Medlemmerne af Folketingets Europaudvalg
og deres stedfortrædere

Asiatisk Plads 2
DK-1448 København K
Telefon +45 33 92 00 00
Telefax +45 32 54 05 33
E-mail: um@um.dk
http://www.um.dk
Girokonto 3 00 18 06

Bilag	Journalnummer	Kontor	
1	400.C.2-0	EUK	11. november 2010

SVAR PÅ UDVALGSSPØRGSMÅL

Direktivet om forvaltere af alternative investeringsenheder (AIFM-direktivet)

Til underretning for Folketingets Europaudvalg vedlægges Finansministeriets besvarelse af spørgsmål nr. 6 ad KOM (2009) 0207, herunder bilag 1 med en præcisering af Finansministeriets skriftlige forelæggelse af 15. oktober 2010 vedr. direktiv om regulering af forvaltere af alternative investeringsenheder (AIFM-direktivet).

Lene Espersen

FINANSMINISTERIET

Folketingets Europaudvalg
Christiansborg

Finansministeren

10. november 2010

Svar på spørgsmål nr. 6 af 19. oktober 2010 vedr. KOM(2009)207 stillet af Europaudvalget udvalget efter ønske fra MF Lone Dybkjær (RV).

Spørgsmål:
Ministeren bedes - som opfølgning på mødet i Europaudvalget den 15. oktober 2010 - fremsende en grundig redegørelse for behandlingen af direktivet om forvaltere af alternative investeringsenheder (KOM(2009)207) på rådsmødet for økonomi- og finansministre den 19. oktober 2010.

Svar:
Drøftelsen af direktivet om forvaltere af alternative investeringsenheder (AIFM-direktivet) på ECOFIN den 19. oktober 2010 tog udgangspunkt i et konkret kompromisforslag fra formandskabet, jf. samlenotat af 15. oktober 2010, som blev justeret på enkelte punkter, som følge af drøftelserne i forbindelse med ECOFIN.

Den samlede kompromistekst, som der blev opnået enighed om på ECOFIN, er vedlagt. Formandskabet forventer at kunne forhandle et endeligt kompromis på plads med Europa-Parlamentet, inden for rammerne af ECOFIN-kompromiset, inden afstemningen i Europa-Parlamentets plenarforsamling den 11. november 2010.

Drøftelserne i forbindelse med ECOFIN vedrørte især følgende hovedtemaer:
1. Tredjelandsbestemmelser
2. De nærmere beføjelser for EU-tilsynsmyndigheden ESMA[1]
3. Gensidighed (reciprocitet)

Det bemærkes, at drøftelsen på ECOFIN ikke vedrørte direktivets krav vedr. kapitalfondes virksomhedsovertagelser, som således er uændrede i forhold til præsentationen heraf i samlenotatet af 15. oktober 2010.

Ad 1: Tredjelandsbestemmelser
For så vidt angår spørgsmålet om betingelserne for, at forvaltere og investeringsenheder fra tredjelande kan markedsføre sig til professionelle investorer i EU,

[1] ESMA ("European Securities and Markets Authority") er den kommende EU-tilsynsmyndighed for værdipapirer og markeder.

herunder det såkaldte EU-pas for disse aktører, indeholdt formandskabets kompromisforslag den grundmodel, som udvalget blev orienteret om ved forelæggelsen fredag den 15. oktober 2010, jf. også præsentationen i samlenotat af 15. oktober 2010. [2]

Der blev på ECOFIN opnået enighed om formandskabets model på dette punkt, idet der dog er foretaget justeringer i mindre detaljer i modellen.

Det endelige kompromis indebærer således f.eks., at hvis Kommissionen ikke indenfor den angivne frist har modtaget den vurdering fra ESMA, som Kommissionen skal lægge til grund for sin beslutning om at indføre et sådant EU-pas, kan Kommissionen alene sætte en ny tidsfrist herfor til ESMA. Formandskabets tidligere kompromisudkast gav i denne situation Kommissionen mulighed for at træffe en beslutning baseret på Kommissionens egen vurdering uden at afvente ESMA's vurdering.

Jf. samlenotatet af 15. oktober 2010 vil medlemsstaterne i en overgangsperiode på 3 år efter indførelsen af EU-passet parallelt hermed fortsat kunne tillade forvaltere og investeringsenheder fra tredjelande alene at markedsføre sig i den pågældende medlemsstat uden at opfylde kravene til et EU-pas. Der vil dermed i overgangsperioden gælde et dobbelt regime, hvor forvaltere og investeringsenheder fra tredjelande vil kunne vælge mellem adgang med et EU-pas hhv. uden et EU-pas. Efter udløbet af overgangsperioden på 3 år vil Kommissionen på baggrund af en anbefaling fra ESMA skulle fastsætte en frist for ophør af det dobbelte regime. ECOFIN-kompromiset ændrede processen vedr. afskaffelsen af det dobbelte regime på tilsvarende vis som processen for indførelse af EU-passet, således at Kommissionen heller ikke på dette punkt kan træffe en beslutning baseret på Kommissionens egen vurdering uden at afvente ESMA's vurdering.

Ad 2: De nærmere beføjelser for EU-tilsynsmyndigheden ESMA
Drøftelsen på ECOFIN vedrørte de konkrete beføjelser, som ESMA vil få i AIFM-direktivet.

ESMA vil således under visse betingelser have mulighed for at påbyde de relevante nationale tilsynsmyndigheder i EU at forbyde eller begrænse specifikke tredjelands-forvalteres eller -investeringsenheders markedsføring i EU, hvis disses aktivitet er kilde til eller forstærker en væsentlig grænseoverskridende risiko for funktionen, integriteten eller stabiliteten af hele eller dele af det finansielle system i EU.

ESMA vil desuden bl.a. have til opgave at udarbejde bindende tekniske tilsynsstandarder vedr. indholdet af de samarbejdsaftaler, der vil skulle indgås

[2] Det bemærkes dog, at der for så vidt angår Kommissionens beslutning om at indføre et EU-pas til forvaltere og investeringsenheder fra tredjelande, i samlenotatet retteligt burde stå "2 år efter direktivets implementering" i stedet for "2 år efter direktivets ikrafttræden" (side 12, andet afsnit), og tilsvarende i den mundtlige forelæggelse.

mellem tilsynsmyndighederne i det relevante EU-land og det pågældende tredjeland, som led i EU-passet o.l.

Det indskrives desuden i bestemmelsen vedr. den fremtidige evaluering af direktivet ("review"-artiklen), at Kommissionen i denne evaluering også skal undersøge ESMA's rolle i forhold til effektiviteten af direktivet, samt hensigtsmæssigheden af evt. at overføre yderligere tilsynsansvar vedr. godkendelse af og tilsyn med forvaltere fra tredjelande fra de nationale tilsynsmyndigheder til ESMA.

Ad 3: Gensidighed (reciprocitet)
Drøftelsen på ECOFIN vedrørte spørgsmålet om gensidighed ift. tredjelande, som kan sikre, at forvaltere og investeringsenheder fra EU vil kunne have samme adgang til at markedsføre sig i tredjelande, som forvaltere og investeringsenheder fra tredjelande vil få i EU. Ifølge det endelige kompromis vil eventuelle vanskeligheder i forhold til adgangen til tredjelande, som forvaltere og investeringsenheder fra EU måtte have oplevet, således skulle indgå i den vurdering, som beslutningen om at indføre et EU-pas baseres på. Desuden vil Kommissionen løbende bestræbe sig på at sikre, at EU's partnere implementerer forpligtelserne vedr. regulering af hedgefonde m.v. på tilsvarende vis som EU.

Det er regeringens vurdering, at ECOFIN-kompromiset ligger inden for det præciserede forhandlingsmandat, som Folketingets Europaudvalg gav tilslutning til forud for ECOFIN, jf. bilag 1, og som er i overensstemmelse med det oversendte samlenotat af 15. oktober 2010.

Danmark støttede således kompromiset på ECOFIN.

Med venlig hilsen

Claus Hjort Frederiksen

Bilag 1

Regeringen har forud for ECOFIN fremlagt følgende oplæg til præcisering af forhandlingsmandatet for Folketingets Europaudvalg:

> "Regeringen støtter formandskabets kompromistekst i lyset af de indrømmelser, der er gjort i forhold til ønskerne i det danske indspil om åbenhed og ansvarlighed vedr. regulering af kapital- og hedgefonde. Direktivet indfører således en lang række oplysnings- og adfærdskrav for – og tilsyn med – en kategori af forvaltere og fonde, som ikke tidligere har været under fælles regulering og tilsyn. Forhandlingerne med Europa-Parlamentet har på enkelte punkter styrket nogle af direktivkravene. En anden dansk hovedprioritet er at sikre, at man nationalt fortsat kan stille strammere krav ved virksomhedsovertagelser, end AIFM-direktivet. Dette indgår i det foreliggende kompromis.
>
> Regeringen støtter også kompromistekstens regler vedrørende tredjelande, idet der lægges vægt på, at forvaltere eller investeringsenheder fra tredjelande således alene skal kunne opnå et EU-pas, og dermed adgang til at markedsføre deres andele i hele EU på baggrund af godkendelse i ét EU-land, hvis de lever op til krav, der er ækvivalente med direktivets regler. Det er vurderingen, at kompromis-teksten i tilstrækkeligt omfang sikrer dette."

Folketingets Europaudvalg har afgivet følgende bemærkning hertil:

> "Europaudvalget støtter regeringens forhandlingsoplæg vedr. gradvis indførelse af et EU-pas for fonde fra tredjelande.
>
> Regeringen har oplyst over for Europaudvalget, at den under forhandlingerne vil fastholde arbejdet for en skærpet regulering af kapitalfonde i direktivet på linje med Europa-Parlamentets forslag og det danske indspil om åbenhed og ansvarlighed på kapitalmarkederne i Europa.
>
> Udvalget støtter på den baggrund regeringens samlede forhandlingsoplæg og er indforstået med, at Danmark i sidste ende kan støtte det kompromis, der kan opnås enighed om."

Regeringen lagde på den baggrund det præciserede forhandlingsmandat og de af Folketingets Europaudvalg afgivne bemærkninger hertil til grund for regeringens støtte til kompromiset om sagen på ECOFIN.

COUNCIL OF THE EUROPEAN UNION

Brussels, 20 October 2010

15053/10

Interinstitutional File: 2009/0064 (COD)

EF 140
ECOFIN 634
CODEC 1069

COVER NOTE

from:	General Secretariat
to:	Delegations
Subject:	Proposal for a Directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending directives 2003/41/EC and 2009/65/EC - Council's position agreed by ECOFIN

Delegations will find attached the Council's position with regard to the above-mentioned Directive as agreed by the Council (ECOFIN) by unanimity on 19 October 2010.

Encl.

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,
After consulting the European Economic and Social Committee,
Acting in accordance with the ordinary legislative procedure,

Whereas :

(1) Managers of alternative investment funds (AIFM) are responsible for the management of a significant amount of invested assets in Europe, 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 AIFM on the markets in which they operate is largely beneficial, but recent financial difficulties have underlined how the activities of AIFM may also serve to spread or amplify risks through the financial system. Uncoordinated national responses make the efficient management of these risks difficult. This Directive therefore aims at establishing common requirements governing the authorisation and supervision of AIFM in order to provide a coherent approach to the related risks and their impact on investors and markets in the European 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 AIFM. Consequently, this Directive should apply to AIFM managing all types of funds that are not covered by Directive 2009/65/EC on the coordination of laws, regulations and

administrative provisions relating to the undertakings for collective investment in transferable securities (UCITS) (recast), irrespective of the legal or contractual manner in which the AIFM is entrusted with this responsibility. AIFM should not be entitled to manage UCITS within the meaning of Directive 2009/65/EC on the basis of authorisation under this Directive.

(4) This Directive aims to provide a European internal market for AIFM, and a harmonised and stringent regulatory and supervisory framework for the activities of all AIFM, EU or non-EU, within the European Union. As the practical consequences and possible difficulties resulting from a harmonised regulatory framework and a European internal market for (a) non-EU AIFM performing management and/or marketing activities within the European Union and (b) for EU AIFM managing non-EU AIF, are uncertain and difficult to predict due to the lack of previous experience in this regard, a review mechanism has been set forth. It is intended that after a transitional period of two years a harmonised European passport regime shall become applicable in the situations described under (a) and (b) after the entry into force of a delegated act by the Commission in this regard and that this harmonised regime shall during a further transitional period of three years co-exist with the national regimes of the Member States subject to certain minimum harmonised conditions. After such a limited period of co-existence, it is the intention that the national regimes shall be terminated, after the entry into force of a delegated act by the Commission in this regard.

Further, four years after the ultimate transposition date of the Directive, the Commission shall review the application and the scope of the Directive taking into account the objectives of this Directive and shall assess whether or not the European harmonised approach has caused any ongoing major market disruption and whether or not it functions effectively in light of the principles of the internal market and of a level playing field.

(5) The scope of this Directive is confined to entities managing AIF as a regular business (AIFM), regardless of whether the AIF is of the open-ended or the closed-ended type, of the legal form of the AIF, or of whether or not the AIF listed, which 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.

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

(6) As certain entities are not considered to be AIFM pursuant to this Directive, they are out of the scope of this Directive. As a consequence this Directive shall not apply to holding companies as defined in the Directive, in the understanding that the purpose of this definition is not to exclude managers of private equity funds, nor managers of alternative investment funds whose shares are admitted to trading on a regulated market from the scope of the Directive. This Directive shall also not apply to the management of pension funds, employee participation or savings schemes, to supranational institutions, national central banks or national, regional and local governments and bodies or institutions which manage funds supporting social security and pension systems, nor to securitisation special purpose vehicles. It shall also not apply to insurance contracts and joint ventures.

(7) Investment firms authorised under Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC and credit institutions authorised under Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) 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 AIF. However, investment firms can only directly or indirectly offer or place units or

shares of an AIF to or with investors in the European Union in respect of AIF, if and to the extent the units or shares thereof can be marketed in accordance with this Directive. When transposing the provisions of this Directive into national law, the Member States should take into account the regulatory purpose of this provision and ensure that investment firms established in a third country that pursuant to the relevant national law can provide investment services in respect of AIF, should also be covered by this provision. The provision of investment services by these entities in respect of AIF 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 inside or outside the Union.

