIFMs (see ESMA Reporting Guidelines).

**R) Do the reporting requirements under Article 24(1), (2) & (4) of the AIFMD also apply to non- EU AIFMs which existed and marketed non-Luxembourg AIFs under the Luxembourg private placement regime rules before 22 July 2013?**

[↪ Art. 45 AIFM Law](#)

No.

As pointed out in point 8.e), the marketing of non-Luxembourg AIFs in Luxembourg by non-EU AIFMs under the existing Luxembourg placement rules will continue to be permitted until 22 July 2014 and will not be affected by the Law of 2013. Non- EU AIFMs which existed and marketed non-Luxembourg AIFs under the Luxembourg private placement regime rules before 22 July 2013 are therefore not concerned by the points 14.n) to 14.r) mentioned before.

**10 August 2015**

**S) When reporting a non-EU master AIF under the requirements of Article 24(1), (2) and (4) of the AIFMD, should the non-EU AIFM include the AuM (and other positions) of such non-EU master AIF in the aggregate amount of AuM (and other positions) to be reported to the CSSF in the AIFM reporting file for the purposes of Article 24(2) of the AIFMD?**

No. The amount of assets under management (AuM) and other positions of a non-EU master AIF, that must be reported to the CSSF as per question 14.o) above in a separate AIF reporting file, should not be included in the aggregate amount of AuM (and other positions) to be reported to the CSSF in the AIFM reporting file.

## 15. Valuation of the AIF's assets

20 February 2014

### A) What types of valuation set-ups are foreseen by the Law of 2013?

[↪ Art. 17\(4\) AIFM Law](#)

The Law of 2013 stipulates that the AIFM may either perform itself the valuation function (Article 17(4)(b) of the Law of 2013) or appoint one or several external valuers (Article 17(4)(a) of the Law of 2013).

### B) Who may be appointed as external valuer pursuant to the Law of 2013?

[↪ Art. 17\(4\) AIFM Law](#)

According to Article 17(4)(a) of the Law of 2013, an external valuer "must be a legal or natural person independent from the AIF, the AIFM and any other persons with close links to the AIF or the AIFM". This could be the AIF's depositary or its administrator (see below and question 15.d)) or any other third party that fulfils this condition.

Further to Article 17(4), paragraph 2 of the Law of 2013, the appointment of the depositary appointed for an AIF as external valuer of that AIF is subject to the condition that it has functionally and hierarchically separated the performance of its depositary functions from its tasks as external valuer and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

Pursuant to [recital 80 of the AIFMD-CDR](#), a third party that has been appointed to perform administration for an AIF (i.e. the AIF's administrator), including calculation of the net asset value, can be considered as an external valuer for the purposes of the AIFMD if it provides tailor-made valuations for individual assets, specifically for those requiring subjective judgement on the value of the assets.

### C) How is the appointment of an external valuer to be formalised?

[↪ Art. 17\(4\) AIFM Law](#)

The appointment of a third party as the AIF's external valuer has to be formalised by a written contract, which clearly states that the third party is appointed as external valuer in the sense of Article 17(4)(a) of the Law of 2013 and sets out its tasks.

### D) May the administrator be appointed as external valuer?

[↪ Art. 17\(4\) AIFM Law](#)

Yes, the administrator may be appointed to act as external valuer if it fulfils the requirements under Articles 17(4) and 17(5) of the Law of 2013.

However, it should be noted that the administrator should not be assumed to always be the external valuer. As pointed out under question 15.c), the administrator's appointment as the AIF's external valuer should clearly follow from the terms of the contract with the administrator.

## 16. Transaction costs

20 February 2014

### A) Must AIFs established under Part II of the Law of 2010 disclose the transaction costs in their periodical financial reports?

Yes, Article 124 of the Law of 2013 has amended Schedule B (« Information to be included in the periodical reports ») of Annex I of the Law of 2010 by adding the disclosure of the transaction costs.

AIFs established under Part II of Law 2010 must disclose the transaction costs in their financial reports.

The transaction costs, which are all costs incurred by a UCI in connection with transactions on its portfolio, including those charged by the custodian bank for the execution of the UCI's transactions, can be disclosed either under a specific heading « transaction costs » of the profit and loss account or in the notes to the accounts.

## 17. Initial capital and own funds requirements applicable to AIFMs

10 August 2015

A) Which regulatory texts are to be taken into consideration for the purpose of assessing the initial capital and own funds requirements applicable to external AIFMs which do not hold a licence as Chapter 15 ManCos (i.e. Chapter 16 ManCos or other Luxembourg based AIFMs)?

↪ Art. 8 AIFM Law

Only the relevant provisions of the Law of 2013 & the AIFMD-CDR apply to these AIFMs, the situation summary of which is reflected in the table below.

| Initial capital <sup>140</sup><br>Art. 8(2) Law of 2013 | Own funds<br>Art. 8(3)/(5) Law of 2013  | Cover of potential professional liability risks<br>Art. 8(7) Law of 2013 & Art. 12-15 AIFMD-CDR |   |
|---|---|---|---|
| at least <b>125,000 EUR</b>                             | <u>Rule</u><br><b>0.02%</b> of the amount by which the value of the portfolios exceeds EUR 250,000,000 (threshold)<br><br><u>Value:</u><br>The value of the portfolio is to be understood as the sum of the <b>net asset values</b> of the managed portfolios ( <b>AIFs only</b> , excluding investments by AIFs in other AIFs that are managed by the same AIFM <sup>141</sup> )<br><br><u>Limits</u><br><b>Maximum</b> (initial capital + own funds)<br>10,000,000 EUR<br><br><b>Minimum</b> <sup>142</sup><br>¼ of the fixed overheads projected in the business plan / ¼ of the fixed overheads of the preceding year | <b>by additional own funds</b>  | <u>Rule</u><br>(at least) equal to <b>0.01%</b> of the value of the portfolios of <b>AIFs</b> managed<br><br><u>Value:</u><br>The value of the portfolios of AIFs managed shall be sum of the <b>absolute value</b> of all assets of all AIFs managed by the AIFM, including assets acquired through use of leverage, whereby derivative instruments shall be valued at their market value – and including investments by AIFs in other AIFs that are managed by the same AIFM <sup>76</sup><br><br><u>Limits</u><br>No maximum/ No threshold applicable <sup>143</sup> |
|   |   | <b>or by a professional indemnity insurance</b>   | <u>Rule</u><br>Requirements under article 15 of AIFMD-CDR<br><br><u>Limits</u><br>No maximum/ No threshold applicable <sup>78</sup>   |

<sup>140</sup> For the provision of the services mentioned in Article 6(4) of the AIFMD, reference is made to article 12 of Directive 2004/39/EC (see article 6(6) of the AIFMD).

<sup>141</sup> Please see: [http://www.esma.europa.eu/system/files/2015-1137\\_qa\\_on\\_the\\_application\\_of\\_the\\_aifmd.pdf](http://www.esma.europa.eu/system/files/2015-1137_qa_on_the_application_of_the_aifmd.pdf), p. 25.

<sup>142</sup> The reference to article 21 of Directive 2006/49/EC shall be construed as a reference to article 97 of Regulation (EU) No 575/2013.

<sup>143</sup> It follows from article 8(7) Law of 2013 that additional own funds or a coverage by a professional indemnity insurance to cover potential professional liability risks are not included in (and are hence to be provided in addition to) the own funds mentioned in the second column of this table.

**B) Which regulatory texts are to be taken into consideration for the purpose of assessing the initial capital and own funds requirements applicable to a Chapter 15 Manco which holds a licence as AIFM?**

**Art. 8 AIFM Law**

Both the relevant provisions of the Law of 2010 and of the Law of 2013 (& the AIFMD-CDR) apply to these AIFMs, the situation summary of which is reflected in the table below.

| Initial capital <sup>144</sup><br>Art. 102(1)a) Law of 2010 | Own funds<br>Art. 102(1)a) Law of 2010  | Cover of potential professional liability risks<br>Art. 8(7) Law of 2013 & Art. 12-15 AIFMD-CDR |  |
|---|---|---|--|
| at least <b>125,000 EUR</b>                                 | <p><u>Rule</u><br/><b>0.02%</b> of the amount by which the value of the portfolios (<b>AIFs, UCITS and other UCIs which do not qualify as AIF</b>) exceeds EUR 250,000,000 (threshold)</p> <p>AIFs qualify as "other UCIs" managed by the Chapter 15 ManCo</p> <p><u>Value</u><br/>The value of the portfolio is to be understood as the sum of the <b>net asset values</b> of the managed portfolios (<b>AIFs<sup>145</sup>, UCITS and other UCIs which do not qualify as AIF</b>)</p> <p><u>Limits</u><br/><b>Maximum</b> (initial capital + own funds)<br/>10,000,000 EUR</p> <p><b>Minimum<sup>146</sup></b><br/>¼ of the fixed overheads projected in the business plan /<br/>¼ of the fixed overheads of the preceding year</p> | <p><b>by additional own funds</b></p>   | <p><u>Rule</u><br/>(at least) equal to <b>0.01%</b> of the value of the portfolios of <b>AIFs</b> managed</p> <p><u>Value</u><br/>The value of the portfolios of AIFs managed shall be sum of the <b>absolute value</b> of all assets of all AIFs managed by the AIFM, including assets acquired through use of leverage, whereby derivative instruments shall be valued at their market value – and including investments by AIFs in other AIFs that are managed by the AIFM<sup>147</sup>.</p> <p><u>Limits</u><br/>No maximum / No threshold applicable<sup>148</sup></p> |
|   |   | <p><b>or by a professional indemnity insurance</b></p>  | <p><u>Rule</u><br/>Requirements under article 15 of AIFMD-CDR</p> <p><u>Limits</u><br/>No maximum / No threshold applicable<sup>83</sup></p>   |

<sup>144</sup> For the provision of the services mentioned in Article 6(4) of the AIFMD, reference is made to article 12 of Directive 2004/39/EC (see article 6(6) of the AIFMD).