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

(9) Several provisions of this Directive oblige the AIFM to ensure compliance with requirements for which, in some fund structures, the AIFM is not responsible. An example is fund structures 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 actually appointed, unless the AIF is internally managed. Since this Directive does not regulate the AIF, there could be no obligation in the Directive on the AIF to appoint a depositary. In cases of failure of an AIFM to ensure compliance with the applicable requirements for which the AIF or another entity on its

behalf is responsible, the competent authorities shall require the AIFM to take the necessary steps to remedy the situation. If, despite such steps, the non-compliance persists, and insofar 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, and if the AIFM does not resign, the competent authorities of its home Member State of the AIFM should require that it resigns. In that case the AIF may no longer be marketed in the European Union. If it concerns an authorised non-EU AIFM marketing a non-EU AIF the AIF may no longer be marketed in the European Union.

(10) Where this Directive refers to the interest of the investors of the AIF, and unless specifically set forth otherwise, the intention is to refer to the interest of the investors in their specific capacity of investor of the AIF and not to the individual interests of the investors.

(11) Subject to the exceptions and restrictions set forth herein, the Directive is applicable (i) to all EU AIFM managing EU AIF or non-EU AIF, irrespective of whether they are marketed in the European Union or not and (ii) to non-EU AIFM managing EU AIF, irrespective of whether they are marketed in the European Union or not and (iii) to non-EU AIFM marketing EU AIF or non-EU AIF within the European Union.

The Directive lays down requirements regarding the manner in which AIFM should manage alternative investment funds (AIF) under their responsibility. For non-EU AIFM this is limited to the management of EU AIF and other AIF the units or shares of which are also marketed to professional investors in the European Union.

The authorisation of an EU AIFM in accordance with this Directive covers the management of EU AIF established in the home Member State of the AIFM. Subject to further notification requirements, this also includes the marketing to professional investors within the European Union of EU AIF managed by the EU AIFM and the management of EU AIF established in Member States other than the home Member State of the AIFM.

This Directive also sets forth the conditions under which authorised EU AIFM are entitled to market non-EU AIF to professional investors in the European Union and the conditions under which a non-EU AIFM may obtain an authorisation to (i) manage EU AIF and/or (ii) to market AIF to professional investors in the European Union with a passport. During a period that is intended to be transitional, Member States may also allow EU AIFM to market non-EU AIF on their territory only and/or allow non-EU AIFM to perform the activities referred to in i) and/or (ii) above on their territory only, subject to national law insofar certain minimum conditions pursuant to this Directive are complied with.

(12) This Directive shall not apply to managers insofar as they manage AIF whose only investors are the managers themselves or their parent undertakings, their subsidiaries or other subsidiaries of their parent undertaking and where these investors are not themselves AIF.

(13) This Directive further provides for a lighter regime for AIFM where the cumulative AIF under management fall below a threshold of EUR 100 million and for AIFM that manage only unleveraged AIF that do not grant investors redemption rights during a period of five years where the cumulative AIF under management fall below a threshold of EUR 500 million. Although the activities of the AIFM concerned are unlikely to have individually significant consequences for financial stability, it could be possible that in aggregation their activities give rise to systemic risks. Consequently, those AIFM should not be subject to full authorisation but to a registration in their home Member States and should, among other requirements, 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 AIF they manage. However, in order to be able to benefit from the rights granted under this Directive those smaller AIFM should be allowed to be treated as AIFM subject to the opt-in procedure foreseen by this Directive. This exemption does not limit the possibilities of Member States to impose stricter requirements on those AIFM who have not opted-in.

(14) The Commission shall, by means of delegated acts, adopt measures specifying 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 the structures referred to are structures 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.

(15) No EU AIFM may manage and/or market one or more EU AIF to professional investors in the European Union unless it has been authorised in accordance with this Directive. An AIFM authorised in accordance with this Directive must comply with the conditions for authorisation established in this Directive at all times.

As soon as this is permitted under the Directive, a non-EU AIFM intending to manage EU AIF and/or market AIF in the European Union with a passport or an EU AIFM intending to market non-EU AIF in the European Union with a passport, must also be authorised in accordance with this Directive.

At least during the transitional period, a non-EU AIFM may also be allowed by a Member State to market AIF on the territory of that Member State and an EU AIFM may also be authorised to market non-EU AIF on the territory of that Member State if at least the minimum conditions as set forth in this Directive are complied with.

(16) Depending on their legal form, AIF could be either externally or internally managed. AIF 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 an 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 AIFM under this Directive and be authorised as such. An AIFM which is an internally managed AIF may however not be authorised as the external manager of one

or more other AIF. An AIF should be deemed externally managed when an external legal person has been appointed as manager by the AIF or on behalf of the AIF (the appointed AIFM), which through this appointment is responsible for managing the AIF. Where an external AIFM has been appointed to manage a particular AIF, it should not be deemed to be providing the investment service of portfolio management, as defined by Article 4(1)(9) of Directive 2004/39/EC 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/EEC10, but instead providing the function of collective portfolio management in accordance with this Directive.

(17) Management of AIF should mean providing at least investment management services. The single AIFM to be appointed pursuant to this Directive can never be authorised to provide the services referred to in point 1(a) of Annex I without providing the services referred to in point 1(b) of Annex I and vice versa. Subject to the conditions set forth in this Directive, an authorised AIFM should however not be prevented from also engaging in the activities of administration and marketing of AIF, or from engaging in activities related to the assets of the AIF. An externally appointed 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 the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, 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 externally appointed AIFM should be allowed to manage UCITS.

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

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

(20) 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 AIFM to establish and maintain, for those categories of staff whose professional activities have a material impact on the risk profiles of AIF they manage, remuneration policies and practices that are consistent with sound and effective risk management. These categories of staff should at least include 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.

The principles governing remuneration policies should recognise that AIFM may apply the provisions in different ways according to their size and the size of the AIF they manage, their internal organisation and the nature, the scope and the complexity of their activities.

The principles regarding sound remuneration policies set out in the Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector are consistent with and complement the principles of this Directive.

In order to promote supervisory convergences in the assessment of remuneration policies and practices, ESMA should ensure the existence of guidelines on sound remuneration policies in the AIFM sector. The Committee of European Banking Supervisors should assist it in the elaboration of such guidelines

The provisions on remuneration are without prejudice to the full exercise of fundamental rights guaranteed by the Treaties, in particular to the provisions of Article 153(5) of the Treaty on the Functioning of the European Union, 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 rights, where applicable, of social partners to conclude and enforce collective agreements, in accordance with national laws and traditions.

(21) Reliable and objective asset valuation is crucial for the protection of investor interests. AIFM employ different methodologies and systems for valuing assets, depending on the assets and markets in which they predominantly invest. It is appropriate to recognise these differences but to, nevertheless, require in all cases the AIFM to implement valuation procedures resulting in the proper valuation of assets of the AIF. The process for valuation of assets and calculation of the net asset value (NAV) should be functionally independent from the portfolio management of the AIFM 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, the AIFM may appoint an external valuer to perform the valuation function.

(22) Subject to strict limitations and requirements, including the existence of an objective reason, an AIFM may delegate responsibility for the performance of some of its functions in accordance with this Directive so as to increase the efficiency of the conduct of its business. Subject to the same conditions, also sub-delegation is allowed. AIFM should however at all times remain responsible for the proper performance of their functions and compliance with the rules set out in this Directive.

The strict limitations and requirements set forth on the delegation of tasks by the AIFM apply to the delegation of the management functions as set forth in Annex I. Delegation of other supporting tasks, such as administrative or technical functions performed by the AIFM as a function of its management tasks are not subject to the specific limitations and requirements set forth in the Directive.

(23) Recent developments underline the crucial need to separate asset safe-keeping and management functions, and segregate investor assets from those of the manager. Although AIFM manage AIF 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 provide depositary functions with respect to AIF.

The provisions relating to the appointment and the tasks of a depositary apply to all AIF managed by an AIFM subject to this Directive and therefore for all AIF business models. They are however 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 AIF are investing in and the tasks related to these assets.

(24) For certain AIF (i) which have no redemption rights exercisable during the period of five years from the date of the initial investments and (ii) which, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with point (a) of paragraph 7 or generally invest in issuers or non-listed companies in order to potentially acquire control over such companies in accordance with what is set forth in Article 26, such as private equity funds, venture capital funds and real estate funds, Member States may allow that a notary, a lawyer a registrar or another entity is appointed to carry out depositary functions as part of professional or business activities in respect of which it is subject to mandatory professional registration recognized by law or to legal or regulatory provisions or rules of professional conduct and which can furnish sufficient financial and professional guarantees to be able to effectively perform the relevant depositary functions and meet the commitments inherent in those functions. This takes account of current practice for certain types of closed-ended funds. However, for all other AIF, the depositary needs to be a credit institution, an investment firm or another entity permitted under the UCITS Directive, given the importance of the custody function. For non-EU AIF only, the depositary can also be a credit institution or any other entity of the same nature as the entities set forth above as long as the entity is subject to effective prudential regulation and supervision to the same effect as the provisions laid down in European Union law and which are being effectively enforced.

(25) The depositary should have its registered office or a branch in the same country as the AIF. For a non-EU AIF, the depositary can only be established in this third country if certain additional conditions are met. On the basis of the criteria set forth in delegated acts, the Commission shall be empowered to adopt implementing measures, stating that prudential regulation and supervision of a third country are to the same effect as the provisions laid down in European Union law and are effectively enforced. Further, the mediation procedure set forth in Article 11 of Regulation (EU) No .../2010 [ESMA] shall apply in the event that competent authorities disagree on the correct applications of the other additional conditions. As an alternative, for non-EU AIF, the depositary can also be established in the home Member State or, as the case may be, the Member State of reference of the AIFM managing the AIF.

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.

(26) The depositary should be responsible (i) for the proper monitoring of the AIF's cash flows, and especially for ensuring that investor money and cash belonging to the AIF, or, as the case may be, 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, (ii) for the safe-keeping of the assets of the AIF, including (a) 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 (b) 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 forth in article 16 of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

(27) A depositary should act honestly, fairly, professionally, independently and in the interest of the AIF or, as the case may be, the investors of the AIF.

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

A third party to whom the depositary function of safekeeping of assets is delegated may maintain a common segregated account for multiple AIF (a so-called omnibus account).

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 by securities settlement systems or the provision of similar services by non-European securities settlement systems shall not be considered a delegation of custody functions.

The strict limitations and requirements set forth on the delegation of tasks by the depositary apply to the delegation of its specific functions as a depositary, i.e. the monitoring of the cash flow, the safe-keeping of assets and the oversight functions. Delegation of other supporting tasks that are linked to its depositary tasks, such as administrative or technical functions performed by the depositary in function of its depositary tasks are not subject to the specific limitations and requirements set forth in the Directive.

(29) The Directive also takes account of the fact that many AIF and in particular hedge funds currently make use of a prime broker. The Directive ensures that AIF may continue to use the function of one or more prime brokers. However, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as prime broker and the potential conflicts of interest are properly identified, managed and disclosed to the investors of the AIF, no prime broker should be appointed as a depositary, since prime brokers act as counterparties to AIF 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 activities to the AIF. These prime brokerage activities do not form part of the delegation arrangement.

(30) The depositary should be liable for the losses suffered by the AIFM, the AIF and the investors. The Directive distinguishes between the loss of financial instruments held in custody, and any other losses. In the latter case, the depositary should be liable in 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 regard, a depositary can, by way of an example, not invoke certain internal situations such as a fraudulent act by an employee to discharge itself from its liability.

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 (i) that the depositary is explicitly allowed to discharge itself from its liability subject to the condition precedent of a contractual transfer of such liability to that third party, pursuant to a written contract between the depositary and the AIF, or as the case may be, the AIFM acting on behalf of the AIF, in which such a discharge is objectively justified, and (ii) that the third party can indeed be held liable for the loss based on a contract between the depositary and

the third party, the depositary can discharge itself in such a case of its liability if it can prove that it has duly performed its due diligence duties and that the specific requirements for delegation are met. By imposing the requirement of a contractual transfer of liability to the third party, the Directive intends to attach external effects to such contract, making the third party directly liable to the AIF, or as the case may be, the investors of the AIF, for the loss of the financial instruments held in custody.

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 depositary delegation requirements, the depositary can discharge itself of its liability provided that: (i) the fund rules or the articles of association of the AIF concerned expressly allow for such a discharge; (ii) the investors have been duly informed of this discharge and the circumstances justifying the discharge prior to their investment; (iii) 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; (iv) there is a written contract between the depositary and the AIF, or, as the case may be, the AIFM acting on behalf of the AIF, which expressly allows such a discharge; and (v) there is a written contract between the depositary and the third party that explicitly transfers the liability of the depositary to that third party and makes it possible for the AIF, or as the case may be, the AIFM acting on behalf of the AIF, to make a claim against the third party in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf.

(31) This Directive should be without prejudice to any future legislative measures with respect to the depositary in the UCITS Directive, as UCITS and AIF are different both in the investment strategies they follow and in the type of investors they are intended for.

(32) An AIFM must, for each of the EU AIF it manages and for each of the AIF it markets in the European Union, make available an annual report for each financial year no later than six months following the end of the financial year in accordance with what is set forth in this Directive. The period of six months is without prejudice to the right of the Member States to impose a shorter period.

(33) Given that an AIFM may employ leverage and may, under certain conditions, contribute to the build up of systemic risk or disorderly markets, special requirements should be imposed on AIFM 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 this situation, special requirements should apply to AIFM, which employ leverage on a substantial basis at the level of the AIF. Such AIFM should be obliged to disclose information regarding the overall level of leverage employed, the leverage arising from borrowing of cash or securities and the leverage arising from position held in derivatives, the reuse of assets and the main sources of leverage in their AIF. Information gathered by competent authorities should be shared with other authorities in the Union, with ESMA and the ESRB so as to facilitate a collective analysis of the impact of the leverage of AIF managed by AIFM on the financial system in the Union, as well as a common response. If one or several AIF 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.

In order to ensure a proper assessment of the risks induced by the use of leverage by an AIFM with respect to the AIF it manages, it is required that the AIFM demonstrates that the leverage limits for each AIF it manages are reasonable and that this AIFM demonstrates how it complies at all times with those limits. It is considered necessary to allow the competent authorities of the home Member State of the AIFM to impose limits on the level of leverage that AIFM could employ in AIF where the stability and integrity of the financial system may be threatened. ESMA and the ESRB shall be informed about any actions taken in this respect.

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 AIFM, poses a substantial risk to the stability and the integrity of the financial system and to issue an advice to competent authorities specifying the remedial measures to be taken.

(34) It is necessary to ensure that the competent authorities of the AIFM, the companies over which AIF managed by an AIFM exercise control and the employees of such companies receive certain information necessary for the company to assess how this control will impact the company's situation.

When AIFM are managing AIF which exercise control over an issuer whose shares are admitted to trading on a regulated market, information should generally be disclosed according to Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids 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 and amending Directive 2001/34/EC2. To this end, specific requirements should apply to AIFM managing AIF 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 then be made available to the (representatives of the) employees of the company and to the investors of the relevant AIF.

The specific information requirement towards employees of a certain company apply in case an AIF has acquired control over such a company in accordance with this Directive. However, as the AIFM in most cases, unless it is an internally managed AIF, ultimately has no control over the AIF and, further, as there is, in accordance with the general principles of company law, no direct relationship between the shareholders and the (representatives of) the employees of a company, pursuant to this Directive no direct information requirements towards the (representatives of) the employees of a company can be imposed on (the manager of) a shareholder, i.e. the AIFM and the AIF.

Therefore, as regards the information requirements towards such (representatives of) the employees, the Directive sets forth a best efforts obligation on the AIFM concerned to require that the board of directors of the relevant company discloses the relevant information as required by this Directive to the (representatives of) the employees of the company.

The Commission is invited to examine the need and the possibilities to amend the information and disclosure requirements applicable in case of control over non listed companies or issuers provided in Articles 26 to 30 in this Directive on a general level, regardless of the type of investor.

(35) When an AIFM manages AIF which reach a position to exercise control over a non-listed company, the AIFM should also be obliged to provide the competent authorities of its home Member State with information on the financing of the acquisition. This obligation to provide information on financing should also apply when an AIFM manages AIF which reach a position to exercise control over an issuer of shares admitted to trading on a regulated market.

(36) When an AIFM manages AIF which reach a position to exercise control over a non-listed company or an issuer, such AIFM shall before the end of the period expiring 24 months following the acquisition of control of the company by the AIF (i) not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company in accordance with what is set forth in the Directive; and (ii) insofar as the AIFM is authorised to vote on behalf of the AIF at the governing bodies of the company, not vote in favour of a distribution, capital reduction, share redemption and/or acquisition of own shares by the company in accordance with what is set forth in the Directive; and finally (iii) in any event use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares by the company in accordance with what is set forth in the Directive.

(37) The information and disclosure requirements and the specific safeguards against asset stripping in case of control over a non-listed company, or, as the case may be, an issuer, are 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, the information rules do not aim at making public propriety information which would put the AIFM at a disadvantage vis-à-vis other possible competitors such as sovereign wealth funds or competitors that may want to put the target company out of business by using the information to its advantage. Therefore all the obligations to report and provide information apply without prejudice to 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 and Directives 2004/25/EC and 2004/109/EC. This means inter alia that Member States should provide that the relevant AIFM should not request the communication of information by the board of directors to the (representatives of the) employees, 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.

These obligations also apply without prejudice to the stricter rules adopted by Member States.

(38) This Directive further lays down the conditions under which an EU AIFM may market the units or shares of an EU AIF to professional investors in the European Union. Such marketing by EU AIFM is only allowed insofar as the AIFM complies with the provisions of this Directive and occurs with a passport. This is without prejudice to the marketing of AIFM falling below the above mentioned thresholds. Marketing of these AIF can still be allowed by the Member States subject to national provisions.

Units or shares of an AIF may only be listed on a stock exchange in the EU or offered or placed by third parties acting on behalf of the AIFM in a given Member State 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 EU laws, such as Directives 2003/71/EC and 2004/39/EC, may also regulate the distribution of AIF to investors in the EU.

(39) Many EU AIFM currently manage non-EU AIF. It is appropriate to allow authorised EU AIFM to manage non-EU AIF without marketing them in the territory of the European Union, without imposing on them the strict depositary requirements and the requirements relating to the annual report as set forth in this Directive, as these requirements have been included for the protection of European investors.

(40) 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 given by ESMA in this regard, occur two years after the final transposition date of this Directive, authorised EU AIFM intending to market non-EU AIF to professional investors in their home Member State and/or in other Member States should be allowed to do so with a passport insofar as they comply with all the provisions of this Directive. That right shall be subject to notification procedures and the fulfilment of conditions in relation to the third country of the non-EU AIF.

(41) During a transitional period, which will in principle, depending on the advice given by ESMA in this regard, be terminated by a delegated act three years after the entry into force of the delegated act pursuant to which the European passport has become applicable, EU AIFM intending to market non-EU AIF within the territory of certain Member States of the European Union, but without a passport, may also be permitted to do this by the relevant Member States, but only insofar as they comply with all the provisions of the Directive with the exception of the depositary requirements. However, such AIFM must ensure that one or more entities are appointed to carry out the duties of the depositary and 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 of the non-EU AIF in order to

ensure an efficient exchange of information that allows competent authorities of the relevant Member State to carry out their duties according to this Directive. The cooperation arrangements should not be used as a barrier to impede third country funds from being marketed in a Member State. Further, the third country where the non-EU AIF is established may not be listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing.

(42) 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 given by ESMA in this regard, occur two years after the final transposition date of this Directive, a basic principle of this Directive shall be that a non-EU AIFM established in a third country should benefit from the rights conferred under this Directive (such as to market shares and units in AIF throughout the European Union with a passport) but only where it is subject to the obligations of this Directive. This should ensure a level playing field between EU and non-EU AIFM. This Directive therefore sets forth a procedure for non-EU AIFM to be authorised under this Directive which will become applicable after the entry into force of the delegated act adopted by the Commission in this regard. To ensure that such compliance is enforced, this Directive further sets forth that the competent authorities of a Member State shall enforce compliance with this Directive. For such non-EU AIFM the competent supervisory authorities will be the competent authorities of the Member State of reference, as defined in this Directive.

Therefore, where a non-EU AIFM intends to manage EU AIF and/or market AIF in the territory of the European Union with a passport, it should also be required to comply with all the provisions of this Directive, so that it is subject to the same obligations as AIFM established in the Union. 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 and/or, as the case may be, the non-EU AIF marketed in the European Union, is submitted, the non-EU AIFM may be exempted from compliance with that provision of the Directive if it can demonstrate that: (i) it is impossible to combine compliance with a provision of this Directive with compliance with a mandatory provision

in the law to which the non- EU AIFM and/or, as the case may be, the non- EU AIF marketed in the European Union, is submitted; (ii) the law to which the non-EU AIFM and/or the non-EU AIF is submitted provides for an equivalent rule having the same regulatory purpose and offering the same level of protection to the investors of the relevant AIF; and (iii) the non-EU AIFM and/or the non-EU AIF complies with that equivalent rule.

Further, such a non-EU AIFM shall have to comply with a specific authorisation procedure and certain specific requirements concerning the third country of the non-EU AIFM, and, as the case may be, of the third country of the non-EU AIF should be satisfied.

ESMA shall give advice on the determination of the Member State of reference, and as the case may be, the exemption in case of incompatibility with an equivalent rule. Specific information requirements from the competent authorities of the Member State of reference to the competent authorities of the host Member States of the AIFM shall apply. Further, the mediation procedure set forth in Article 11 of [ESMA regulation] shall 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 of equivalent rules and the assessment regarding the fulfilment of the specific requirements concerning the third country of the non-EU AIFM, and, as the case may be, of the third country of the non-EU AIF.

ESMA shall, on an annual basis, conduct peer review analysis of the supervisory activities of the competent authorities in relation to the authorisation and the supervision of non-EU AIFM, to further enhance consistency in supervisory outcomes, in accordance with Article 15 of Regulation …/… [ESMA Regulation].

(43) During a transitional period, which will in principle, depending on the advice given by ESMA in this regard, be terminated by a delegated act three years after the entry into force of the delegated act pursuant to which the European passport has become applicable, a non-EU AIFM intending to market AIF in the territory of certain Member States of the European Union only and without such a passport, may also be permitted to do this by the relevant Member States, but only insofar certain minimum conditions are satisfied. Those AIFM should be subject at least to rules similar to those applicable to EU AIFM managing EU AIF with respect to the disclosure to investors. In order to facilitate the monitoring of systemic risk those AIFM should also be subject to disclosure requirements vis-à-vis the competent authorities of their home Member State. Therefore, such AIFM must comply with the transparency requirements set forth in the Directive, and with Section 2 of Chapter V. Further, appropriate cooperation arrangements for the purpose of systematic risk oversight and in line with international standards should be in place between the competent authorities of the Member State(s) where the AIF are marketed, if applicable, the competent authorities of the EU AIF and the supervisory authorities of the third country of the non-EU AIFM in order to ensure an efficient exchange of information that allows competent authorities of the relevant Member States to carry out their duties according to this Directive. The 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, and as the case may be, the non-EU AIF is established may not be listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing.

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

(45) Member States should be able to allow the marketing of all or certain types of AIF managed by AIFM to retail investors on 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 may be considered as a type of AIF which may be marketed to retail investors on its territory. Without prejudice to the application of other instruments of European Union law, Member States may in such cases impose stricter requirements on AIF and AIFM as a precondition for marketing to retail investors than is the case for AIF marketed to professional investors on their territory, irrespective of whether AIF are marketed on a domestic or cross-border basis. Where a Member State allows the marketing of AIF to retail investors on its territory, this possibility should be available regardless of the Member State where the AIFM is established, and Member States may not impose stricter requirements on AIF established in the Union and marketed on a cross-border basis than on AIF marketed domestically. In addition, AIFM, investment firms authorised under Directive 2004/39/EC and credit institutions authorised under Directive 2006/48/EC which provide investment services to retail clients have to 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.

(46) 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 the competent authorities of the host Member States of the AIFM shall be allowed to take direct action relating to the provisions under their responsibility. For the other provisions the competent authorities of the host Member States shall 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.

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

ESMA shall develop technical regulatory standards on the contents of the cooperation arrangements that must be concluded by the home Member State, or, as the case may be, the Member State of reference of the AIFM and the relevant supervisory authorities from outside the European Union and on the procedures for the exchange of information. The technical standards should ensure that pursuant to these cooperation arrangements all necessary information should be provided for the competent authorities of both the home as the host Member States to be able to exercise their supervisory and investigatory powers under this Directive. ESMA shall also have a facilitating role in the negotiation and conclusion of the cooperation arrangements. For example, ESMA can use its facilitating role by providing for a standard format for such cooperation arrangements.

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

(48) This Directive respects the fundamental rights and observes the principles recognized in particular in the Treaty on the Functioning of the European Union and in the Charter of Fundamental Rights of the European Union, notably the right to the protection of personal data recognized in Article 16 of the Treaty 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. 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, which should be fully applicable to the processing of personal data for the purposes of this Directive.

(49) The measures necessary for the implementation of this Directive should be adopted by means of implementing acts in accordance with Article 291 of the Treaty on the Functioning of the European Union (TFEU).

The Commission will be empowered to adopt delegated acts in accordance with Article 290 of the TFEU where explicitly allowed in this Directive. In particular, the Commission should be empowered to adopt delegated acts specifying how to calculate the thresholds for the lighter regime and how to treat AIFM whose assets under management, including any assets acquired through use of leverage, in one and the same calendar year occasionally exceed and/or fall below the relevant threshold; the obligations to register for the entities falling below the thresholds and to provide information in order to effectively monitor systemic risk a; and the obligations to notify the relevant competent authorities. 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. Delegated acts should also be adopted 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 AIFM comply with their obligations as regards their conduct of business, their obligation to act in the best interests of the AIF or the investors of the AIF it manages and the integrity of the market; to have and employ effectively the resources and procedures that are necessary for the proper performance of its business activities; to take all reasonable steps to avoid conflicts of interests and, when they cannot be avoided, to identify, prevent, manage and monitor, and where applicable, disclose, those conflicts of interest in order to prevent them from adversely affecting the interests of the AIF and its investors and to ensure that the AIF it manages are fairly treated; to comply with all regulatory requirements applicable to the conduct of its business activities so as to promote the best interests of the AIF or the investors of the AIF it manages and the

integrity of the market; and to treat all AIF investors fairly. Delegated acts should further be adopted to specify the type of conflicts of interests AIFM have to identify, as well as the reasonable steps AIFM are expected to take in terms of structures and organizational and administrative procedures in order to identify, prevent, manage monitor and disclose conflicts of interest. 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 shall be functionally and hierarchically separated from the operating units, including the portfolio management function; the specific safeguards against conflicts of interests; and the risk management requirements to be employed by AIFM. Delegated acts should also be adopted to specify the liquidity management systems and procedures that AIFM 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 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. Delegated acts should also be adopted to specify the requirements that AIFM have to comply with when investing in such securitisation instruments. Delegated acts should also be adopted specifying the administrative and accounting procedures, control and safeguard arrangements for electronic data processing and adequate internal control mechanisms. Delegated acts should also be adopted to specify the procedures for the proper valuation of the assets and the calculation of the net asset value per share or unit of the AIF; the professional guarantees the external valuer must be able to furnish; and the periodicity for valuation appropriate for open-ended funds. Delegated acts should also be adopted to specify the conditions under which the delegation of AIFM functions should be approved and the conditions under which the manager has delegated its functions to the extent that it becomes a letter-box entity and could no longer be considered to be the manager of the AIF. As regards depositaries, delegated acts should also be adopted to specify the criteria for assessing that the prudential regulation and supervision of third countries where the depositaries are established are to the same effect as the provisions laid down in European

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 shall be included in the scope of the depositary's custody duties, the conditions upon which the depositary may exercise its custody duties over financial instruments registered with a central depositary and the conditions upon which the depositary shall safe keep 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 and circumstances under which financial instruments held in custody shall 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 and circumstances under 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 AIFM have to make available for each AIF they manage and to specify the disclosure obligations of AIFM to investors and reporting requirements to competent authorities as well as their frequency. Delegated acts should also be adopted to specify when leverage is considered to be employed on a substantial basis. Delegated acts should be adopted to specify the principles competent authorities should use when considering implementation of limits on leverage. Delegated acts should also be adopted to specify the cooperation arrangements in relation to non-EU AIFM and/or non-EU AIF 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 AIFM between competent authorities and the provision of certain information to ESMA.