<sup>145</sup> Excluding investments by AIFs in other AIFs that are managed by the same AIFM, please see: [http://www.esma.europa.eu/system/files/2015-1137\\_qa\\_on\\_the\\_application\\_of\\_the\\_aifmd.pdf](http://www.esma.europa.eu/system/files/2015-1137_qa_on_the_application_of_the_aifmd.pdf), p. 25.

<sup>146</sup> The reference to article 21 of Directive 2006/49/EC shall be construed as a reference to article 97 of Regulation (EU) No 575/2013.

<sup>147</sup> Please see: [http://www.esma.europa.eu/system/files/2015-1137\\_qa\\_on\\_the\\_application\\_of\\_the\\_aifmd.pdf](http://www.esma.europa.eu/system/files/2015-1137_qa_on_the_application_of_the_aifmd.pdf), p. 25.

<sup>148</sup> It follows from article 8(7) Law of 2013 that additional own funds or a coverage by a professional indemnity insurance to cover potential professional liability risks are not included in (and are hence to be provided in addition to) the own funds mentioned in the second column of this table.

**C) What are the risks that should be covered either by additional own funds or by a professional indemnity insurance?**

[↪ Art. 8 AIFM Law](#)

The professional liability risks to be covered pursuant to AIFMD shall be risks of loss or damage caused by a relevant person ([Article 1 of the AIFMD-CDR](#)) through the negligent performance of activities for which the AIFM has legal responsibility.

The risks that should at least be covered are enumerated in [Article 12 of the AIFMD-CDR](#).

**D) In a master-feeder AIF structure, where a Chapter 15 ManCo respectively a Chapter 16 ManCo authorised under the AIFMD is the appointed AIFM of one of these AIFs and carries out activities pursuant to the AIFMD (i.e. the activities referred to in Annex I of the AIFMD) for the other AIF, does it have to cover potential professional liability risks on the master and feeder level?**

[↪ Art. 8 AIFM Law](#)

Yes.

However, the professional liability risks to be covered pursuant to [Article 9\(7\) of AIFMD](#) shall be risks of loss or damage caused by a relevant person through the negligent performance of activities for which the AIFM has legal responsibility.

## **18. Marketing of AIFs to professional investors in Luxembourg without passport by non-EU AIFMs on the basis of Article 45 of the Law of 2013**

18 July 2014

**A) Are non-EU AIFMs allowed to market AIFs to professional investors in Luxembourg without a passport?**

[↪ Art. 45 AIFM Law](#)

Yes.

The minimum conditions applicable for the marketing without a passport are set under Article 45 of the Law of 2013.

**B) Are non-EU AIFMs required to inform the CSSF, if they want to market AIFs to professional investors in Luxembourg on the basis of Article 45 of the Law of 2013?**

[↪ Art. 45 AIFM Law](#)

Yes, non-EU AIFMs must inform the CSSF prior to any marketing activity.

**C) Do non-EU AIFMs have to inform the CSSF if they stop marketing AIFs to professional investors in Luxembourg on the basis of Article 45 of the Law of 2013?**

[↪ Art. 45 AIFM Law](#)

Yes.

When informing the CSSF, non-EU AIFMs must indicate the date from which they will stop marketing activities in Luxembourg.

**D) What information should be provided to the CSSF by non-EU-AIFMs before they may start marketing AIFs to professional investors in Luxembourg on the basis of Article 45 of the Law of 2013?**[↪ Art. 45 AIFM Law](#)

An information form for the marketing in Luxembourg of AIFs managed by non-EU AIFMs on the basis of Article 45 of the Law of 2013 is available for download on the website of the CSSF.

**E) What information should be provided periodically by non-EU AIFMs to the CSSF on the basis of Article 45 of the Law of 2013?**[↪ Art. 45 AIFM Law](#)

As long as the passport is not available: The reporting requirements under Article 24 of the AIFMD apply to non-EU AIFMs marketing AIFs in Luxembourg on the basis of Article 45 of the Law of 2013. The reporting to the CSSF should however only cover the data for those AIFs that are marketed in Luxembourg.

Once the passport regime is available: As soon as the passport is available to non-EU AIFMs, the reporting required under Article 24 of the AIFMD should, in accordance with [Article 110 \(7\) of the AIFMD-CDR](#), be provided to the competent authority of the Member State of reference.

**F) Can non-EU AIFMs market their regulated Luxembourg AIFs (UCIs under part II of the Law of 2010, SIFs under the Law of 2007, SICARs under the Law of 2004) to professional investors in Luxembourg on the basis of Article 45 of the Law of 2013 without previously informing the CSSF?**[↪ Art. 45 AIFM Law](#)

No.

The non-EU AIFMs should inform the CSSF as soon as they start to market the regulated Luxembourg AIFs to professional investors in Luxembourg on the basis of Article 45 of the Law of 2013.

It should be noted that the requested information may be introduced at the same time as the approval process for a regulated Luxembourg AIF, if the non-EU AIFM intends to market the AIF once the authorisation is received. The requested information should be provided to the CSSF via the information form referred to under point 18.d).

**G) Can non-EU AIFMs market their non-regulated Luxembourg AIFs (Luxembourg AIFs other than UCIs under part II of the Law of 2010, SIFs under the Law of 2007, SICARs under the Law of 2004) to professional investors in Luxembourg on the basis of Article 45 of the Law of 2013 without previously informing the CSSF?**[↪ Art. 45 AIFM Law](#)

No.

The non-EU AIFMs should inform the CSSF as soon as they start to market the non-regulated Luxembourg AIFs to professional investors in Luxembourg on the basis of Article 45 of the Law of 2013.

The requested information should be provided to the CSSF via the information form referred to under point 18.d).

**H) What general rules apply to non-EU AIFMs marketing AIFs to professional investors in Luxembourg on the basis of Article 45 of the Law of 2013?**[↪ Art. 45 AIFM Law](#)

As long as the passport regime is not available: The non-EU AIFMs should comply with the rules set in Article 45 of the Law of 2013 and section XIII (Guidelines on disclosure) of ESMA's guidelines on sound remuneration

policies under AIFMD. Although the non-EU AIFMs market AIFs to professional investors under Article 45 of the Law of 2013, they should not contravene namely the Consumer Code.

Once the passport regime will be available: Further rules apply to the non-EU AIFMs as the parallel application of the national regime should be without prejudices of the [Articles 37, 39 and 40 of the AIFMD](#).

**I) Do non-EU AIFMs have to apply for an authorisation under Article 32(5) of the Law of 1993 if they want to market AIFs to professional investors in Luxembourg on the basis of article 45 of the Law of 2013?**

[Art. 45 AIFM Law](#)

No.

Non-EU AIFMs have not to apply for an authorisation under article 32(5) of the Law of 1993. As mentioned under point 18.b), non-EU AIFMs must however inform the CSSF prior to any marketing activity in Luxembourg.

**J) What are the rules applicable to non-EU AIFMs which marketed AIFs to professional investors in Luxembourg under the existing Luxembourg placement regime before 22 July 2013?**

[Art. 45 AIFM Law](#) | [Art. 58 AIFM Law](#)

As mentioned under point 8.e), the marketing of AIFs in Luxembourg by non-EU AIFMs under the existing Luxembourg placement rules will continue to be permitted until 22 July 2014.

These non-EU AIFMs, which marketed AIFs to professional investors in Luxembourg under the existing Luxembourg placement regime before 22 July 2013, will have to send to the CSSF the information form referred to under point 18.d) if they intend to continue to market their AIFs in Luxembourg on the basis of Article 45 of the Law of 2013. It should be noted that this obligation applies also to non-EU AIFMs marketing their regulated and non-regulated Luxembourg AIFs in Luxembourg (see points 18.f) and 18.g) above).

## **19. Marketing of non-EU AIFs to professional investors in Luxembourg without passport by EU AIFMs on the basis of Article 37 of the Law of 2013**

**29 December 2014**

Preliminary remark:

The term "EU AIFM" referred to in section 19 of the FAQs covers EU AIFMs irrespective of whether they are AIFMs established in Luxembourg or in another EU Member State.

**A) Are EU AIFMs allowed to market non-EU AIFs to professional investors in Luxembourg without a passport?**

[Art. 37 AIFM Law](#)

Yes.

The minimum conditions applicable are set out under Article 37 of the Law of 2013.

**B) Who is concerned by Article 37 of the Law of 2013?**

Every authorised EU AIFM which intends to market to professional investors in Luxembourg without passport shares or units of

(i) one or more non-EU AIF(s) it manages, or

(ii) one or more EU feeder AIF(s) whose master AIF is not an EU AIF or whose master AIF is not managed by an authorised EU AIFM.

**C) Are EU AIFMs required to inform the CSSF if they want to market non-EU AIFs to professional investors in Luxembourg on the basis of Article 37 of the Law of 2013?**

[↪ Art. 37 AIFM Law](#)

Yes, EU AIFMs must inform the CSSF prior to any marketing activity on the basis of Article 37 of the Law of 2013.

**D) Do EU AIFMs have to inform the CSSF if they stop marketing non-EU AIFs to professional investors in Luxembourg on the basis of Article 37 of the Law of 2013?**

[↪ Art. 37 AIFM Law](#)

Yes.

When informing the CSSF, EU AIFMs must indicate the date from which they will stop marketing activities in Luxembourg under Article 37 of the Law of 2013.

**E) What information should be provided to the CSSF by EU AIFMs before they may start marketing non-EU AIFs to professional investors in Luxembourg on the basis of Article 37 of the Law of 2013?**

[↪ Art. 37 AIFM Law](#)

An information form for the marketing in Luxembourg of non-EU AIFs by EU AIFMs on the basis of Article 37 of the Law of 2013 is available for download on the website of the CSSF.