Depending on the advice of ESMA in this regard and the criteria set forth in the Directive, a delegated act shall also be adopted in order to extent the European passport to EU AIFM marketing non-EU AIF in the European Union and to non-EU AIFM managing and/or marketing AIF in the European Union, and another delegated act shall be adopted to terminate the application of national private placement regimes in this regard.

The European Parliament or the Council have a period of three months from the date of notification to object to a delegated act. At the initiative of the European Parliament or the Council, this period can be prolonged by three months in significant areas of concern. The European Parliament and the Council may inform the other institutions of their intention not to raise objections. This early approval of delegated acts is of particular importance when deadlines need to be respected, for example to allow Member States to transpose delegated acts within the transposition period laid down in Article 63 of this Directive, where relevant.

(50) In accordance with Declaration 39 on Article 290 of the TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, the Commission should 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.

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

(52) Two years after the final transposition date of this Directive, ESMA shall issue an opinion on the functioning of the European passport then in force and on the functioning of national private placement regimes. It shall also issue advice on the extension of the European passport to EU AIFM marketing non-EU AIF in the European Union and to non-EU AIFM managing and/or marketing AIF in the European Union. The Commission shall adopt a delegated act within three months after having received the ESMA advice and opinion and taking into account the criteria listed in paragraph 2 of Article 63bis and the

objectives of this Directive, inter alia the internal market, investor protection and the effective monitoring of systemic risk, specifying the date when the rules set forth in Articles 35, 37, 37a, 38, 39 and 39bis shall become applicable in all Member States.

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, IOSCO 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 our international partners."

(53) Three years after the entry into force of the delegated act pursuant to which the European passport has become applicable for all AIFM, ESMA shall issue an opinion on the functioning of the European passport then in force and on the functioning of national private placement regimes. It shall also issue an advice on the termination of such national regimes. The Commission shall adopt a delegated act within three months after having received the ESMA advice and opinion and taking into account the criteria listed in paragraph 2 of Article 63ter and the objectives of this Directive, inter alia the internal market, investor protection and the effective monitoring of systemic risk, specifying the date when the national regimes set forth in Articles 36 and 40 shall have to be terminated in all Member States.

(54) Four years after the transposition date of this Directive, the Commission shall, on the basis of public consultation and in the light of the discussions with competent authorities, commence with a review of the application and the scope of this Directive. The review should analyse the experience acquired in applying the Directive, its impact on investors, AIF or AIFM, both within and outside the Union, and in how far the objectives of the Directive have been achieved and, if necessary, propose appropriate amendments. The examination shall include a general survey of the functioning of the rules in this Directive and the experience acquired in applying them. The Commission shall in its review examine the functions of ESMA and the EU competent Authorities in ensuring effective supervision of all AIFM operating in the EU markets in the context of this Directive, including inter alia – as consistent with the ESMA Regulation - entrusting ESMA with further supervisory responsabilities in the field of authorisation and supervision of non-EU AIFM. In this conctext the Commission shall assess the costs and benefits of entrusting ESMA with such tasks.

This Directive aims at establishing a framework capable of addressing the potential risks which might arise from the activities of AIFM and the effective monitoring of these risks by the competent authorities within the European Union. It is necessary to provide for a stringent regulatory and supervisory framework which leaves no gaps in financial regulation. In this regard reference is made to the already existing due diligence requirements applicable to professional investors pursuant to the relevant regulation

applicable to such investors. Further, the Commission is also invited to review the relevant legislation with respect to professional investors in order to assess the need to impose tighter requirements regarding the due diligence procedure to be undertaken by a European professional investors investing on its own initiative in non-EU financial products, such as inter alia non-EU AIF.

At the end of the review the Commission shall present a report to the Council and the European Parliament, including, if appropriate, proposed amendments taking into account the objectives of the Directive and potential impacts on investors, AIF or AIFM, both within and outside the Union.

CHAPTER I
GENERAL PROVISIONS

Article 1

Subject matter

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

Article 2

Scope

1. Subject to the exceptions set forth herein, this Directive shall apply to:

   (i) all EU AIFM, which manage one or more alternative investment funds (AIF) irrespective of whether the AIF is an EU AIF or a non-EU AIF;
   (ii) all non-EU AIFM, which manage one or more EU AIF; and
   (iii) all non-EU AIFM, which market one or more AIF in the European Union, irrespective of whether the AIF is an EU AIF or a non-EU AIF.

In this regard, it is of no significance

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

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

(c) what the legal structure of the AIFM is.

2. The Directive shall not apply to the following entities:

(a) holding companies;

(b) institutions which are covered by Directive 2003/41/EC of the European Parliament and the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (IORP), including, where applicable, the authorised entities responsible for managing IORP and acting on their behalf referred to in Article 2(1) of that Directive or the appointed investment managers pursuant to Article 19(1) of the same Directive, insofar as they do not manage AIF;

(c) supranational institutions, such as the World Bank, the IMF, the ECB, the EIB, the European development finance institutions (DFIs) and bilateral development banks, the EIF, other supranational institutions and similar international organisations, in case such institutions or organisations manage one or several AIF in so far as those AIF act in the public interest;

(d) national central banks;

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

(f) employee participation schemes or employee saving schemes;

(g) securitisation special purpose entities.

3. Member States shall take the necessary steps to ensure that AIFM referred to in paragraph 1 comply with the applicable requirements of this Directive on an ongoing basis.

Article 3

Exemptions

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

2. Without prejudice to the application of Article 44, for the following AIFM, the application of the Directive shall be limited to the provisions set forth in paragraphs 3 and 4 below:

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

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

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

   (a) be subject to a registration with the competent authorities of its home Member State;

(b) at the time of registration identify itself and the AIF managed by it to the competent authorities of its home Member State;

(c) at the time of registration provide information on the investment strategies of the AIF managed by it to the competent authorities of its home Member State;

(d) provide regularly the competent authorities of its home Member State with information on the main instruments in which they are trading and on the principal exposures and most important concentrations of AIF they manage in order to enable the competent authorities to effectively monitor systemic risk, and

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

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

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

4. AIFM referred to in paragraph 2 do not benefit from any of the rights granted under this Directive, unless the AIFM chooses to opt-in under this Directive in which case the entire Directive, subject to the exceptions set forth herein, shall be applicable to those AIFM.

5. The Commission shall, in accordance with the regulatory procedure referred to in Article 57(2), adopt implementing measures with a view to specifying the procedures for AIFM which choose to opt-in under this Directive in accordance with paragraph 4.

6. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:

(a) how to calculate the thresholds referred to in paragraph 2 and to treat AIFM whose assets under management, including any assets acquired through use of leverage, in one and the same calendar year occasionally exceed and/or fall below the relevant threshold

(b) the obligations to register for the entities set forth in paragraph 2 and to provide information in order to effectively monitor systemic risk as set forth in paragraph 3, and

(c) the obligations to notify competent authorities referred to in paragraph 3.

Article 4

Definitions

1. For the purpose of this Directive, the following definitions shall apply, unless specifically provided otherwise in this Directive:

(a) 'Activities related to the assets of AIF' means performing services necessary to meet the fiduciary duties of the AIFM, facilities management, real estate administration activities, advice to undertakings on capital structure, industrial strategy and related matters, advice and services relating to mergers and the purchase of undertakings and other services connected to the management of the AIF and the companies and other assets it has invested in.

(b) 'AIF' or 'alternative investment fund' means any collective investment undertaking, including investment compartments thereof,

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

(ii) which does not require authorisation pursuant to Article 5 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS);

(c) 'AIFM' or ‘manager of alternative investment funds’ means any legal person whose regular business is managing one or more AIF;

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

(e) 'Carried interest’ means a share in the profits of the AIF accrued to the AIFM as compensation for the management of the AIF and excluding any share in the profits of the AIF accrued to the AIFM as a return on any investment by the AIFM into the AIF.

(f) ‘Close links’ means a situation in which two or more natural or legal persons are linked by :

(i) participation, which means the ownership, direct or by way of control, of 20% or more of the voting rights or capital of an undertaking,

(ii) control, which means the relationship between a parent undertaking and a subsidiary, in all the cases referred to in Article 1(1) and (2) of Seventh Council Directive 83/349/EEC of 13 June 1983, or a similar relationship between any natural or legal person and an undertaking, any subsidiary undertaking of a subsidiary undertaking also being considered a subsidiary of the parent undertaking which is at the head of those undertakings.

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

(g) ‘Competent authorities’ means the national authorities of Member States, which are empowered by law or regulation to supervise AIFM;

(h) ‘Competent authorities of a depositary’ means

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

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

(iii) if the depositary is a legal person referred to in point (c) of the first subparagraph of Article 21(3), the national authorities of its home Member State which are empowered by law or regulation to supervise such legal persons;

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

(v) if the depositary is appointed as depositary for a non-EU AIF in accordance with paragraph (b) of Article 21(5), and is not any of the entities referred to above, the relevant national authorities of the third country where the depositary has its registered office;

(i) ‘Competent authorities of an EU AIF’ means the national authorities of a Member State which are empowered by law or regulation to supervise AIF;

(j) ‘Control’ means control as defined in Article 1 of the Seventh Council Directive 83/349/EEC of 13 June 1983;

(k) 'Established' means

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

(ii) for AIF, 'being authorised or registered in', or, as the case may be if it is not authorised or registered, 'having its registered office in';

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

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

(l) 'EU AIF' means

(i) any AIF which is authorised or registered in a Member State of the European Union under the applicable national law; and

(ii) any AIF which is not authorised or registered in a Member State, but has its registered office and/or head office in a Member State of the European Union;

(m) 'EU AIFM' means any AIFM which has its registered office in a Member State of the European Union;

(n) 'Feeder AIF' means an AIF which:

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

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

(iii) has otherwise an exposure of at least 85% of its assets to one or more such master AIF.

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

(p) 'Initial capital' means the funds as referred to in Article 57(a) and (b) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast);

(q) ‘Issuer’ means any issuer within the meaning of Article 2(1)(d) of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC which has its registered office in the European Union, and whose shares are admitted to trading on a regulated market within the meaning of Article 4(1), point 14, of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC;

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

(i) a company whose shares are admitted to trading on a European regulated market and which is operating for its own account; or

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

(s) ‘Home Member State of an AIF' means

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

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

(t) ‘Home Member State of an AIFM" means the Member State in which the AIFM has its registered office;

(u) ‘Host Member State of an AIFM' means, as the case may be,

(i) The Member State, other than the home Member State, within the territory of which an EU AIFM markets shares or units of an EU AIF; or

(ii) The Member State, other than the home Member State, within the territory of which an EU AIFM manages EU AIF; or

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

(iv) The Member State, other than the Member State of reference, within the territory of which a non-EU AIFM manages EU AIF; or

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

(vi) The Member State, other than the Member State of reference, within the territory of which a non-EU AIFM markets shares or units of a non-EU AIF.

(v) ‘Legal representative’ means any natural or legal person having its domicile, for natural persons, or its registered office, for legal persons, in the European Union who, explicitly designated by a non-EU AIFM, acts on behalf of such non-EU AIFM and may be addressed by authorities, clients, bodies and counterparties to the non-EU AIFM in the European Union instead of the non-EU AIFM with regard to the latter's obligations under this Directive.

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

(x) ‘Managing AIF’ means providing at least investment management services referred to in point 1(a) or (b) of Annex I to one or more AIF;

(y) 'Marketing' means any direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares in an AIF it manages to or with investors domiciled in the Union;

(z) 'Master AIF' means any AIF in which another AIF invests or has an exposure in accordance with what is set forth in point (n) above.

(aa) 'Member State of reference' means the Member State of reference for a non-EU AIFM as determined in accordance with Article 37 paragraph 4;

(ab) 'Non-EU AIF' means any AIF which is not an EU AIF;

(ac) 'Non-EU AIFM' means any AIFM which is not an EU AIFM;

(ad) 'Non-listed company' means any company which has its registered office in the European Union whose shares are not admitted to trading on a regulated market within the meaning of Article 4(1), point 14, of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC;

(ae) 'Own funds' means own funds as referred to in Title V, Chapter 2, Section 1 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast);

(af) 'Parent undertaking' means a parent undertaking as defined in Articles 1 and 2 of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54(3)(g) of the Treaty on consolidated accounts;

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

(ah) ‘Professional investor’ means any investor which is considered to be a professional client or may be treated as a professional client on request within the meaning of Annex II of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC;

(ai) ‘Qualifying holding’ means any direct or indirect holding in an AIFM which represents 10% or more of the capital or of the voting rights, as set out in Articles 9 and 10 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, taking into account the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive, or which makes it possible to exercise a significant influence over the management of the AIFM in which that holding subsists;

(aj) ‘Representatives of employees’ means representatives of employees as defined by Article 2(e) of Directive 2002/14 of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community;

(ak) ‘Retail investor’ means any investor who is not a professional investor;

(al) 'Subsidiary’ means a subsidiary undertaking as defined in Articles 1 and 2 of the Seventh Council Directive 83/349/EEC of 13 June 1983, including any subsidiary of a subsidiary undertaking of an ultimate parent undertaking;

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

(an) 'Supervisory authorities of a non-EU AIFM' means the national authorities of a third country which are empowered by law or regulation to supervise AIFM;

(ao) ’Securitisation special purpose entity’ means, for the purpose of paragraph 2(g) of Article 2, an entity whose sole purpose is to carry on a securitisation or securitisations within the meaning of Article 1(2) of Regulation (EC) No 24/2009 of the European Central Bank of 19 December 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions (ECB/2008/30) and other activities which are appropriate to accomplish that purpose;

(ap) 'UCITS' means an undertaking for collective investment in transferable securities authorised in accordance with Article 5 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

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

3. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:

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

(b) how leverage shall be calculated.

4. ESMA shall develop draft regulatory technical standards to determine, where relevant in the application of this Directive and to ensure a uniform conditions of application, the types of AIFM.

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

Article 5

Determination of AIFM

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

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

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

3. If, despite such steps referred to in paragraph 2, the non-compliance persists, and insofar it concerns an EU AIFM or an EU AIF, the competent authorities of the home Member State of the AIFM shall require that it resigns as AIFM of that AIF. In that case the AIF may no longer be marketed in the European Union. If it concerns a non-EU AIFM managing a non-EU AIF, the AIF may no longer be marketed in the European Union. The competent authorities of the home Member State of the AIFM shall immediately inform the competent authorities of the host Member States of the AIFM.

CHAPTER II
AUTHORISATION OF AIFM

Article 6

Conditions for taking up activities as AIFM

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

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

2. Member States shall require that no externally appointed AIFM shall engage in activities other than those referred to in Annex I of this Directive and the additional management of UCITS subject to authorisation under Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

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

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

(a) management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement provision in accordance with Article 19(1) of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, in accordance with mandates given by investors on a discretionary, client-by-client basis;

(b) as non-core services:

(i) investment advice;

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

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

5. AIFM shall not be authorised under this Directive to provide only the services referred to in paragraph 4, or to provide non-core services referred to in point (b) of paragraph 4 without being authorised for the services referred to in point (a) of paragraph 4, or to provide only the activities referred to in point 2 of Annex I of this Directive, or to provide the services referred to in point 1(a) of Annex I without providing the services referred to in point 1(b) of Annex I and vice versa.

6. Article 2(2) and Articles 12, 13 and 19 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC shall apply to the provision of the services referred to in paragraph 4 of this Article by AIFM.

7. Member States shall require that the AIFM provides the competent authorities of the home Member State of the AIFM with the information they require to monitor compliance with the conditions referred to in this Directive on a continuous basis.

8. Investment firms authorised under Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC and credit institutions authorised under Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) are not be required to obtain an authorisation under this Directive in order to provide investment services such as individual portfolio management in respect of AIF. However, investment firms can only, directly or indirectly, offer or place shares or units of AIF to or with investors in the European Union in respect of AIF, if and to the extent the units or shares thereof can be marketed in accordance with this Directive.

Article 7

Application for authorisation

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

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

(a) Information on the persons effectively conducting the business of the AIFM;

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

(c) A programme of activity setting out the organisational structure of the AIFM, including information on how the AIFM intends to comply with its obligations under Chapters II, III, IV, and where applicable, 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 an authorisation shall further provide the following information on the AIF it intends to manage to the competent authorities of its home Member State:

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

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

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

(d) Information on the arrangements made for the appointment of the depositary in accordance with Article 21 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 of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) and applies for authorisation as an AIFM under this Directive, the competent authorities should not require the management company to provide information or documents which the management company already provided when applying for authorisation under Directive 2009/65/EC, provided that such information or documents is still up to date.

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

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

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

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

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

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

Article 8

Conditions for granting the authorisation

1. The competent authorities of the home Member State of an AIFM shall not grant an authorisation unless the following conditions are met:

(a) The relevant competent authorities are satisfied that the AIFM will be able to fulfil the conditions of this Directive;
(b) The AIFM has sufficient initial capital and own funds in accordance with the requirements of Article 9;
(c) The persons who effectively conduct the business of an AIFM are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the AIF managed by the AIFM, the names of those persons and of every person succeeding them in office being communicated forthwith to the competent authorities of the home Member State of the AIFM and the conduct of the business of an AIFM being decided by at least two persons meeting such conditions;

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

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

The authorisation shall be valid for all Member States.

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

(a) a subsidiary of another AIFM, a management company authorised under Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (hereinafter referred to as a UCITS management company), an investment firm, a credit institution or an insurance undertaking authorised in another Member State;

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

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

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

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

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

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

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

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

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

a) specify the requirements applicable to the AIFM under paragraph 3;

b) specify the requirements applicable to shareholders and members with qualifying holdings referred to in paragraph 1(d), as well as to specify obstacles which may prevent effective exercise of the supervisory functions of the competent authorities.

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

Article 9

Initial capital and own funds

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

2. Where an AIFM is appointed as external manager of one or more AIF, the AIFM shall have an initial capital of at least EUR 125 000, taking into account the following paragraphs.

3. Where the value of the portfolios of AIF managed by the AIFM exceeds EUR 250 million, the AIFM shall provide an additional amount of own funds. That additional amount of own funds shall be equal to 0.02 % of the amount by which the value of the portfolios of the AIFM exceeds EUR 250 million but the required total of the initial capital and the additional amount must not, however, exceed EUR 10 million.

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

5. Irrespective of the amount of the requirements set out in paragraph 3, the own funds of the AIFM shall never be less than the amount required under Article 21 of Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast).

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

7. To cover potential professional liability risks resulting from activities the AIFM may carry out pursuant to this Directive, both internally managed AIF and externally appointed AIFM shall:

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

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

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

9. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:

(a) the risks the additional own funds or the professional indemnity insurance referred to in paragraph 7 must cover;

(b) the conditions for determining the appropriateness of additional own funds or the coverage of the professional indemnity insurance referred to in paragraph 7;

(c) the manner of determining ongoing adjustments of the additional own funds or of the coverage of the professional indemnity insurance referred to in paragraph 7.

10. With the exception of paragraphs 7 and 8 and their implementing measures by means of delegated acts, this Article shall not apply to AIFM which are also authorised as management companies under Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

Article 10

Changes in the scope of the authorisation

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

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

Article 11

Withdrawal of the authorisation

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

(a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased the activity covered by this Directive for the preceding six months, unless the Member State concerned has provided for authorisation to lapse in such cases;
(b) has obtained the authorisation by making false statements or by any other irregular means;
(c) no longer fulfils the conditions under which authorisation was granted;

(d) no longer complies with Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) if its authorisation also covers the discretionary portfolio management service referred to in paragraph 4(a) of Article 6 of this Directive;

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

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

CHAPTER III
OPERATING CONDITIONS FOR AIFM

SECTION 1 : GENERAL PRINCIPLES

Article 12
General principles

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

The AIFM shall:

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

(b) act in the best interests of the AIF or the investors of the AIF it manages and the integrity of the market;

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

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

(e) comply with all regulatory requirements applicable to the conduct of its business activities so as to promote the best interests of the AIF or the investors of the AIF it manages and the integrity of the market;

(f) treat all AIF investors fairly.

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

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

(a) not be permitted to invest all or a part of the client's portfolio in units or shares of the AIF it manages, unless it receives prior general approval from the client;
(b) with regard to the services referred to in paragraph 4 of Article 6 be subject to the provisions laid down in Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes.

3. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying the criteria to be used by the relevant competent authorities to assess whether AIFM comply with their obligations under paragraph 1.

Article 13
Remuneration

1. Member States shall require AIFM to have remuneration policies and practices for those categories of staff, including senior management, 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 AIF they manage, that are consistent with and promote sound and effective risk management and do not encourage risk-taking which is inconsistent with the risk profiles, fund rules or instruments of incorporation of the AIF it manages.

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

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

Article 14

Conflicts of interest

1. Member States shall require AIFM to take all reasonable steps to identify conflicts of interest that arise in the course of managing one or more AIF between:

(a) the AIFM, including their managers, employees or any person directly or indirectly linked to the AIFM by control, and the AIF managed by the AIFM or the investors of this AIF;or
(b) one AIF or the investors of this AIF and another AIF or the investors of this AIF, or
(c) the AIF or the investors of the AIF and another client of the AIFM; or
(d) the AIF or the investors of the AIF and a UCITS managed by the AIFM or the investors of such UCITS; or
(e) two of the AIFM's clients.

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

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

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

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

4. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:

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

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

Article 15

Risk management

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

The functional and hierarchical separation of the functions of risk management in accordance with subparagraph 1 shall be reviewed by the competent authorities of the home Member State of the AIFM in line with the principle of proportionality, in the understanding that the AIFM must in any event be able to demonstrate that specific safeguards against conflicts of interest allow for the independent performance of risk management activities and that the risk management process satisfies the requirements of this Article and is consistently effective.

2. The AIFM shall implement adequate risk management systems in order to identify, measure, manage and monitor appropriately all risks relevant to each AIF investment strategy and to which each AIF is or can be exposed.

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

3. The AIFM shall at least:

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

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

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

4. The AIFM shall set a maximum level of leverage which the AIFM may employ on behalf of each AIF it manages as well as extent of the right of the re-use of collateral or guarantee that could be granted under the leveraging arrangement, taking into account, inter alia:

(a) the type of AIF;

(b) their strategy;

(c) the sources of their leverage;

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

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

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

(g) the assets liability ratio;

(h) the scale, nature and extent of the AIFM's activity in the markets concerned.

5. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:

(a) the risk management systems to be employed by AIFM as a function of the risks which the AIFM incurs on behalf of the AIF that it manages;

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

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

(d) specific safeguards against conflicts of interest referred to in subparagraph 2 of paragraph 1;

(e) the requirements referred to in paragraph 3.

Article 16

Liquidity management

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

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

2. The AIFM shall ensure that for each AIF it manages the investment strategy, the liquidity profile and the redemption policy are consistent.

3. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying
   (a) the liquidity management systems and procedures,
   (b) the alignment of the investment strategy, liquidity profile and redemption policy set out in paragraph 2.

Article 17

Investment in securitisation positions

1. In order to ensure cross-sectoral consistency and to remove misalignment between the interest of firms that repackage loans into tradable securities and originators within the meaning of Article 4(41) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), and AIFM that invest in these securities or other financial instruments on behalf of one or more AIF, the Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures laying down the requirements in the following areas :

   (a) the requirements that need to be met by the originator, the sponsor or the original lender, in order for an AIFM to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011 on behalf of one or more AIF, including requirements that ensure that the originator, the sponsor or the original lender, retains a net economic interest of not less than 5 per cent.

   (b) qualitative requirements that must be met by AIFM which invest in these securities or other financial instruments on behalf of one or more AIF.

SECTION 2 : ORGANISATIONAL REQUIREMENTS

Article 18

General principles

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

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

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

Article 19

Valuation

1. The AIFM shall ensure that, for each AIF that it manages, appropriate and consistent procedures are established so that a proper and independent valuation of the assets of the AIF can be performed in accordance with this Article and the applicable national and AIF rules.

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

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

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

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

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

The investors are informed of the valuations and calculations in the way set forth in the relevant AIF's rules or instruments of incorporation.

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

(a) an external valuer, being a legal or natural person independent from the AIF, the AIFM and from any other persons with close links to the AIF or the AIFM; or
(b) the AIFM itself, provided that the valuation task is functionally 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 cannot be appointed as external valuer of that AIF, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as external valuer and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

5. When an external valuer is performing the valuation function, the AIFM shall be able to demonstrate that:

(a) the external valuer is subject to mandatory professional registration recognized by law or to legal or regulatory provisions or rules of professional conduct; and
(b) the external valuer can furnish sufficient professional guarantees to be able to effectively perform the relevant valuation function in accordance with paragraphs 1, 2 and 3; and
(c) the appointment of the external valuer complies with the requirements of Article 20 (1) and their implementing measures by means of delegated acts.

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

7. The AIFM shall notify the appointment of the external valuer to the competent authorities of their home Member State which may require that another external valuer be appointed instead, if the conditions laid down in paragraph 5 are not or no longer met.

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

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

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

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

11. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:

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

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

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

SECTION 3 : DELEGATION OF AIFM FUNCTIONS

Article 20

Delegation

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

The following conditions have to be complied with:

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

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

(c) where the delegation concerns the portfolio management or the risk management, the mandate must be given only to undertakings which are authorised or registered for the purpose of asset management and subject to supervision. Where this condition cannot be satisfied, delegation may only be given on the condition of prior approval by the competent authorities of the home Member State of the AIFM;

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

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

(f) the AIFM must be able to demonstrate that the 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.

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

(i) the depositary or to a delegate of the depositary, or

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

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

2. In no case shall the AIFM's liability towards the AIF and its investors be affected by the fact that the AIFM has delegated functions to a third party, or by any further sub-delegation, nor shall the AIFM delegate its functions to the extent that, in essence, it can no longer be considered to be the manager of the AIF and to the extent that it becomes a letter-box entity.

3. The third party may sub-delegate any of the functions delegated to it as long as the following conditions are fulfilled:

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

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

(c) the conditions set forth in paragraph 1 points (a) to (f), in the understanding that all references to the 'delegate' shall be read as references to the 'sub-delegate'.

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

(i) the depositary or to a delegate of the depositary, or

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

4. Where the sub-delegate further delegates any of the functions delegated to it, the conditions set forth in paragraph 3 shall apply mutatis mutandis.

5. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:

(a) the conditions for fulfilling the requirements set out in paragraphs 1 and 3;

(b) the conditions under which the manager has delegated its functions to the extent that it becomes a letter-box entity and could no longer be considered to be the manager of the AIF as set out in paragraph 2.

SECTION 4 : DEPOSITARY

Article 21

Depositary

1. For each AIF it manages, the AIFM shall ensure that a single depositary is appointed in accordance with the provisions set forth below.

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

3. The depositary shall be either:

   (a) a credit institution having its registered office in the European Union and authorised in accordance with Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), or

   (b) an investment firm having its registered office in the European Union, subject to capital adequacy requirements according to Article 20 (1) of Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions including capital requirement for operational risks and authorised in accordance with Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council

Directive 93/22/EEC, and which also provide the ancillary service of safe-keeping and administration of financial instruments for the account of clients in accordance with Section B(1) of Annex I to that Directive; such investment firms shall in any case have own funds not less than the amount of initial capital referred to in Article 9 of Directive 2006/49/EC; or

(c) other categories of institutions which are subject to prudential regulation and ongoing supervision and which at the date of entry into force of this Directive pursuant to Article 55 belong to those categories determined by Member States to be eligible to be depositaries under Article 23 (3) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

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

In addition to the provisions of the first and second subparagraph, Member States may allow that for AIF (i) which have no redemption rights exercisable during the period of five years from the date of the initial investments and (ii) which, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with point (a) of paragraph 7 or generally invest in issuers or non-listed companies in order to potentially acquire control over such companies in accordance with what is set forth in Article 26, the depositary may be an entity which carries out depositary functions as part of its professional or business activities in respect of which such entity is subject to mandatory professional registration recognized by law or to legal or regulatory provisions or rules of professional conduct and which can furnish sufficient financial and professional guarantees to be able to effectively perform the relevant depositary functions and meet the commitments inherent to those functions.