**F) To what extent are the depositary requirements under the AIFMD applicable to EU AIFMs marketing non-EU AIFs to professional investors in Luxembourg on the basis of Article 37 of the Law of 2013?**

[↪ Art. 37 AIFM Law](#)

Pursuant to Article 37 a) of the Law of 2013, EU AIFMs must ensure that one or more entities are appointed to carry out the duties referred to under [Article 21 \(7\) \[cash-monitoring\]](#), [\(8\) \[safekeeping of assets\]](#) and [\(9\) \[oversight of certain operational functions\]](#) of the AIFMD.

These duties are commonly designated as "Depo Lite Services".

Further questions relating to the "Depo Lite Services" under Article 21 (7), (8) and (9) of the AIFMD are addressed in points 19.g) to 19.i) hereafter.

**G) Do EU AIFMs, if they want to market non-EU AIFs to professional investors in Luxembourg on the basis of Article 37 of the Law of 2013, have to inform the CSSF on the identity of the entity(ies) appointed to carry out the "Depo Lite Services" under Article 21 (7), (8) and (9) of the AIFMD?**

Yes.

Every EU AIFM (irrespective of whether the EU AIFM is an AIFM established in Luxembourg or in another EU Member State), which intends to start marketing activities in Luxembourg under Article 37 of the Law of 2013, must inform the CSSF on the identity of the entity(ies) appointed to carry out the "Depo Lite Services" referred to in [Article 21 \(7\), \(8\) and \(9\) of the AIFMD](#).

**H) In case of an EU AIFM marketing non-EU AIFs to professional investors in Luxembourg on the basis of Article 37 of the Law of 2013, what is the number of entities that can be appointed in order to perform the "Depo Lite Services" under Article 21 (7), (8) and (9) of the AIFMD?**

In the case described, one or several entities can be appointed per non-EU AIF to perform the duty referred to under [Article 21 \(8\) \[safekeeping of assets\] of the AIFMD](#), i.e. either a single depositary shall carry out this duty with regard to the AIF's assets entrusted to it for safe-keeping, or, in case several entities (different prime brokers, for example) have been appointed to perform this duty, each such entity shall carry out this duty with regard to the portion of the AIF's assets that has been entrusted to it for safe-keeping.

However, as to the duties referred to under [Article 21 \(7\) \[cash-monitoring\]](#) and [\(9\) \[oversight of certain operational functions\]](#) of the AIFMD, the number of entities per non-EU AIF that can be appointed is limited to a maximum of one entity per duty.

**I) In case of an EU AIFM marketing non-EU AIFs to professional investors in Luxembourg on the basis of Article 37 of the Law of 2013, what are the requirements regarding the location of the entitie(s) appointed for the carrying out of the "Depo Lite Services" under Article 21 (7), (8) and (9) of the AIFMD?**

[↪ Art. 37 AIFM Law](#)

There are no specific requirements provided for under Article 37 of the Law of 2013 with respect to the location of the entitie(s) appointed for the carrying out of the "Depo Lite Services" referred to under [Article 21 \(7\), \(8\) and \(9\) of the AIFMD](#).

**J) What general rules apply to EU AIFMs marketing non-EU AIFs to professional investors in Luxembourg on the basis of Article 37 of the Law of 2013?**

[↪ Art. 37 AIFM Law](#)

Although EU AIFMs may market non-EU AIFs to professional investors under Article 37 of the Law of 2013, they should not contravene namely to the Luxembourg Consumer Code.

**K) What are the rules applicable to EU AIFMs which marketed non-EU AIFs to professionnal investors in Luxembourg under the existing Luxembourg placement regime before 22 July 2013?**

[↪ Art. 37 AIFM Law](#)

These EU AIFMs, which marketed non-EU AIFs to professionnal investors in Luxembourg under the existing Luxembourg placement regime before 22 July 2013, will have to send to the CSSF the information form referred to under point 19.e) if they intend to continue to market their non-EU AIFs in Luxembourg on the basis of Article 37 of the Law of 2013.

## **20. Notification to the CSSF of the acquisition of major holdings and control of non-listed companies on the basis of Article 25 of the Law of 2013<sup>149</sup>**

**29 December 2014**

**A) Which entities are concerned by the provisions of Article 25 of the Law of 2013 relating to the notification to the CSSF of the acquisition of major holdings and control of non-listed companies?**

[↪ Art. 25 AIFM Law](#) | [↪ Art. 45 AIFM Law](#)

The following entities are concerned by the provisions of Article 25 of the Law of 2013 relating to the notification to the CSSF of the acquisition of major holdings and control of non-listed companies:

(i) every Luxembourg AIFM authorised under chapter 2 of the Law of 2013.

(ii) every non-EU AIFM marketing AIFs to professional investors in Luxembourg without passport on the basis of article 45 of the Law of 2013. Regarding the marketing regime under article 45 of the Law of 2013, please refer to section 18 above.

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<sup>149</sup> The term "AIFM" in the points 20.a) to 20.g) hereafter refers to (i) authorised Luxembourg AIFMs and (ii) non-EU AIFMs performing marketing activities in Luxembourg under article 45 of the Law of 2013.

## **B) What are the different scenarios under which AIFMs have to make the notifications to the CSSF required under Article 25 of the Law of 2013?**

### **↳ Art. 25 AIFM Law**

The scenarios under which AIFMs have to make the notifications to the CSSF required under Article 25 of the Law of 2013 are the following:

#### **(A) Notification of acquisition of major holdings (Article 25 (1) of the Law of 2013)**

Notification to the CSSF under Article 25 (1) of the Law of 2013 is required when an AIFM manages an AIF that acquires, disposes of or holds shares of a non-listed company, any time when the proportion of voting rights of the non-listed company held by the AIF reaches, exceeds or falls below the thresholds of 10%, 20%, 30%, 50% and 75%.

#### **(B) Notification of the acquisition of control<sup>150</sup> of non-listed companies (Article 25 (2) of the Law of 2013)**

Notification to the CSSF under Article 25 (2) of the Law of 2013 is required in the following situations:

- (i) when an AIFM manages one or more AIFs, which either individually or jointly, on the basis of an agreement aimed at acquiring control, acquire control of a non-listed company;
- (ii) when an AIFM cooperating with one or more other AIFMs on the basis of an agreement pursuant to which the AIFs managed by those AIFMs jointly, acquires control of a non-listed company.

## **C) What is the definition of a "non-listed company"?**

Pursuant to Article 1 (63) of the Law of 2013, "non-listed company" means any company which has its registered office in the European Union and the shares of which are not admitted to trading on a "regulated market" within the meaning of point (14) of Article 4 (1) of Directive 2004/39/EC on markets in financial instruments, i.e. a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments in the system and in accordance with its nondiscretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III of the said Directive.

## **D) Are there situations where AIFMs are not required to notify to the CSSF the acquisition of major holdings and control of non-listed companies in accordance with the provisions of Article 25 of the Law of 2013?**

### **↳ Art. 25 AIFM Law**

Yes.

Notification to the CSSF of the acquisition of major holdings and control under Article 25 of the Law of 2013 is not required where the non-listed companies are:

- (i) small and medium-sized enterprises within the meaning of Article 2(1) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises<sup>151</sup>;

or

- (ii) special purpose vehicles with the purpose of purchasing, holding or managing real estate.

<sup>150</sup> Pursuant to article 24 (5) of the Law of 2013, "control" shall mean more than 50% of the voting rights of the non-listed company.

<sup>151</sup> Pursuant to article 2(1) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003, the category of micro, small and medium-sized enterprises is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

With respect to point (i), the AIFM may rely on the information which is made available by the investee companies at time of acquisition.

**E) What information should AIFMs notify to the CSSF in case of the acquisition of major holdings and control of non-listed companies under Article 25 of the Law of 2013?**

[↪ Art. 25 AIFM Law](#) | [↪ Art. 26 AIFM Law](#)

A specific form for the notification of major holdings and control of non-listed companies on the basis of Article 25 of the Law of 2013 is available for download on the website of the CSSF.

**(A) Notification of acquisition of major holdings (Article 25 (1) of the Law of 2013)**

The relevant information has to be filled out in point IV. – section 1 of the notification form.

**(B) Notification of the acquisition of control of non-listed companies (Article 25 (2) of the Law of 2013)**

The relevant information has to be filled out in point IV – section 2 of the notification form.

Please note further that in case of acquisition of control of non-listed companies, the CSSF may at any time request the AIFM to make available the information referred to in Article 26 (2) of the Law of 2013.

**F) What is the timeframe within which AIFMs have to make the notifications to the CSSF required under Article 25 of the Law of 2013 in case of the acquisition of major holdings and control of non-listed companies?**

[↪ Art. 25 AIFM Law](#)

Pursuant to Article 25 (5) of the Law of 2013, the notifications under Article 25 of that law shall be made as soon as possible, but not later than 10 working days after the date on which the AIF has reached, exceeded or fallen below the relevant threshold or has acquired control over the non-listed company.

**G) As of when must AIFMs comply with the rules under Article 25 of the Law of 2013 regarding the acquisition of major holdings and control of non-listed companies?**

[↪ Art. 25 AIFM Law](#) | [↪ Art. 45 AIFM Law](#)

AIFMs must comply with the rules under Article 25 of the Law of 2013 as of the following date:

(i) for Luxembourg authorised AIFMs, as of the date the AIFM is authorised by the CSSF under chapter 2 of the Law of 2013;

(ii) for non-EU AIFM marketing AIFs to professional investors in Luxembourg without passport on the basis of Article 45 of the Law of 2013, as of the date from which the non-EU AIFM will start marketing activities in Luxembourg under that Article.