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

(a) an AIFM is not allowed to act as depositary;

(b) a prime broker acting as counterparty to an AIF is not allowed to act as depositary for this AIF, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as prime broker and the potential conflicts of interest are properly identified, managed, 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 10 is allowed if the relevant conditions are met.

5. The depositary shall be located as follows:

(a) For EU AIF, the depositary shall be established in the home Member State of the AIF;

(b) For non-EU AIF, the depositary shall be established in the third country where the AIF is established, or in the home Member State of the AIFM managing the AIF, or, as the case may be, in the Member State of reference of the AIFM managing the AIF.

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

(i) the competent authorities of the Member States in which the shares or units of the third country AIF are intended to be marketed, and, insofar different, of the home Member State of the AIFM, have signed cooperation and exchange of information arrangements with the competent authorities of the depositary;

(ii) in the third country where the depositary is established depositaries are subject to effective prudential regulation (including minimum capital requirements) and supervision which are to the same effect as the provisions laid down in European Union law and which are effectively enforced;

(iii) the third country where the depositary is established is not listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing;

(iv) the Member States in which the shares or units of the third country AIF are intended to be marketed, and, insofar different, of the home Member State of the AIFM, have signed an agreement with the third country where the depositary is established which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention and ensures an effective exchange of information in tax matters including, if any, multilateral tax agreements;

(v) the depositary shall by contract be liable to the AIF, or, as the case may be, to the investors of the AIF, consistently with the paragraphs 11 and 12 of this Article and shall explicitly agree to comply with paragraph 10 of this Article.

Where a competent authority of another Member State disagrees with the assessment made on the application of points (i), (ii), (iii) or (v) of subparagraph (b) by the competent authorities of the home Member State of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 11 of Regulation (EU) No .../2010 [ESMA].

The Commission shall adopt, by means of delegated acts in accordance with Article 54 and subject to the conditions laid down in Articles 55 and 56, measures specifying the criteria for assessing that the prudential regulation and supervision of third countries are to the same effect as the provisions laid down in European law and are effectively enforced, as referred to in point (ii) of this paragraph 5.

On the basis of the criteria referred to in third subparagraph, the Commission shall adopt, in accordance with the procedure referred to in Article 57(2), implementing measures, stating that prudential regulation and supervision of a third country are to the same effect as the provisions laid down in European Union law and are effectively enforced.

6. The depositary shall in general ensure that the AIF's cash flows are properly monitored, and shall in particular ensure that all payments made by or on behalf of investors upon the subscription of shares or units of an AIF have been received and that all cash of the AIF has been booked in one or more cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the depositary acting on behalf of the AIF at an entity referred to in Article 18 (1) (a) to (c) of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, or an other entity of the same nature as the entity referred to in Article 18 (1) (a) to (c) of that Commission Directive 2006/73/EC in the relevant market where cash accounts are required as long as such entity is subject to effective prudential regulation and supervision of the same effect as the provisions laid down in European Union law and which are effectively being enforced, and in accordance with the principles set forth in Article 16 of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

In case the cash accounts are opened in the name of the depositary acting on behalf of the AIF, 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.

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

(a) Financial instruments that can be held in custody

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

(ii) For this purpose, the depositary shall ensure that all those financial instruments that can be registered in a financial instruments account opened in the depositary's books, are registered in the depositary's books within segregated accounts in accordance with the principles set forth in Article 16 of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, opened in the name of the AIF or, as the case may be, the AIFM acting on behalf of the AIF, so that they can at all times be clearly identified as belonging to the AIF in accordance with the applicable law.

(b) Other assets

(i) For all other assets of the AIF, the depositary shall verify the ownership of the AIF, or, as the case may be, the AIFM acting on behalf of the AIF, of such assets and shall maintain a record of those assets for which it is satisfied that the AIF, or, as the case may be, the AIFM acting on behalf of the AIF, holds the ownership of such assets;

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

(iii) The depositary shall keep this record up to date.

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

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

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

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

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

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

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

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

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

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

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

(a) the tasks are not delegated with the intention to avoid the requirements of this Directive, and
(b) the depositary can demonstrate that there is an objective reason for the delegation; and

(c) the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it wants to delegate parts of its tasks, and shall keep exercising all due skill, care and diligence in the periodic review and ongoing monitoring of any third party to whom it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it; and

(d) the depositary has ensured that the third party fulfils the following conditions and on an ongoing basis ensures that it will remain to fulfil such conditions during the performance of the tasks delegated to it:

(i) it has the structures and the expertise that are adequate and proportionate to the nature and complexity of the assets of the AIF or the AIFM acting on behalf of the AIF which have been entrusted to it in accordance with paragraph 7;

(ii) as far as the delegation of custody tasks referred to in point (a) of paragraph 7 are concerned, it is subject to effective prudential regulation (including minimum capital requirements) and supervision in the jurisdiction concerned;

(iii) as far as the delegation of custody tasks referred to in point (a) of paragraph 7 are concerned, it is subject to external periodic audit to ensure that the financial instruments are in its possession;

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

(v) it may not make use of the assets without the prior consent of the AIF or, as the case may be, the AIFM acting on behalf of the AIF, and a prior information of the depositary; and

(vi) it complies with the general obligations and prohibitions set forth in paragraph 7 and 9.

However, where the law of a third country requires that certain financial instruments are held in custody by a local entity and there are no local entities that satisfy the delegation requirements laid down in paragraph 10(d) (ii) and/or (iii), the depositary can delegate its functions to such local entity notwithstanding that the requirements have not be fulfilled, if and to the extent (i) required by the law of the third country; and (ii) only as long as there are no local entities that satisfy the delegation requirements; and (iii) the investors of the relevant AIF have been duly informed of this delegation required due to legal constraints in the law of the third country and the circumstances justifying the delegation prior to their investment; and (iv) the AIF or the AIFM on behalf of the AIF instructed the depositary to delegate the custody of such financial instruments to such local entity.

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

For purposes of this paragraph, the provision of services as specified by Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems by securities settlement systems as designated for the purposes of that Directive 98/26/EC or the provision of similar services by non-European securities settlement systems shall not be considered a delegation of its custody functions.

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

In the case of such a loss of a financial instrument held in custody, the depositary shall return a financial instrument of the identical type or the corresponding amount to the AIF or, as the case may be, the AIFM acting on behalf of the AIF without undue delay. The depositary shall not be liable if it can prove that the loss has arisen as a result of an 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, as the case may be, to the investors of the AIF, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly perform its obligations pursuant to this Directive.

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

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

(i) that all requirements for the delegation of its custody tasks, as set forth in paragraph 10 (a) to (d), are met, and

(ii) that there is a written contract between the depositary and the third party that explicitly transfers the liability of the depositary to that third party and makes it possible for the AIF, or as the case may be, the AIFM acting on behalf of the AIF, to make a claim against the third party in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf.

Further, where the law of a third country requires that certain financial instruments are held in custody by a local entity and there are no local entities that satisfy the delegation requirements laid down in paragraph 10(d) (ii) and/or (iii), the depositary can discharge itself of its liability provided that the following conditions are fulfilled:

(i) the fund rules or the articles of association of the AIF concerned expressly allow for such a discharge under the conditions set forth below; and

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

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

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

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

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

14. The depositary shall make available on request to its competent authorities all information which it has obtained while undertaking its duties and that may be necessary for the competent authorities of the AIF or the AIFM. If the competent authorities of the AIF or the AIFM are different from those of the depositary, the competent authorities of the depositary shall share the information received without delay with the competent authorities of the AIF and the AIFM.

15. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:

(a) the particulars that need to be included in the standard agreement as referred to in paragraph 2;

(b) general criteria for assessing whether the prudential regulation and supervision of third countries as referred to in the second subparagraph of paragraph 2 are to the same effect as the provisions laid down in European Union law and are effectively enforced;

(c) the conditions for performing the depositary functions pursuant to paragraphs 6, 7 and 8, including:

- the type of financial instruments that shall be included in the scope of the depositary's custody duties according to point (a) of paragraph 7;
- the conditions upon which the depositary may exercise its custody duties over financial instruments registered with a central depositary; and
- the conditions upon which the depositary shall safe keep according to point (b) of paragraph 7 the financial instruments issued in a nominative form and registered with an issuer or a registrar;

(d) the due diligence duties of depositaries pursuant to paragraph 10 (c);

(e) the segregation obligation set forth in paragraph 10 (d) (iv):

(f) the conditions and circumstances under which financial instruments held in custody shall be considered as lost;

(g) what is to be understood by external events beyond reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary pursuant to paragraph 11;

(h) the conditions and circumstances under which there is an objective reason to contract a discharge pursuant to paragraph 12.

CHAPTER IV
TRANSPARENCY REQUIREMENTS

Article 22
Annual report

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

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

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

   (a) a balance-sheet or a statement of assets and liabilities;
   (b) an income and expenditure account for the financial year;
   (c) a report on the activities of the financial year;
   (d) any material changes in the information listed in Article 23 during the financial year covered by the report;

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

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

3. The accounting information given in the annual report shall be prepared in accordance with the accounting standards of the home Member State of the AIF, or, as the case may be, in accordance with the accounting standards of the third country where the AIF has its registered office and with the accounting rules laid down in the fund rules or in the instruments of incorporation of the AIF.

The accounting information given in annual report shall be audited by one or more persons empowered by law to audit accounts in accordance with Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC. The auditor's report, including any qualifications, shall be reproduced in full in the annual report.

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

4. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying the content and format of the annual report. These measures shall be adapted to the type of AIF to which they apply.

Article 23

Disclosure to investors

1. AIFM shall for each of the EU AIF it manages and for each of the AIF it markets in the European Union make available to AIF investors, in a way as set forth in the AIF's fund rules or articles of association, the following information before they invest in the AIF, as well as any material changes thereof:

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

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

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

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

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

(f) a description of any delegated management function as referred to in Annex 1 by the AIFM and of any safekeeping function delegated by the depositary, the identification of the 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, according to Article 19;

(h) a description of the AIF's liquidity risk management, including the redemption rights both in normal and exceptional circumstances, existing redemption arrangements with investors;

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

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

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

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

(m) the latest net asset value of the AIF or the latest market price of the unit or share of the AIF, according to Article 19;

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

(o) the identity of the prime broker and a description of any material arrangement of the AIF with its prime brokers and the way the conflicts of interests in relation thereof are managed and, as the case may be, the provision in the contract with the depositary on the possibility of transfer and reuse of AIF assets, and about any transfer of liability to the prime broker that may exist;

(p) how and when the information required by paragraphs 4 and 5 will be disclosed.

2. The AIFM shall inform the investors before they invest in the AIF of any arrangement made by the depositary to contractually discharge itself of the liability in accordance with Article 21(12). The AIFM shall also inform investors of any changes with respect to depositary liability without delay.

3. Where the AIF is required to publish a prospectus in accordance with Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC or in accordance with national law, only such information referred to in paragraph 1 and paragraph 2 which is in addition to that contained in the prospectus need to be disclosed separately or as additional information in the prospectus.

4. AIFM shall for each of the EU AIF it manages and for each of the AIF it markets in the European Union shall periodically disclose to investors:

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

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

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

5. AIFM managing one or more EU AIF employing leverage or marketing in the European Union one or more AIF employing leverage, shall for each such AIF disclose on a regular basis:

(a) any changes to the maximum level of leverage which the AIFM may employ on behalf of the AIF as well as any right of the re-use of collateral or any guarantee granted under the leveraging arrangement;
(b) the total amount of leverage employed by that AIF.

6. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying the disclosure obligations of AIFM referred to in paragraphs 4 and 5, including the frequency of the disclosure set forth in paragraph 5. These measures shall be adapted to the type of AIFM to which they apply.

Article 24
Reporting obligations to competent authorities

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

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

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

(a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
(b) any new arrangements for managing the liquidity of the AIF;
(c) the actual risk profile of the AIF and the risk management tools employed by the AIFM to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk;
(d) the main categories of assets in which the AIF invested;
(e) the results of the stress tests performed according to Article 15(3)(b) and Article 16(1) second subparagraph.

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

(a) an annual report of each EU AIF managed by the AIFM and, as the case may be, for each AIF marketed in the European Union, for each financial year, according to Article 22(1);
(b) a detailed list of all AIF which the AIFM manages for the end of each quarter.

4. AIFM managing one or more AIF employing leverage on a substantial basis shall make available information about the overall level of leverage employed by each AIF it manages, a break-down between leverage arising from borrowing of cash or securities and leverage embedded in financial derivatives and the extent to which their assets have been reused under leveraging arrangements to the competent authorities of its home Member State.

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

For the non-EU AIFM, the reporting obligations set forth in this paragraph are limited to the EU AIF managed by them and the non-EU AIF marketed by them in the European Union.

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

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

6. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:

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

(b) the obligations to report and provide information referred to in paragraphs 1 through 5.

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

CHAPTER V

AIFM MANAGING SPECIFIC TYPES OF AIF

SECTION 1 : AIFM MANAGING LEVERAGED AIF

Article 25

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

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

2. The competent authorities of the home Member States of the AIFM shall ensure that all information gathered under Article 24, in respect of all AIFM 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 through the procedures set out in Article 48 on supervisory co-operation. They shall, without delay, also provide information through this mechanism, and bilaterally to the competent authorities of other Member States directly concerned, if an AIFM under their responsibility, or AIF managed by this AIFM could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions in other Member States.

3. The AIFM must demonstrate that the leverage limits for each AIF it manages are reasonable and that it complies at all times with the leverage limits set by it. Competent authorities shall assess the risks that the use of leverage by an AIFM with respect to the AIF it manages could entail, and when it is deemed necessary in order to ensure the stability and integrity of the financial system, the competent authorities of the home Member State of the AIFM, after having notified ESMA, the ESRB and, as the case may be, the competent authorities of the relevant AIF, shall impose limits to the level of leverage that an AIFM may employ or other restrictions on the management of the AIF with respect to the AIF under its management to limit the extent to which the use of leverage contributes to the build-up of systemic risk in the financial system or risks of disorderly markets. The competent authorities of the home Member State of the AIFM shall duly inform ESMA and the ESRB and, as the case may be, the competent authorities of the AIF, of actions taken in this respect, through the procedures set out in Article 48 on supervisory co-operation.

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

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

6. After receiving notification referred to in paragraph 4, ESMA shall issue advice to the competent 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 satisfied, whether the measures are appropriate and the duration of the measures.

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

8. If a competent authority proposes to take action contrary to the ESMA advice referred to in paragraphs 6 or 7 it shall inform ESMA, stating its reasons. ESMA 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 the advice. The competent authorities concerned shall receive advanced notice about such a publication.

9. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures setting out principles specifying the circumstances in which competent authorities exercise the provisions in paragraph 3, taking into account different strategies of AIF, different market conditions in which AIF operate and possible pro-cyclical effects following from exercising the provisions.

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

Article 26

Scope

1. Section 2 of Chapter V shall apply to the following:

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

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

2. Section 2 of Chapter V shall not apply where the non-listed companies concerned are:

   (i) small and medium enterprises within the meaning of article 2(1) of the annex of Commission Recommendation 2003/361/EC, concerning the definition of micro, small and medium sized enterprises; or

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

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

4. Paragraph 1 and 2 of Article 28 and Article 30 shall apply also with regard to issuers. For the purposes of that Article, the first and second paragraph 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, not only the voting rights held directly by the relevant AIF shall be taken into account, but also the voting rights of (i) any undertaking controlled by the AIF and (ii) those of any natural or legal person acting in its own name but on behalf of the AIF or of any undertaking controlled by the AIF, whereby control by the over such undertakings shall be established on the basis of what is set forth in the first subparagraph.

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

For the purpose of paragraph 1 and 2 of Article 28 and Article 30, for issuers control shall be defined as in Article 5(3) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

6. This Section shall apply subject to the conditions and restrictions relating to Article 6 of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Union.

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

Article 27

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

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

2. Member States shall require that when an AIF acquires, individually or jointly, control over a non-listed company pursuant to paragraph 1 juncto paragraph 5 of Article 26, the AIFM managing such AIF shall notify

   (i) the non-listed company,

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

   (iii) the competent authorities of the home Member State of the AIFM,

   of the acquisition of control by the AIF.

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

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

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

(c) the date on which control was reached.

4. In its notification to the non-listed company, the AIFM shall request the board of directors of the company to inform the representatives of employees or, where there are no such representatives, the employees themselves, without undue delay of the acquisition of control by the AIF managed by the AIFM and of the information referred to in paragraph 3 above. The AIFM shall use its best efforts to ensure that the representatives of employees or, where there are no such representatives, the employees themselves, are duly informed by the board of directors in accordance with what is set forth above.

5. The notifications referred to in paragraphs 1 to 3 above shall be made as soon as possible, but not later than ten working days the first of which being the day on which the AIF has reached, exceeded or fallen below the relevant threshold, or, as the case may be, has acquired control over the non-listed company.

Article 28

Disclosure in case of acquisition of control

1. Member States shall require that when an AIF acquires, individually or jointly, control of a non-listed company or an issuer pursuant to paragraph 1 juncto paragraph 5 of Article 26, the AIFM managing such AIF shall make the information set out in the second subparagraph available to

(i) the company concerned,

(ii) the shareholders of the company of which the identities and addresses are available to the AIFM or can be made available by the company or a register to which the AIFM has or can get access to, and

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

Member States may require that the information set out in the second subparagraph is also made available to the national competent authorities of the non-listed company the Member States may designate to that effect.

The AIFM shall make available:

(a) The identity of the AIFM which either individually or in agreement with other AIFM manage(s) the AIF that has/have reached control;

(b) The policy for preventing and managing conflicts of interests, in particular between the AIFM, the AIF and the company, and including information about the specific safeguards established to ensure that any agreement between the AIFM and/or the AIF and the company shall be at arms length;

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

2. In its notification to the company pursuant to paragraph 1(i) above, the AIFM shall request the board of directors of the company to inform the representatives of employees or, where there are no such representatives, the employees themselves, without undue delay of the information referred to in paragraph 1 above. The AIFM shall use its best efforts to ensure that the representatives of employees or, where there are no such representatives, the employees themselves, are duly informed by the board of directors in accordance with what is set forth above.

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

(i) the non-listed company, and

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

In addition, the AIFM managing the relevant AIF shall request and use its best efforts to make sure that the board of the non-listed company makes available the information set forth in the first subparagraph to the representatives of employees, or, where there are no such representatives, the employees themselves, of the non-listed company.

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

Article 29

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

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

   (i) either request and use its best efforts to make sure that the annual report of the non-listed company is drawn up in accordance with paragraph 2 is made available by the board of the company to all representatives of employees or, where there are no such representatives, to the employees themselves within the period such annual report has to be drawn up in accordance with the national applicable law; or

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

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

   (a) any important events that have occurred since the end of the financial year;
   (b) the company's likely future development;
   (c) the information concerning acquisitions of own shares prescribed by Article 22 (2) of Directive 77/91/EEC.

3. The AIFM managing the relevant AIF shall

(i) request and use its best efforts to make sure that the board of the non-listed company makes available the information relating to the company concerned as referred to in paragraph 1(ii) above to all representatives of employees of the relevant company within the period referred to in Article 22 (1); or, as the case may be,

(ii) make available the information referred to in paragraph 1(i) above to the investors of the AIF, insofar already available, within the period referred to in Article 22 (1) and in any event not later than the date when the annual report of the non-listed company has been drawn up in accordance with the national applicable law.

Article 30

Asset stripping

1. Member States shall require that when an AIF, individually or jointly, acquires control of a non-listed company or an issuer pursuant to paragraph 1 juncto paragraph 5 of Article 26, the AIFM managing such AIF shall before the end of the period expiring 24 months following the acquisition of control of the company by the AIF:

(i) not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in paragraph 2 below; and

(ii) insofar the AIFM is authorised to vote on behalf of the AIF at the governing bodies of the company, not vote in favour of a distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in paragraph 2 below; and

(iii) in any event use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares by the company as described in paragraph 2 below.

2. The obligations imposed on the AIFM pursuant to paragraph 1 shall relate to the following:

(a) any distribution to shareholders made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may be not distributed under the law or the statutes, in the understanding that where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital;

(b) any distribution to shareholders the amount of which would exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes;

(c) to the extent that acquisitions of own shares are permitted, the acquisitions by the company, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, that would have the effect of reducing the net assets below the amount mentioned in paragraph (a);

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

CHAPTER VI

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

Article 31

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

1. Member States shall ensure that an authorised EU AIFM may market shares or units of any EU AIF that it manages to professional investors in the home Member State of the AIFM as soon as the conditions laid down in this Article are met.

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

2. The AIFM shall submit a notification to the competent authorities of its home Member State in respect of each EU AIF that it intends to market.

   That notification shall comprise the documentation and information as set forth in Annex III A

3. No later than twenty working days after receipt of a complete notification file pursuant to paragraph 2, competent authorities of the home Member State of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 2. The competent authorities of the home Member State of the AIFM may only prevent the marketing of the AIF if the AIFM's management of the AIF is not or will not be in accordance with one or more provisions of this Directive or in general the AIFM will not or does not comply with one or more provisions of this Directive . In case of a positive decision, the AIFM may start marketing the AIF in its home Member State as of the date of the notification by the competent authorities confirming that the AIFM may start marketing the AIF.

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

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

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

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

5. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine:
   (a) the form and content of a standard model of the notification letter referred to in paragraph 2;
   (b) the form of the written notice referred to in paragraph 4.

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

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

Article 32

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

1. Member States shall ensure that an authorised EU AIFM may market shares or units of an EU AIF that it manages to professional investors in another Member State than the home Member State of the AIFM as soon as the conditions laid down in this Article are met.

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

2. The AIFM shall submit a notification to the competent authorities of its home Member State in respect of each EU AIF that it intends to market.

That notification shall comprise the documentation and information as set forth in Annex III B.

3. The competent authorities of the home Member State of the AIFM shall, no later than twenty working days after the date of receipt of the complete notification file referred to in paragraph 2, transmit the complete notification file to the competent authorities of the Member State(s) where the AIF is proposed to be marketed. Such transmission shall only occur if the AIFM's management of the AIF is and will be in accordance with the provisions of this Directive and that in general the AIFM complies with the provisions of this Directive.

The competent authorities of the home Member State of the AIFM shall enclose an attestation that the AIFM concerned is authorised to manage AIF with that particular investment strategy.

4. Upon transmission of the notification file, the competent authorities of the home Member State of the AIFM shall without delay notify the AIFM about the transmission. The AIFM may start marketing the AIF in the host Member State(s) of the AIFM as of the date of that notification.

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

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

6. Member States shall ensure that the notification letter by the AIFM referred to in paragraph 2 and the attestation referred to in paragraph 3 are provided in a language customary in the sphere of international finance.

Member States shall ensure that electronic transmission and filing of the documents referred to in paragraph 3 is accepted by their competent authorities.

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

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

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

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

8. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine:

(a) the form and content of a standard model of the notification letter referred to in paragraph 2;

(b) the form and content of a standard model of attestation referred to in paragraph 3;

(c) the form of the transmission referred to in paragraph 3;

(d) the form of the written notice referred to in paragraph 7.

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

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

Article 33

Conditions for managing AIF established in other Member States

1. Member States shall ensure that an authorised EU AIFM may manage EU AIF established in another Member State either directly or via the establishment of a branch, provided that the AIFM is authorised to manage that type of AIF.

2. Any AIFM intending to manage EU AIF established in another Member State for the first time shall communicate the following information to the competent authorities of its home Member State:

(a) the Member State in which it intends to manage AIF directly or establish a branch;

(b) a programme of operations stating in particular the services which it intends to perform and identifying the AIF it intends to manage.

3. If the AIFM intends to establish a branch, it shall provide, in addition to paragraph 2, the following information:

(a) the organisational structure of the branch;

(b) the address in the home Member State of the AIF from which documents may be obtained;

(c) the names and contact details of persons responsible for the management of the branch.

4. The competent authorities of the home Member State of the AIFM shall, within one month of receiving the complete documentation in accordance with paragraphs 2 or within two months of receiving the complete documentation in accordance with paragraph 3, transmit this complete documentation to the competent authorities of the host Member State of the AIFM. Such transmission shall only occur if the AIFM's management of the AIF is and will be in accordance with the provisions of this Directive and that the AIFM complies with the provisions of this Directive.

The competent authorities of the home Member State of the AIFM shall enclose an attestation that the AIFM concerned is authorised by them.

The competent authorities of the home Member State of the AIFM shall immediately notify the AIFM about the transmission. Upon receipt of the transmission notification the AIFM may start to provide its services in the host Member State of the AIFM.

5. The host Member State of the AIFM shall not impose any additional requirements on the AIFM concerned in respect of the matters covered by this Directive.

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

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

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

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

7. In order to ensure consistent harmonisation of this Article, ESMA may develop draft regulatory technical standards to specify the information to be notified in accordance with paragraphs 2 and 3.

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

8. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to establish standard forms, templates and procedures for the transmission of information in accordance with paragraphs 2 and 3.

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

CHAPTER VII

SPECIFIC RULES IN RELATION TO THIRD COUNTRIES

Article 34

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

1. Member States shall ensure that an authorised EU AIFM may manage non-EU AIF which are not marketed in the European Union provided that:

   (a) The AIFM complies with all the requirements established in this Directive except for Article 21 and Article 22 in respect of those AIF; 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 according to this Directive.

2. The Commission shall adopt by means of delegated acts, in accordance with Article 54 and subject to the conditions set forth in Articles 55 and 56, measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

3. In order to ensure uniform application of this Article, ESMA shall develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1.

Article 35

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

1. Member States shall ensure that an authorised EU AIFM may market to professional investors in the European Union shares or units of the non-EU AIF they manage and of EU feeder AIF that do not fulfil the requirements referred to in the second subparagraph of paragraph 1 of Article 31 as soon as the conditions laid down in this Article are met.

2. The AIFM must comply with all the requirements established in this Directive, with the exception of Chapter VI. In addition the following conditions apply:

   (a) 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, taking into account Article 48(4), that allows the competent authorities to carry out their duties according to this Directive.

   (b) The third country where the non-EU AIF is established is not listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing.

   (c) The third country where the non-EU AIF is established has signed an agreement with the home Member State of the authorised AIFM and with each other Member State in which the shares or units of the non-EU AIF are proposed to be marketed, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention and ensures an effective exchange of information in tax matters, including, if 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 this paragraph 2 by the competent authorities of the home Member State of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 11 of Regulation (EU) No .../2010 [ESMA].

3. In case the AIFM intends to market shares or units of the non-EU AIF in its home Member State, the AIFM shall submit a notification to the competent authorities of its home Member State in respect of each non-EU AIF that it intends to market.

That notification shall comprise the documentation and information as set forth in Annex III A.

4. No later than twenty working days after receipt of a complete notification pursuant to paragraph 3, the competent authorities of the home Member State of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 3 in its territory. The competent authorities of the home Member State of the AIFM may only prevent the marketing of the AIF if the AIFM's management of the AIF is not or will not be in accordance with one or more provisions of this Directive, or, in general the AIFM will not or does not comply with one or more provisions of this Directive. In case of a positive decision, the AIFM may start marketing the AIF in its home Member State as of the date of the notification by the competent authorities confirming that the AIFM may start marketing the AIF.

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

5. In case the AIFM intends to market shares or units of the non-EU AIF in one or more Member State(s) other than its home Member State, the AIFM shall submit a notification to the competent authorities of its home Member State in respect of each non-EU AIF that it intends to market.

That notification shall comprise the documentation and information as set forth in Annex III B.

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

The competent authorities of the home Member State of the AIFM shall enclose an attestation that the AIFM concerned is authorised to manage AIF with that particular investment strategy.

7. Upon transmission of the notification file, the competent authorities of the home Member State of the AIFM shall without delay notify the AIFM about the transmission. The AIFM may start marketing the AIF in the relevant host Member State(s) of the AIFM as of the date of that notification by the competent authorities.