## **21. Definition of marketing and reverse solicitation**

### **10 August 2015**

*Preliminary remarks:* Given that there is no guidance on a European level regarding what marketing exactly consists in, the guidance and position of the different national competent authorities may vary.

The same applies in relation to the concept of "reverse solicitation" (also referred to as "passive marketing", i.e. activities that are generally not considered as (active) marketing under the AIFMD and to which, consequently, the AIFMD marketing requirements do not apply).

Important: It has to be noted that reverse solicitation shall in no case be invoked to circumvent the requirements contained in the AIFMD.

**A) When does marketing take place?**[↪ Art. 1\(9\) AIFM Law](#)

Under Article 1(9) of the Law of 2013 "marketing" is defined as "a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the Union".

Marketing within the meaning of the Law of 2013 takes place when the AIF, the AIFM or an intermediary on their behalf seeks to raise capital by actively making units or shares of an AIF available for firm purchase by a potential investor.

**B) Does the presentation of draft documents in relation to an AIF by the AIFM to prospective investors constitute a marketing activity?**

No, provided that such draft documents cannot be used by the prospective investors to formally subscribe or commit to subscribe shares or units of the AIF.

**C) Is the AIFM allowed to present to prospective investors documents in relation to the AIF it manages prior to informing the CSSF in accordance with Articles 29, 31, 37 or 45 of the Law of 2013?<sup>152</sup>**[↪ Art. 29 AIFM Law](#) | [↪ Art. 31 AIFM Law](#) | [↪ Art. 37 AIFM Law](#) | [↪ Art. 45 AIFM Law](#)

Yes, provided that no subscription in the relevant AIF may become effective until and unless the CSSF is informed in accordance with Articles 29, 31, 37 or 45 of the Law of 2013. For the avoidance of doubt the presentation of such documents at the initiative of the AIF or the AIFM shall no longer allow the benefit of reverse solicitation by the investors to whom they have been presented.

**D) By which means can an AIFM perform a marketing activity?**

By an offer or placement which may be materialised in various forms (e.g. advertising, distribution of AIF documents to prospective investors, road shows, distance marketing), provided the relevant material delivered to investors can be used to formally subscribe or commit to subscribe for shares or units of the AIF.

**E) Does marketing in Luxembourg require a physical presence of the AIFM on the Luxembourg territory?**

No. Without prejudice to Article 32(5) of the Law of 1993, marketing in Luxembourg does not require a physical presence of the AIFM on Luxembourg territory.

**F) Can marketing in Luxembourg be performed through Luxembourg based intermediaries?**

Yes. Marketing in Luxembourg can be performed by Luxembourg based intermediaries (e.g. management companies, credit institutions or professionals of the financial sector authorised under the Law of 1993), as long as the authorisation of these professionals covers the possibility to perform such activity.

**G) Does the marketing activity have to take place on the Luxembourg territory in order to qualify as marketing in Luxembourg?**

Yes. The marketing activity has to take place on the Luxembourg territory in order to qualify as marketing in Luxembourg. For distance marketing of services please refer to question 21.h) below.

**H) When does distance marketing qualify as marketing in Luxembourg?**

Distance marketing refers to any marketing activity which is carried out by any means of communication (e.g. telephone, website) which does not imply the simultaneous physical presence in Luxembourg of (i) the AIF, the AIFM, or, as the case may be, their intermediary, and (ii) the investor. Distance marketing qualifies as marketing

<sup>152</sup> Pursuant to article 58 (5) of the Law of 2013, the articles 35, 36, 39, 40, 41 and 42 of this Law will only be applicable once the European Commission has adopted the delegated act referred to under article 67 (6) of the AIFMD and from the date disclosed therein.

in Luxembourg when the investors are domiciled or have their registered office in Luxembourg – and the relevant materials can be used by the investor to formally subscribe or commit to subscribe for shares or units of the AIF.

**I) What does reverse solicitation consist in?**

Reverse solicitation consists in providing information regarding an AIF and making units or shares of that AIF available for purchase to a potential investor following an initiative of that investor (or an agent of that investor) without any solicitation made by the AIF or its AIFM (or an intermediary acting on their behalf) in relation to the relevant AIF.

**J) Is reverse solicitation to be considered as marketing within the meaning of the AIFMD?**

No, to the extent that the different elements defined under item 21.k) below are met.

**K) What are the different cumulative components of reverse solicitation?**

The cumulative components are twofold:

- the investor (or an agent of the investor) has approached the AIFM or the AIF on its own initiative with the intention of investing in (or, initially, receiving information regarding) AIF(s) managed by such AIFM;
- neither the AIFM, nor the AIF (nor any intermediary acting on their behalf) has solicited the investor to invest in the relevant AIF.

**L) Who has the burden of proof with respect to the two criteria under item 21.k)?**

The AIFM has the burden of proof as regards the investor's initiative to invest in an AIF managed by the AIFM. Evidence could be produced by means of written confirmation by the investor that he/she has decided on his/her own initiative to invest in (or, initially, request for information regarding) the relevant AIF(s).

**M) Do investments made in AIFs in the context of a discretionary mandate for the management of individual investment portfolios (at the initiative of the investment manager) have to be considered as marketing of such AIF vis-à-vis the investment manager and its client?**

No.

**N) Does a proposal to invest in an AIF in the context of an investment advisory agreement (at the initiative of the adviser) have to be considered as marketing of such AIF vis-à-vis the adviser and its client?**

No.

**O) Do investments in targeted AIFs made in the context of collective portfolio management of a UCI or an AIF (at the initiative of such UCI/AIF or of its management company, AIFM, portfolio manager or other agent) have to be considered as marketing of such target AIF vis-à-vis the UCI/AIF and the portfolio manager?**

No.

**P) Does marketing include secondary trading of units or shares of an AIF?**

No, except where there is an indirect offering or placement through one or more intermediaries acting at the initiative or on behalf of the AIFM or the AIF.

(9 June 2016)

## 22. Loan Origination

9 June 2016

### A) Is Loan Origination an allowed activity for AIFs in Luxembourg?

Yes.

In principle, Loan Origination by AIFs is permissible as the Law of 2013 and the AIFMD, as well as the respective Product Laws or regulations applicable to AIFs (if any) do not prohibit this activity.

In the particular case of AIFs qualifying as ELTIF(s), EuSEF(s) or EuVECA(s), the granting of loans is also explicitly mentioned and permitted under certain conditions in the respective EU regulations.

The CSSF would like to emphasise that certain aspects (as further specified below) should be considered by an AIFM or an AIF, where applicable, before and when performing Loan Origination. In the context of the approval and on-going supervisory process, if applicable, of the AIFM or, where applicable, of the AIF itself active in this area, the CSSF will analyse these aspects on a case-by-case basis.

### A1) Is Loan Participation/Acquisition an allowed activity for AIFs in Luxembourg?

Yes.

For the same reasons, Loan Participation/Acquisition by AIFs is also a permitted activity.

Again, the aspects as further specified below should be considered by the AIFM or, where applicable, by the AIF itself before and when performing Loan Participation/Acquisition.

### B) What are the aspects to be addressed by an AIFM/AIF engaging in Loan Origination?

All general requirements applicable to AIFMs in regards to their managed AIFs according to the Law of 2013 apply.

Additionally, the particular requirements of the respective Product Laws or regulations applicable to the AIF (if any) will have to be adhered to dependent on the legal and regulatory status of the AIF.

More specifically, the following key principles should be adhered to by the AIFM or, where applicable, by the AIF itself if and when engaging in Loan Origination:

- they should ensure to address all aspects and risks of this activity;
- they should particularly avail of proper organisational and governance-structures (processes and procedures), necessary expertise/experience in origination activity combined with appropriate technical and human resources, with a focus on credit and liquidity risk management (within an overall adequate risk management process), concentration and risk limitation, clear policies regarding assets and investors (e.g. loan and investor categories, avoidance of conflicts of interest), proper disclosure and transparency, amongst other.

Generally, it is the responsibility of the AIFM or, where applicable, of the AIF itself, to ensure the implementation of a robust and appropriate approach for this activity.

The CSSF will evaluate in the context of its approval and on-going supervisory process, if applicable, on a case-by-case basis the approaches implemented by the AIFMs or, where applicable, by the AIFs.

### B1) What are the aspects to be addressed by an AIFM/AIF engaging in Loan Participation/Acquisition?

All general requirements applicable to AIFMs in regards to their managed AIFs according to the Law of 2013 apply.

Additionally, the particular requirements of the respective Product Laws or regulations applicable to the AIF (if any) will have to be adhered to dependent on the legal and regulatory status of the AIF.

More specifically, the following key principles should be adhered to by the AIFM or, where applicable, by the AIF itself if and when engaging in Loan Participation/Acquisition:

- they should ensure to address all aspects and risks of this activity.
- they should particularly avail of proper organisational and governance-structures (processes and procedures), necessary expertise/experience in participation activity combined with appropriate technical and human resources, with a focus on credit and liquidity risk management (within an overall adequate risk management process), concentration and risk limitation, clear policies regarding assets and investors (e.g. loan and investor categories, avoidance of conflicts of interest), proper disclosure and transparency, amongst other.

Generally, it is the responsibility of the AIFM or, where applicable, of the AIF itself, to ensure the implementation of a robust and appropriate approach for this activity.

The CSSF will evaluate in the context of its approval and on-going supervisory process, if applicable, on a case-by-case basis the approaches installed by the AIFMs or, where applicable, by the AIFs.

### **23. Impact of the PRIIPs Regulation**

**16 December 2022**

**A) Do manufacturers of Luxembourg AIFs the units of which are being advised on, offered or sold to retail investors need to draw up a PRIIPs KID?**

Yes, manufacturers of Luxembourg AIFs the units of which are being advised on, offered or sold to retail investors need to have in place a PRIIPs KID.

**B) Can Luxembourg AIFs, the units of which are being advised on, offered or sold to retail investors, benefit from the exemption provided under Article 32(2) of the PRIIPs Regulation if they have issued a UCITS KIID (hereafter referred to as "UCITS-like KIID")?**

- [Repealed as of 29 December 2023]

**C) Does the PRIIPs Regulation apply to manufacturers of and persons advising on or selling Luxembourg AIFs the units of which are solely being advised on, offered or sold to professional investors?**

No.

**D) Do Luxembourg AIFs, the units of which are solely being advised on, offered or sold to professional investors, need to amend their offering documents so for the regime under question 23.d) to apply?**

**27 September 2019**

Yes, it is strongly recommended that Luxembourg AIFs that are exclusively advised on, offered or sold to professional investors amend their offering documents before in order to include a reference to the fact that their units are solely advised on, offered or sold to professional investors and that, as a consequence, no PRIIPs KID shall be issued.

In addition, all SIFs, Part II UCIs and SICARs (that are advised on, offered or sold to retail and/or professional investors) are required to complete an on-line assessment available on the eDesk portal as specified in Circular CSSF 19/721- Dematerialisation of requests to the CSSF. The eDesk portal can be accessed via [eDesk \(cssf.lu\)](https://www.cssf.lu/eDesk).

**E) Does a PRIIPs KID need to be provided to retail investors outside the EU/EEA?**

No, a PRIIPs KID does not need to be provided to retail investors outside the EU/EEA unless the applicable rules and regulations of the third country in which the marketing takes place provide otherwise.

**F) When and how should the PRIIPs KID be provided to retail investors?**

The person(s) advising on, or selling Luxembourg AIFs the units of which are being advised on, offered or sold to retail investors shall provide such investors with the PRIIPs KID in good time before those investors are bound by any contract or offer relating to the subscription of units in that AIF, in accordance with Article 13(1) of the PRIIPs Regulation, unless the conditions of Article 13(3) or 13(4) of the PRIIPs Regulation apply.

The PRIIPs KID shall be made available to retail investors free of charge:

- in paper form; or
- by using a durable medium other than paper, subject to the conditions of Article 14(4) of the PRIIPs Regulation; or
- by means of a website subject to the conditions of Article 14(5) of the PRIIPs Regulation.

In accordance with Article 5(1) of the PRIIPs Regulation, a PRIIP manufacturer shall always publish the PRIIPs KID on its website.

**G) In which language should a PRIIPs KID be drawn up?**

Where a Luxembourg AIF advises on, offers or sells its units/shares to retail investors, the PRIIPs KID should be written in the official languages, or in one of the official languages, used in the part of the Member State where the AIF is advised on, offered or sold or in a language accepted by the competent authorities of that Member State.

**H) Does the CSSF require the notification of a draft PRIIPs KID by (the manufacturer of) a Luxembourg AIF the units of which are advised on, offered or sold to retail investors?**

No.

**I) Does the CSSF require the notification of a final PRIIPs KID by (the manufacturer of) a Luxembourg AIF the units of which are advised on, offered or sold to retail investors?**

**11 April 2019**

No. However, the CSSF reserves the right to request the notification of a final PRIIPs KID on a case-by-case basis. Such notification does not render the CSSF responsible for the content of a final PRIIPs KID. Manufacturers of Luxembourg AIFs remain at all times responsible for the drawing up and the content of a final PRIIPs KID.

**J) Will the final version of a PRIIPs KID be visa-stamped by the CSSF?**

No.

**K) Which procedure must be followed in order to file the final version of a PRIIPs KID with the CSSF, if requested?**

**11 April 2019**

If requested, the final version of a PRIIPs KID must be filed by adhering to the instructions provided in [Circular CSSF 19/708](#).

**L) Does a specific yearly timeline apply in connection with the annual update of PRIIPs KID for Luxembourg AIFs?**

**29 December 2023**

No. Article 15 of Commission Delegated Regulation (EU) 2017/653 requires PRIIP manufacturers to review the information contained in the PRIIPs KID at least every 12 months following the date of the initial publication of the PRIIPs KID without providing for a specific yearly timeline for such annual update.

## **24. List of the cooperation arrangements required under the AIFMD signed by the CSSF**

**18 July 2014**

ESMA has published a list of the AIFMD MoUs signed between EU securities regulators (including the CSSF) and non-EU authorities (ref. 2013/1491). This list, which is updated from time to time, is available on the following website:

<https://www.esma.europa.eu/about-esma/international-cooperation>.

## **25. What are the conditions to comply with in case of data transfer by a UCI administrator or a depositary to another service provider?**

**30 October 2020**

Pursuant to Article 41 (2a) of the [amended Law of 1993 on the financial sector](#), in case a UCI administrator or a depositary (a credit institution, an investment firm or a professional of the financial sector) is outsourcing services implying a transfer of relevant information to a third party, the UCI administrator or the depositary must ensure that its client, the Board of Directors ("BoD") of the SICAV or of the IFM for common funds, has accepted the outsourcing of the relevant outsourced services, the type of information transmitted in the context of the outsourcing and the country of establishment of the entities that provide the outsourced services.

Any transfer of information related to investors should be disclosed prior to the transfer, by the UCI, respectively the IFM for common funds, to investors through appropriate means, namely the prospectus and the application form combined, if appropriate, with a reference to a website. Existing investors should be informed by the UCI, respectively the IFM for common funds, prior to the transfer of their information, about any update of the fund documents aiming at the aforesaid disclosure by means of a letter, email or any other means of communication provided for by the prospectus.

Due to transparency and confidentiality requirements, the same conditions apply to UCI/IFM acting as UCI administrator.

The aforesaid requirements apply independently from the General Data Protection Regulation (EU) 2016/679, if applicable.

(10 June 2021)

## **26. Application of MiFID to IFMs**

**10 June 2021**

### **A) Do IFMs and UCIs qualify as clients under MiFID?**

Yes. UCIs and their investment fund manager qualify as clients under Article 1 (3) of the Law of 1993 / Article 4 (1) (9) of MiFID.

### **B) How should the exemption from MiFID for UCIs and their IFM foreseen under Article 2(1) (i) MiFID be understood?**

The management of collective funds by IFMs is not a service under MiFID. IFMs and their UCIs are therefore exempted from the scope of MiFID under Article 1-1 (2) (i) of the Law of 1993 / Article 2 (1) (i) of MiFID when performing the functions included in the collective portfolio management themselves. However, the exemption does not cover the functions of collective portfolio management:

- undertaken by an authorised IFM under a delegation arrangement (the "delegate IFM") from another authorised IFM or,
- delegated by an authorised IFM to a third party (the "third-party delegate").

### **C) When does the service rendered by third parties to IFMs fall within the scope of MiFID?**

When an IFM does not perform all the functions of the collective portfolio management itself or uses the service of a third-party delegate, the exemption foreseen under Article 1-1 (2) (i) of the Law of 1993 / Article 2 (1) (i) of MiFID does not apply to such third-party delegate.

In such a circumstance, the IFM gives a mandate to a third-party delegate to execute on its behalf the relevant activity. Thus, the IFM becomes a client of this third-party delegate and the third-party delegate may be subject to the MiFID rules if:

- a) the service rendered qualifies as an investment service or an activity under Annex II of the Law of 1993 / Annex I of MiFID; and,
- b) the service relates to transactions on financial instruments as defined under section B of Annex II of the Law of 1993 / section C Annex I of MiFID; and,
- c) the service is rendered by a third party established in the EU or is considered to be rendered in Luxembourg by a third party established outside of the EU as further clarified by the CSSF in Part III of Circular CSSF 19/716.

#### **D) Do MiFID rules apply to the performance of functions included in the collective portfolio management by another delegate IFM?**

Where an IFM delegates the performance of one or several functions included in the collective portfolio management to another IFM, the exemption foreseen under Article 1-1 (2) (i) of the Law of 1993 / Article 2 (1) (i) of MiFID does not apply to the delegate IFM.

In such case, the delegate IFM, must in principle, depending on the tasks performed, be authorised to provide discretionary portfolio management and non-core services foreseen under Article 101 (3) of the Law of 2010 or under Article 5 (4) of the Law of 2013 such as investment advice, administration of units of UCIs or, for authorised AIFM, reception and transmission of orders ("RTO").

Those delegate IFMs are not subject to the full scope of MiFID rules, only Articles 1-1, 37-1 and 37-3 of the Law of 1993 / Articles 15, 16, 24 and 25 of MiFID, apply. The delegate IFMs are not authorised to provide other MiFID services or activities than those covered under Article 101 (3) of the Law of 2010 or under Article 5 (4) of the Law of 2013.

#### **E) Do MiFID rules apply to the marketing of funds?**

**3 April 2024**

Marketing of funds is part of the functions included in the collective portfolio management. Consequently, if the authorisation of an IFM includes the marketing function, the IFM can perform the marketing for the funds under its management ("direct marketing").

If, in relation to a fund under its management, the IFM does not perform the marketing function itself, the exemption foreseen under Article 1-1 (2) (i) of the Law of 1993 / Article 2 (1) (i) of MiFID does not apply but MiFID rules may apply to the entity undertaking the marketing function depending on where and to whom the fund is distributed, and on the services provided, in which case and, to the extent such entity is another IFM established in Luxembourg, an additional authorisation under Article 101 (3) of the Law of 2010 or under Article 5 (4) of the Law of 2013 (as applicable) may be required for such other IFM.

No such additional authorisation is required if such other IFM only brings together a potential investor with an IFM and / or its investment fund without however providing the investment service of reception and transmission of orders. It is however the responsibility of such other IFM to assess to what extent the activities undertaken do or not qualify as pre-marketing as defined in Article 1 (58-1) of the Law of 2013 / Article 4 (1) (aea) of the AIFMD or marketing of funds as further clarified under question G hereunder.

#### **F) Do MiFID rules apply when an IFM delegates the marketing to another IFM?**

As explained under question E, if an IFM does not operate the activity of marketing by itself, the exemption foreseen under Article 1-1 (2) (i) of the Law of 1993 / Article 2 (1) (i) of MiFID does not apply.

Any Luxembourg IFM that markets funds that it does not directly manage on behalf of another IFM, acts as an intermediary as any investment firm covered by MiFID and must therefore be authorised under Article 101 (3) of the Law of 2010 or under Article 5 (4) of the Law of 2013, depending on the type of fund and services offered, namely:

- discretionary portfolio management and,
- investment advice relating to UCIs or/and,
- safekeeping and administration of UCIs or,
- for authorised AIFMs, RTO relating to UCIs.

In such case, Articles 1-1, 37-1 and 37-3 of the Law of 1993 / Articles 15, 16, 24 and 25 of MiFID, will be applicable to the Luxembourg IFM.

EU IFMs marketing on behalf of another IFM, in Luxembourg, funds that they do not manage directly, must be authorised under Article 6 (3) of the UCITS Directive or under Article 6 (4) of the AIFM Directive.

### **G) Which MiFID investment services may be considered as marketing of funds?**

The marketing of funds is not an investment service "per se" under MiFID as it is not part of the list of services and activities included in sections A and C Annex II of the Law of 1993 / sections A and B of Annex I of MiFID. However, the following MiFID services may be used for the distribution of funds:

- Reception and transmission of orders relating to UCIs;
- Execution of orders on behalf of clients;
- Dealing on own account;
- Portfolio management;
- Investment advice;
- Underwriting and/or placing of UCIs on a firm commitment basis;
- Placing of UCIs without a firm commitment basis.

### **H) Is investment advice included in the activity of collective portfolio management?**

No. Investment advice is not listed in the functions included in the activity of collective portfolio management under Annex II of the Law of 2010 or Annex I of the Law of 2013.

### **I) Do MiFID rules apply to investment advisors when they provide investment advice to an IFM?**

Yes. As per Article 9 of MiFID Delegated Regulation 2017/565, investment advice given to an IFM that enable to take an investment decision, qualify as personal recommendations issued to a client under MiFID as the recommendations are not issued exclusively to the public.

Consequently, third parties that provide investment advice relating to financial instruments as defined under section B of Annex II of the Law of 1993 / section C Annex I of MiFID, to UCI/IFM, to an IFM, are in principle subject to MiFID rules.

### **J) Are IFMs authorised to provide investment advice to another IFM?**

No, except if the IFM is also authorised under Article 101 (3) b) of the Law of 2010 or under Article 5 (4) (b) (i) of the Law of 2013, to provide investment advice.

### **K) Which MiFID exemptions may apply to third parties providing investment services to IFM?**

The third parties providing investment services to IFMs may benefit from the following exemptions:

- a) Specific exemptions under the Law of 1993/MiFID:

- Intragroup service exemption under Article 1-1 (2) (b) and (c) of the Law of 1993 / Article 2 (1) (b) of MiFID.
- Service complementary to their professional activities as foreseen under Article 1-1 (2) (d) of the Law of 1993 / Article 2 (1) (c) of MiFID.
- Investment advice not specifically remunerated rendered in the course of providing another professional activity not covered by MiFID under Article 1-1 (2) (l) of the Law of 1993 / Article 2 (1) (k) of MiFID.

b) Partial exemption from MiFID rules:

- Authorised EU IFM rendering discretionary portfolio management and non-core services under Article 101 (3) of the Law of 2010 / Article 5 (4) of the Law of 2013 are subject to Articles 1-1, 37-1 and 37-3 of the Law of 1993 / Articles 15, 16, 24 and 25 of MiFID.

In any case, the third parties must be able to demonstrate that they fall within the scope of an exemption, should they provide services without an authorisation under the MiFID applicable framework.

## Appendix XVI: CSSF Regulation N°15-03

### COMMISSION de SURVEILLANCE du SECTEUR FINANCIER

In case of discrepancies between the French and the English text, the French text shall prevail.

[CSSF Regulation N° 15-03](#) laying down detailed rules for the application of [Article 46 of the law of 12 July 2013](#) on alternative investment fund managers on the marketing of foreign alternative investment funds to retail investors in Luxembourg

(Mémorial A – No. 224 of 2 December 2015)

The Executive Board of the Commission de Surveillance du Secteur Financier,

Having regard to Article 108a of the Constitution;

Having regard to the Law of 23 December 1998 establishing a financial sector supervisory commission ("*Commission de surveillance du secteur financier*"), and in particular Article 9(2) thereof;

Having regard to the Law of 12 July 2013 on alternative investment fund managers, and in particular Article 46 thereof;

Decides:

*Article 1*

#### **Definitions**

In addition to the definitions set out in Article 1 of the law of 12 July 2013 on alternative investment fund managers that apply for the purposes of this regulation, "foreign alternative investment funds (foreign AIFs)" shall mean alternative investment funds (AIFs) within the meaning of Directive 2011/61/EU on Alternative Investment Fund Managers which are established in a Member State of the European Union other than Luxembourg or in a third country.

*Article 2*

#### **Object**

This regulation lays down detailed rules for the application of Article 46 of the law of 12 July 2013 on alternative investment fund managers by establishing the procedure and the conditions applicable to the marketing of foreign AIFs to retail investors in Luxembourg.

*Article 3*

#### **Scope**

(1) Without prejudice to the provisions provided for in paragraph 2, this regulation shall apply to the marketing to retail investors in Luxembourg of:

- (a) foreign AIFs managed by an AIFM established in Luxembourg which is authorised pursuant to [Chapter 2 of the law of 12 July 2013](#) on alternative investment fund managers;
- (b) foreign AIFs managed by an AIFM established in another EU Member State which is authorised pursuant to [Chapter II of Directive 2011/61/EU](#) on Alternative Investment Fund Managers;
- (c) foreign AIFs managed by an AIFM established in a third country which is authorised pursuant to Chapter II of Directive 2011/61/EU on Alternative Investment Fund Managers, subject to [Article 66\(3\)](#) of said Directive.

(2) This regulation does not apply to the marketing of foreign AIFs in Luxembourg to:

- well-informed investors within the meaning of Article 2(1) of the law of 13 February 2007 relating to specialised investment funds, or of Article 2 of the law of 15 June 2004 relating to the Investment company in risk capital (SICAR);
- eligible investors pursuant to [Regulation \(EU\) No 345/2013](#) on European venture capital funds;
- eligible investors pursuant to [Regulation \(EU\) No 346/2013](#) on European social entrepreneurship funds;
- eligible investors pursuant to [Regulation \(EU\) No 2015/760](#) on European long-term investment funds.

#### *Article 4*

#### **Marketing authorisation by the CSSF**

(1) Prior to marketing its units or shares to retail investors in Luxembourg, any foreign AIF must have obtained an authorisation for such marketing by the CSSF, in accordance with the provisions of this regulation.

(2) Foreign AIFs authorised to market their units or shares pursuant to this regulation are registered by the CSSF on the "List of foreign AIFs authorised to market their units or shares to retail investors in Luxembourg in accordance with [Article 46 of the law of 12 July 2013](#) on alternative investment fund managers".

(3) The marketing authorisation pursuant to this regulation may not be granted prior to the completion of the notification procedure required for the marketing to professional investors, as provided for by the relevant provisions of the law of 12 July 2013 on alternative investment fund managers or of Directive 2011/61/EU on Alternative Investment Fund Managers.

Without prejudice to the documents and information to provide to the CSSF in the context of the notification procedure required for the marketing to professional investors referred to in subparagraph 1, the authorisation request for the marketing to retail investors in Luxembourg shall include the additional items set out in Article 5 of this regulation.

#### *Article 5*

#### **Marketing authorisation request**

(1) The authorisation request to be filed with the CSSF pursuant to this regulation shall include the following documents and information:

- (a) a certificate by the relevant supervisory authority of the home Member State of the foreign AIF certifying that the latter is authorised and subject to a permanent supervision in its home State;
- (b) the addendum to the prospectus/issuing document of the foreign AIF which includes specific information for the marketing in Luxembourg;
- (c) the latest annual report of the foreign AIF;
- (d) the curriculum vitae of the conducting persons (*dirigeants*) of the foreign AIF;
- (e) the draft agreement to be entered into between the foreign AIF and the Luxembourg paying agent;
- (f) if the foreign AIF is a feeder AIF, information on the master AIF including information on where the master AIF is established, the master AIF's constitutive documents and the prospectus/issuing document of the master AIF.

The addendum referred to under item (b), which will be part of the foreign AIF's prospectus/issuing document, shall include all information useful to investors in Luxembourg, for them to invest with full knowledge of the facts. The information to be included in said addendum shall comprise, among others:

- appropriate information on the risks inherent to the foreign AIF's investment policy;
- information on the fees and expenses that may be charged to investors;

- the name, address and duties of the paying agent in Luxembourg from which investors may request the subscription, redemption or conversion of their units or shares;
- the place where the foreign AIF's latest prospectus/issuing document, its constitutive documents and the latest financial reports are made available;
- details on how the foreign AIF's net asset value is published;
- the name of the Luxembourg newspaper in which the investor notices are published.

(2) In addition to the documents and information referred to in paragraph 1, the CSSF may request any additional document and information it deems necessary for the scrutiny of the authorisation request.

#### *Article 6*

#### **Marketing authorisation conditions**

(1) In addition to the requirement to comply with the conditions set out in [Article 46 of the law of 12 July 2013](#) on alternative investment fund managers, the CSSF grants authorisation to a foreign AIF to market its units or shares to retail investors in Luxembourg only on condition that the AIF concerned be managed by a single manager, which may be either a manager established in Luxembourg authorised pursuant to [Chapter 2 of the law of 12 July 2013](#) on alternative investment fund managers, or a manager authorised pursuant to [Chapter II of Directive 2011/61/EU](#) established in another Member State or third country.

The management of the foreign AIF shall moreover permanently comply with all the provisions provided for in Directive 2011/61/EU on Alternative Investment Fund Managers.

(2) Where the foreign AIF is a feeder AIF, the marketing authorisation referred to in paragraph 1 is, in addition, subject to the condition that the master AIF be subject, in its home State, to a permanent supervision performed by a competent authority provided for by law, in order to ensure the protection of investors. In this case, cooperation between the CSSF and the supervisory authority of the master AIF must also be ensured.

(3) The marketing authorisation implies for the foreign AIF the obligation to inform the CSSF of any material changes to the documents and information provided in accordance with Article 5 of this regulation and upon which the CSSF based its decision to grant authorisation.

#### *Article 7*

#### **Foreign AIF types which may be authorised to market their units or shares to retail investors in Luxembourg**

(1) Subject to paragraph 2 of this article, a foreign AIF shall comply with the following rules to be eligible for marketing its units or shares to retail investors in Luxembourg:

(a) Periodicity of the calculation of the issue and redemption prices of the foreign AIF's units or shares:

Foreign AIFs must determine the issue and redemption prices of their units or shares at sufficiently close and fixed intervals, but at least once a month.

(b) Risk spreading:

Foreign AIFs must demonstrate sufficient risk spreading.

In general, the CSSF considers that a sufficient risk-spreading principle is complied with where the investment restrictions of a foreign AIF are in line with the following guidelines:

##### A. Securities

1. The foreign AIF may not invest more than 10% of its assets in unlisted securities or securities which are not traded on another regulated market which operates regularly and is recognised and open to the public.

2. The foreign AIF may not acquire more than 10% of the same type of securities issued by the same issuer.

3. The foreign AIF may not invest more than 20% of its assets in securities of a same issuer.

The restrictions set out under items 1, 2 and 3 above do not apply to:

- investments in securities issued or guaranteed by an OECD Member State or its regional or local authorities or by EU, regional or global supranational institutions and bodies;

- investments in target UCIs subject to risk-spreading requirements which are at least similar to those applicable to UCIs subject to Part II of the law of 17 December 2010 relating to undertakings for collective investment.

#### B. Borrowings

The foreign AIF may not take on borrowings for an amount exceeding 25% of its net assets, without prejudice to item D. of this paragraph.

#### C. Use of financial derivatives

When using financial derivatives, the foreign AIF must ensure an appropriate risk spreading of the underlying assets.

Furthermore, the relevant foreign AIF must be subject to risk-spreading and investment restriction rules similar to those applicable to UCIs subject to Part II of the law of 17 December 2010 relating to undertakings for collective investment adopting so-called alternative investment strategies.

#### D. Real estate assets

In order to ensure a minimum risk spreading, the foreign AIF may not invest more than 20% of its assets in a single real estate object.

Furthermore, the aggregate of all borrowings of the foreign AIF may not exceed on average 50% of the valuation of all its properties.

(2) The CSSF may grant derogations from the rules set out under paragraph 1 based on an adequate justification and depending on the specific investment policy of a given foreign AIF.

### *Article 8*

#### **Provisions governing the payments to investors, the redemptions and subscriptions of units or shares and the dissemination of information**

(1) A foreign AIF which is authorised to market its units or shares to retail investors in Luxembourg pursuant to this regulation shall appoint a credit institution to ensure the payments to investors and the redemptions and subscriptions of units or shares in Luxembourg.

(2) A foreign AIF marketing its units or shares to retail investors in Luxembourg shall furthermore take appropriate measures to ensure that the information and documents it has to produce are available to investors in Luxembourg.

The information and documents referred to in the preceding subparagraph shall be provided to investors in Luxembourg in either: French, German, English or Luxembourgish. Such information may notably be provided on a website.

### *Article 9*

#### **Applicable marketing rules in Luxembourg**

Without prejudice to Article 8 of this regulation, the provisions of the following laws shall be complied with when marketing securities to investors in Luxembourg:

- Law of 8 April 2011 concerning the implementation of a Consumer Code, as amended.

*Article 10*  
**Termination of marketing**

The CSSF shall be informed whenever a foreign AIF decides to no longer market its units or shares to retail investors in Luxembourg on the basis of [Article 46 of the law of 12 July 2013](#) on alternative investment fund managers. Consequently, the relevant foreign AIF shall be withdrawn from the list referred to in Article 4(2) of this regulation.

*Article 11*  
**Publication**

This regulation shall be published in the *Mémorial* and on the CSSF's website.

The regulation shall enter into force on the first day of the month following its publication in the *Mémorial*.

Foreign UCIs other than UCITS which have been authorised for marketing to retail investors in Luxembourg shall be considered, ipso jure, to be authorised pursuant to this regulation at the moment of its entry into force.

Luxembourg, 26 November 2015

COMMISSION DE SURVEILLANCE DU SECTEUR FINANCIER

Claude SIMON  
Director

Andrée BILLON  
Director

Simone DELCOURT  
Director

Jean GUILL  
Director General

## Appendix XVII: FAQ CBDF – marketing communications published by CSSF

[Art. 28-1 AIFM Law] [Art. 28-2 AIFM Law] [Art. 29 AIFM Law] [Art. 29-1 AIFM Law] [Art. 30 AIFM Law] [Art. 30-1 AIFM Law] [Art. 31 AIFM Law] [Art. 31-1 AIFM Law] [Art. 34 AIFM Law] [Art. 35 AIFM Law] [Art. 36 AIFM Law] [Art. 37 AIFM Law] [Art. 46 AIFM Law] [Art. 46-1 AIFM Law]

### CSSF FAQ - Cross Border Distribution of Funds (CBDF) - Guidance on marketing communications

[\(version updated on 12 October 2022\)](#)

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#### CONTEXT

The present document refers to a list of questions & answers (FAQs) in relation to a number of key aspects of the **application of article 4 of the CBDF Regulation** and ESMA Guidelines with the objective to bring further clarity on the supervisory expectations of the competent authority.

This document will be updated from time to time and the CSSF reserves the right to alter its approach to any matter covered by the FAQs at any time. The entities concerned should regularly check the website of the CSSF

in relation to any matter of importance to them to see if questions have been added and/or positions have been altered.

The present FAQs are to be read in conjunction with ESMA Guidelines as well as questions and answers to be published by ESMA with respect to **marketing communications** ("MCs"), if any. In this context, the CSSF refers to the information made available by ESMA on the following website: <http://www.esma.europa.eu>.

***This document will be updated when necessary and the CSSF reserves the right to adapt its approach to any matter covered by the Q&A at any time. You should regularly check the website of the CSSF in relation to any matter of importance to you to see if questions have been added and/or positions have been adapted.***

## Definitions, abbreviations and acronyms

"CBDF": Cross Border Distribution of Funds;

"CBDF Regulation": Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014;

"Circular 22/795": Circular CSSF 22/795 of 31 January 2022 on the application of ESMA Guidelines;

"ESMA Guidelines": Guidelines of ESMA on marketing communications (ESMA34-45- 1272) under the CBDF Regulation published on 2 August 2021;

"Funds": collective investment undertakings;

"IFM": Investment Fund Manager;

"MC": Marketing communication within the meaning of article 4 of the CBDF Regulation;

"MiFiD II Directive": Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU;

"SFDR": Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, as amended.

## 1. Scope

### 1.1. Which Luxembourgish entities are in the scope of article 4 of the CBDF Regulation?

**Published on: 20/09/2022**

All Investment Fund Managers ("IFMs") listed under "2. Scope of application" of Circular 22/795 are in the scope of article 4 of the CBDF Regulation and of the ESMA Guidelines in relation to the Funds they manage, i.e.:

- management companies incorporated under Luxembourg law and subject to Chapter 15 of the Law of 17 December 2010 relating to undertakings for collective investment ("2010 Law");
- management companies incorporated under Luxembourg law and subject to Article 125-2 of Chapter 16 of the 2010 Law;
- investment companies which did not designate a management company within the meaning of Article 27 of the 2010 Law;
- alternative investment fund managers authorised under Chapter 2 of the Law of 12 July 2013 on alternative investment fund managers ("2013 Law");
- internally managed alternative investment funds ("AIFs") within the meaning of point (b) of Article 4(1) of the 2013 Law;
- managers of European qualifying venture capital funds ("EuVECA") within the meaning of Regulation (EU) No 345/2013;
- managers of European qualifying social entrepreneurship funds ("EuSEF") within the meaning of Regulation (EU) No 346/2013.

For the avoidance of doubt, article 4 of the CBDF Regulation shall not apply as such to IFMs that act as a distributor or as an intermediary for Funds that they do not manage, although they may be impacted by this article.

In this context, please also refer to the answer to question 1.51 below.

## **1.2. Which documents or messages should be understood under the term "marketing communications"?**

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The IFM shall assess, on the basis of article 4 of the CBDF Regulation and of the examples mentioned in section 1 of the ESMA Guidelines, whether a document or a message advertising for a UCITS or an AIF qualifies as an MC. As an example, Funds factsheets qualify in principle as MCs and should be identified/flagged as such. Messages broadcasted on any social media platform may also qualify as MCs if they fulfil the elements referred to in the ESMA Guidelines.

On that basis, IFMs shall define and identify/flag the documents which qualify as MC within the meaning of article 4 of the CBDF Regulation and ESMA Guidelines.

## **1.3. Which Funds are in scope of article 4 of the CBDF Regulation?**

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All UCITS and AIFs, including when they are set up as EuVECAs, EuSEFs, ELTIFs and MMFs managed by an IFM listed under "**2. Scope of application**" of Circular 22/795 and question 1.1 above, are in scope of article 4 of the CBDF Regulation.

This means that:

- MCs addressed to investors or potential investors of regulated and non-regulated Funds managed by an IFM listed under question 1.1 are in scope.
- MCs addressed to investors or potential investors of Luxembourgish and non-Luxembourgish Funds managed on a national, respectively cross border basis by an IFM listed under question 1.1, are in scope.

MCs addressed to investors or potential investors which are not resident in the EEA are not in scope of article 4 of the CBDF Regulation.

## **1.4. Which investors should be understood under the term "investors and potential investors"?**

**Published on: 20/09/2022**

"Investors and potential investors" should be understood in a broad sense, i.e. referring to already existing investors in the relevant (sub-)fund as well as to entities or persons that may become investors in such (sub-)fund.

Please also refer to question 1.7 below.

## **1.5. Are the distributors or intermediaries involved in the distribution of Funds managed by the IFM impacted by article 4 of the CBDF Regulation?**

**Published on: 20/09/2022**

Please refer to Question 1, Section XIII of ESMA's Questions and Answers on the application of the UCITS Directive (UCITS) as well as to [Question 4, Section VIII of ESMA's Questions and Answers on the application of AIFMD \(AIFMD\)](#) which provide that:

**"Fund managers are responsible for the compliance with Article 4 of Regulation (EU) 2019/1156, irrespective of who is the actual entity marketing the fund, and of the relationship it has with the third party distributor (whether it is contractual or not)."**

In this context, IFMs are also advised to consult the relevant sections on delegation and organisation of the marketing function provided by Circular CSSF 18/698 on the authorisation and organisation of investment funds managers incorporated under Luxembourg law.

### **1.6. Are MCs in relation to a Luxembourgish or non-Luxembourgish EU Fund which is managed by a Luxembourgish IFM and distributed only in Luxembourg in scope of article 4 of the CBDF Regulation?**

**Published on: 20/09/2022**

YES, since the CSSF considers that article 4 of the CBDF Regulation does not limit the scope to Funds which have been solely notified for distribution on a cross border basis, but also includes Funds which are distributed in Luxembourg.

### **1.7. Are MCs targeting professional investors in scope of article 4 of the CBDF Regulation?**

**Published on: 20/09/2022**

YES, as no exemption is foreseen by the CBDF Regulation, MCs addressed to all types of investors or potential investors of UCITS and AIFs, including when they are set up as EuVECAs, EuSEFs, ELTIFs and MMFs, are in scope.

### **1.8. When did the CBDF Regulation and ESMA Guidelines enter in force?**

**Published on: 20/09/2022**

According to article 19 of the CBDF Regulation, article 4 (1) to (5) of the CBDF Regulation apply since 2 August 2021. Consequently, the obligations stated in article 4 whereby **"[IFMs]... shall ensure that all marketing communications addressed to investors are identifiable as such and describe the risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner, and that all information included in marketing communications is fair, clear and not misleading (...)"**, have been applicable since this date, despite the fact that precisions were given at a later stage by means of the ESMA Guidelines. ESMA Guidelines, as adopted by the CSSF via Circular 22/795, apply since 2 February 2022, as stated in Circular 22/795.

## **2. Governance & organisation of the IFM**

### **2.1. To which extent shall the IFM be involved in the process of preparation and validation of MCs?**

**Published on: 20/09/2022**

As a prelude, the IFM shall define and implement measures that allow it to identify and flag an MC as such.

The IFM shall be involved in the process of preparation and validation of MCs through its senior management and/or its internal control functions. By "involvement of the IFM", it is meant that the following requirements shall be met:

- The IFM must be organised in a way that a review of MCs in accordance with the four-eyes principle can always be ensured. The senior management and/or the internal control functions should make sure that a sign-off process based on the four-eyes principle is in place and applied as part of the oversight;
- As part of its follow-up duties of the distribution network of UCIs, as laid down under point 92 of CSSF Circular 18/698, the executive committee of the IFM must implement procedures and arrangements allowing it to ensure compliance of MCs with article 4 of the CBDF Regulation;

- In addition, compliance with article 4 of the CBDF Regulation should be part of the report of the compliance officer of the IFM which is required under point 260 of CSSF Circular 18/698. Breaches of compliance of MCs in respect of this article 4 of the CBDF Regulation have to be reported to the senior management of the IFM as part of the **Management Information**;
- The IFM should ensure especially a proper validation of the consistency between MCs and legal and regulatory documents, as foreseen under article 4 of the CBDF Regulation and points 18 to 21 of the ESMA Guidelines.

A risk-based approach, where MCs are scored based on the assessed risks, may be implemented as part of the validation process of MCs. In this case, the methodology used for the risk-based approach (i.e.: determination of a risk rating of MCs depending on risks factors, such as the typology of MC) must be defined and approved by the senior management of the IFM. As an example, the review of a low-risk MC could be carried out by the marketing team and the review of a high-risk MC could be carried out by marketing and compliance of the IFM.

The use of committees at group level where the IFM is represented may be considered.

The use of a robust automated system for the preparation of MCs can support this process.

In order to better manage the MCs, the IFM may use tools, such as data rooms and CRM tools to help compile all the MCs into one place.

## **2.2. To which extent may an IFM take into account transversal or specific skills existing within the group to which it belongs or third parties when preparing and validating MCs?**

**Published on: 20/09/2022**

The IFM may consider transversal or specific skills existing within the group to which it belongs or third parties when preparing and validating MCs.

If some tasks relating to the preparation and/or the validation of MCs are done by other units or entities of the group or third parties, the IFM is not expected to replicate those tasks. However, the IFM shall ensure that the conditions laid down under question 2.1 above are continuously met.

## **2.3. Can the IFM delegate the preparation of MCs?**

**Published on: 20/09/2022**

YES, the IFM can delegate some or all tasks related to the preparation of MCs. In this case, the IFM has to perform an adequate oversight of the delegate(s). The delegation contract shall clarify the respective duties of the IFM and the delegate in relation to compliance with article 4 of the CBDF Regulation.

## **2.4. Which elements shall be integrated in the marketing procedure as part of the application of the CBDF Regulation?**

**Published on: 20/09/2022**

The marketing procedure of the IFM, as referred to under point 520 of CSSF Circular 18/698, shall be amended to reflect, among other things, the process of identification/flagging of a document or a message that qualifies as an MC. Moreover, the process of ensuring compliance with article 4 of the CBDF Regulation, also considering the CSSF expectations in terms of governance and organisation set out as part of the answers to the present FAQ, shall be duly documented by the IFM.

## **2.5. Do you have examples of breaches of article 4 of the CBDF Regulation?**

**Published on: 20/09/2022**

Any non-compliance with the requirements of article 4 of the CBDF Regulation and of the ESMA Guidelines, as adopted by the CSSF via Circular 22/795, is considered as a breach of article 4 of the CBDF Regulation.

In practice, any MC which promotes, for example a high return, while the Fund documentation presents a more conservative approach, might be assessed as not compliant.

An MC which does not include a proper disclaimer that the communication is an MC within the meaning of the CBDF Regulation, as required by points 6 to 10 of the ESMA Guidelines, will be assessed as a breach of article 4 of the CBDF Regulation.

### **3. Information on marketing communications to be provided by IFMs to the CSSF**

#### **3.1. Are IFMs subject to a periodic reporting to the CSSF with regards to MCs?**

**Published on: 20/09/2022**

NO, IFMs shall provide the required information (as further described under the answer to question 3.2) upon request. No periodic reporting to the CSSF is implemented.

#### **3.2. What kind of information should be provided to the CSSF upon request?**

**Updated on: 12/10/2022**

IFMs in scope of Circular 22/795 shall, as from 16 September 2022, be ready to provide the following information with regards to the MCs used in relation with the Funds under their management:

- Types of MC used;
- Country(ies) of dissemination of the MC (EEA only);
- Targeted investors.

This information should be provided upon request.

As of 1 January 2023, IFMs in scope of Circular 22/795 must be able to link the above information to their relevant Fund(s) (respectively sub-funds) and identify if the MC entails information with regards to ESG in the context of the application of article 13 of SFDR and of the ESMA Supervisory briefing on Sustainability risks and disclosures in the area of investment management (ESMA34-45-1427).

#### **3.3. Should an IFM with top-up MiFiD license also provide information on MCs in relation to the services of Discretionary Portfolio Management and Investment Advice?**

**Published on: 20/09/2022**

YES, notwithstanding the fact that Discretionary Portfolio Management and Investment Advice are not in scope of the CBDF Regulation, IFMs with a top-up MiFiD license shall be ready to provide the following information on MCs with regards to Discretionary Portfolio Management and Investment Advice services:

- Type of MC used;
- Country(ies) of dissemination of the MC (EEA only);
- Targeted investors.

This information is in relation to all financial instruments referred to in appendix 1 section C of the MiFiD II Directive in the context of the application of article 24 (3) of the MiFiD II Directive and article 44 of the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU 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.

#### **3.4. Which documents or information may be requested by the CSSF as part of the verification conducted by the CSSF in order to verify compliance with the applicable requirements under article 4 of the CBDF Regulation and the ESMA Guidelines?**

**Published on: 20/09/2022**

The CSSF may request a copy or reproduction of any MC linked to a Fund managed by a Luxembourgish IFM in scope of Circular 22/795 and addressed to investors or potential investors in the EEA as part of its verification process.

In addition, any legal and regulatory Fund documents, as described under point 18 of the ESMA Guidelines, may be requested by the CSSF. This includes, for example, the key information document ("KID") under PRIIPs Regulation (EU) n°1286/2014 or the documents foreseen under article 23 of Directive 2011/61/EU on alternative investment fund managers. The IFM must be able to provide the CSSF with those documents without delay.









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