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

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

9. Member States shall ensure that the notification letter of the AIFM referred to in paragraph 5 and the attestation referred to in paragraph 6 are provided in a language customary in the sphere of international finance.

Member States shall ensure that electronic transmission and filing of the documents referred to in paragraph 6 is accepted by their competent authorities.

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

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

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

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

11. The Commission shall adopt by means of delegated acts, in accordance with Articles 54 and subject to the conditions set forth in Articles 55 and 56, measures regarding the cooperation arrangements referred to in paragraph 2(a) in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

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 paragraph 2(a).

13. ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in paragraph 2(a) 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 excercise their supervisory and investigatory powers under this Directive.

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

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

15. In case a competent authority rejects a request to exchange information in accordance with what is set forth in the technical standards set forth 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 11 of Regulation [ESMA].

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 standard model of the notification letter referred to in paragraph 3;

(b) the form and content of a standard model of the notification letter referred to in paragraph 5;

(c) the form and content of a standard model of attestation referred to in paragraph 6;

(d) the form of the transmission referred to in paragraph 6;

(e) the form of the written notice referred to in paragraph 10.

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

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

Article 36

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

1. Without prejudice to Article 35, Member States may allow an authorised EU AIFM to market to professional investors, on their territory only, shares or units of non-EU AIF they manage and of EU feeder AIF that do not fulfil the requirements referred to in the second subparagraph of paragraph 1 of Article 31, provided that:

(a) The AIFM complies with all the requirements established in this Directive with the exception of Article 21. Those AIFM shall however ensure that one or more entities are appointed to carry out the duties referred to in paragraphs 6, 7 and 8 of Article 21. The AIFM shall not perform those functions. The AIFM shall provide its supervisory authorities with information about the identity of those entities responsible for carrying out the duties referred to in paragraph paragraphs 6,7 and 8 of Article 21.

(b) Appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows competent authorities of the home Member State of the AIFM to carry out their duties according to this Directive.

(c) The third country where the non-EU AIF is established is not listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing.

2. Member States may impose stricter rules on the AIFM in respect of the marketing of units or shares of non-EU AIF to investors on their territory for the purpose of this Article.

3. The Commission shall adopt by means of delegated acts, in accordance with Article 54 and subject to the conditions set forth in Articles 55 and 56 measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

4. In order to ensure uniform application of this Article, ESMA shall develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1.

Article 37

Authorisation of non-EU AIFM intending to manage EU AIF and/or market AIF managed by it in the European Union in accordance with Article 38 or 39

1. Member States shall require that non-EU AIFM intending to manage EU AIF and/or to market AIF managed by it in the territory of the European Union in accordance with Article 38 or 39 must acquire a prior authorisation by the competent authorities of their Member State of reference in accordance with the provisions set forth below.

2. A non-EU AIFM intending to obtain authorisation to manage EU AIF and/or market AIF managed by it in the European Union in accordance with Article 38 or 39, must comply with all provisions of this Directive, with the exception of Chapter VI in the understanding that:

(i) all references in the Directive to 'the competent authorities of the home Member State of the AIFM' shall be read as references to 'the competent authorities of the Member State of reference of the AIFM', and

(ii) if and to the extent compliance with a provision of this Directive is incompatible with compliance with the law to which the non-EU AIFM and/or, as the case may be, the non-EU AIF marketed in the European Union, is submitted, the AIFM must not comply with that provision of the Directive if it can demonstrate that (i) it is impossible to combine compliance with a provision of this Directive with compliance with a mandatory provision in the law to which the non- EU AIFM and/or, as the case may be, the non- EU AIF marketed in the European Union, is submitted, (ii) the law to which the non-EU AIFM and/or the non-EU AIF is submitted provides for an equivalent rule having the same regulatory purpose and offering the same level of protection to the investors of the relevant AIF and (iii) the non-EU AIFM and/or the non-EU AIF complies with that equivalent rule.

3. A non-EU AIFM intending to obtain authorisation to manage EU AIF and/or to market AIF managed by it in the European Union in accordance with Article 38 or 39, must have a legal representative established in its Member State of reference. The legal representative shall be the contact point of the AIFM in the European Union and any official correspondence between the competent authorities and the AIFM and between the EU investors of the relevant AIF and the AIFM as set forth in this Directive shall take place through this legal representative. The legal representative shall perform the compliance function relating to the management and marketing activities performed by the AIFM under this Directive together with the AIFM.

4. The Member State of reference of a non-EU AIFM shall be determined as follows:

(a) If the non-EU AIFM intends to manage only one EU AIF, or several EU AIF established in the same Member State and does not intend to market any AIF in accordance with Article 38 or 39 in the European Union, the home Member State of that or those AIF is deemed to be the Member State of reference and the competent authorities of this Member State will be competent for the authorisation procedure and for the supervision of the AIFM.

(b) If the AIFM intends to manage several EU AIF established in different Member States and does not intend to market any AIF in accordance with Article 38 or 39 in the European Union, the Member State of reference will either be,

(i) the Member State where most of the AIF are established, or

(ii) the Member State where the largest amount of assets is being managed.

(c) If the non-EU AIFM intends to market only one EU AIF in only one Member State of the European Union, the Member State of reference will be:

(i) 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 of the European Union, the Member State of reference will be that Member State.

(e) If the AIFM intends to market only one EU AIF, but in different Member States, the Member State of reference shall be:

(i) 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 AIFM intends to market only one non-EU AIF, but in different Member States, the Member State of reference shall be one of those Member States.

(g) If the AIFM intends to market several EU AIF in the European Union, the Member State of reference shall be:

(i) insofar those AIF are all registered or authorised in the same Member State, the home Member State of those AIF or the Member State where the AIFM intends to develop effective marketing for most of those AIF;

(ii) insofar those AIF are not all registered or authorised in the same Member State, the Member State where the AIFM intends to develop effective marketing for most of those AIF.

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

In accordance with the criteria set forth above in points (b), (c)(i), e(i), (e)(ii), (g)(i) and (f) several Member States of reference are possible. In such case, the Member States shall require that the non-EU AIFM intending to manage EU AIF without marketing them and/or market AIF managed by it in the European Union in accordance with Article 38 or 39 shall submit a request to the competent authorities of all of the Member States that are possible Member States of reference in accordance with the criteria set forth above under points (b), (c)(i), e(i), (e)(ii), (g)(i) or (f) to determine its Member State of reference among each other. Those competent authorities shall jointly decide within one month who the Member State of reference for such non-EU AIFM shall be. The competent authorities of the Member State that is ultimately appointed as Member State of reference shall without undue delay inform the non-EU AIFM thereof. If the non-EU AIFM is not duly informed of the decision made by the relevant competent authorities within 7 days after the decision or if the relevant competent authorities have not timely decided, it may itself choose its Member State of reference based on the criteria set forth above.

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

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

When receiving the application for authorisation, the competent authorities shall assess whether the determination by the AIFM as regards its Member State of reference respects the criteria laid down in paragraph 4. If the competent authorities consider that this is not the case, they shall refuse the authorisation request of the non-EU AIFM explaining the reasons for their refusal. On the contrary, if the competent authorities consider that the criteria of paragraph 4 have been respected, they shall notify ESMA of this fact and shall ask ESMA to issue an advice on the assessment made by them. In their notification to ESMA, the competent authorities shall provide ESMA with the justification by the AIFM of its assessment regarding the Member State of reference and with information on the marketing strategy of the AIFM.

Within one month after having received the notification referred to in subparagraph 2, ESMA shall issue advice to the relevant competent authorities about their assessment on the Member State of reference in accordance with the criteria set forth in paragraph 4. ESMA can only issue a negative advice in case it considers that the criteria of paragraph 4 have not been respected.

The term set forth in Article 8, paragraph 5 shall be suspended during the ESMA review in accordance with this paragraph.

If the competent authorities propose to grant authorisation contrary to the ESMA advice referred to in subparagraph 3 it shall inform ESMA, stating its reasons. ESMA shall publish the fact that a competent authority does not comply or intend to comply with its advice. ESMA may also decide, on a case by case basis, to publish the reasons provided by the competent authority for not complying with that advice. The competent authority shall receive advanced notice about such a publication.

If the competent authorities propose to grant authorisation contrary to the ESMA advice referred to in subparagraph 3 and the AIFM intends to market shares or units of AIF managed by it on the territory of other Member States than the Member State of reference, the competent authorities of the Member State of reference shall also inform the competent authorities of those Member States thereof, stating its reasons. Insofar applicable, the competent authorities of the Member State of reference shall also inform the competent authorities of the home Member States of the AIF managed by the AIFM thereof, stating its reasons.

6. Where a competent authority of a Member State disagrees with the determination of the Member State of reference by the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 11 of Regulation (EU) No .../2010 [ESMA].

7. Without prejudice to what is set forth in paragraph 8, no authorisation shall be given unless the following additional conditions are met:

(a) The Member State of reference is indicated by the AIFM in accordance with the criteria of paragraph 4 and supported by the disclosure of the marketing strategy, and the procedure set forth in paragraph 5 has been followed by the relevant competent authorities;
(b) The AIFM has appointed a legal representative established in its Member State of reference;

(c) The legal representative shall, next to the AIFM itself, be the contact person of the non-EU AIFM for the investors of the relevant AIF, for ESMA and for the competent authorities as regards the activities for which the AIFM is authorised in the European Union and shall at least be sufficiently equipped to perform the compliance function pursuant to this Directive;

(d) Appropriate cooperation arrangements are in place between the competent authorities of the Member State of reference, the competent authorities of the EU AIF 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 according to this Directive;

(e) The third country where the non-EU AIFM is established is not listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing;

(f) The third country where the non-EU AIFM is established has signed an agreement with the Member State of reference, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention and ensures an effective exchange of information in tax matters, including, if any, multilateral tax agreements;

(g) The effective exercise by the competent authorities of their supervisory functions under this Directive is not prevented by the laws, regulations or administrative provisions of a third country governing the AIFM, nor by limitations in the supervisory and investigatory powers of the third country supervisory authorities.

Where a competent authority of another Member State disagrees with the assessment made on the application of the points (a), (b), (c), (d), (e) and (g) of this paragraph 7 by the competent authorities of the Member State of reference of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 11 of Regulation (EU) No .../2010 [ESMA].

Where a competent authority of an EU AIF does not enter into the required cooperation arrangements as set forth in point (d) of this paragraph 7 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 11 of Regulation (EU) No .../2010 [ESMA].

8. The authorisation shall take place in accordance with the provisions of Chapter IV which shall apply mutatis mutandis in the understanding that:

(i) the information referred to in paragraph 2 of Article 7 shall be supplemented by:
   (a) a justification by the AIFM of its assessment regarding the Member State of reference in accordance with the criteria set forth in paragraph 4 with information on the marketing strategy;
   (b) a list of those provisions of the Directive for which compliance by the AIFM is impossible as compliance by the AIFM with these provisions is, in accordance with what is set forth in paragraph 2(ii) of this Article, incompatible with compliance with a provision in the law to which the non-EU AIFM and/or, as the case may be, the non-EU AIF marketed in the European Union, is submitted; and
   (c) written evidence based on the technical standards developed by ESMA that (i) the relevant third country law provides for a rule equivalent to the provisions for which compliance is impossible, which has the same regulatory purpose and offers the same level of protection to the investors of the relevant AIF and that (ii) the AIFM complies with that equivalent rule; such written evidence being supported by a legal opinion on the existence of the relevant incompatible provision in the law of the third country and including a description of the regulatory purpose and the nature of the investor protection pursued by it; and
   (d) identification and location of the legal representative of the AIFM;

(ii) the information referred to in paragraph 3 of Article 7 may be limited to the EU AIF the AIFM intends to manage, and, as the case may be, to those AIF managed by the AIFM that it intends to market in the European Union with a passport;

(iii) the condition of paragraph 1(a) of Article 8 shall be without prejudice to what is set forth in paragraph 2(ii) of this Article 37;

(iv) the condition of paragraph 1(e) of Article 8 shall not apply;

(v) the second subparagraph of paragraph 5 of Article 8 shall be supplemented with: "the information provided in accordance with paragraph 13(i) of Article 37".

Where a competent authority of another Member State disagrees with the authorisation given by the competent authorities of the Member State of reference of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 11 of Regulation (EU) No .../2010 [ESMA].

9. In case the competent authorities of the Member State of reference consider that the AIFM may rely on paragraph 2 to be exempted from compliance with certain provisions of this Directive, they shall without undue delay inform ESMA thereof. They shall support this assessment by the information provided by the AIFM in accordance with paragraph 8(i)(b) and 8(i)(c).

Within one month after having received the notification referred to in subparagraph 1, ESMA shall issue advice to the competent authorities about the application of the exemption for compliance with the Directive caused by the incompatibility in accordance with what is set forth in paragraph 2. The advice may in particular address whether the conditions for such exemption appear to be satisfied based on the information provided by the AIFM in accordance with paragraph 8(i)(b) and 8(i)(c) and on the technical standards on equivalence. ESMA shall seek to build a common European supervisory culture and consistent supervisory practices and ensure consistent approaches among competent authorities in relation to the application of this paragraph.

The term set forth in Article 8, paragraph 5 shall be suspended during the ESMA review in accordance with this paragraph.

If the competent authorities of the Member State of reference propose to grant authorisation contrary to the ESMA advice referred to in subparagraph 2 it shall inform ESMA, stating its reasons. ESMA shall publish the fact that a competent authority does not comply or intend to comply with that advice. ESMA may also decide, on a case by case basis, to publish the reasons provided by the competent authorities for not complying with that advice. The competent authorities concerned shall receive advanced notice about such a publication.

If the competent authorities propose to grant authorisation contrary to the ESMA advice referred to in subparagraph 2 and the AIFM intends to market shares or units of AIF managed by it on the territory of other Member States than the Member State of reference, the competent authorities of the Member State of reference shall also inform the competent authorities of those Member States thereof, stating its reasons.

Where a competent authority of another Member State disagrees with the assessment made on the application of this paragraph 9 by the competent authorities of the Member State of reference of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 11 of Regulation (EU) No .../2010 [ESMA].

10. The competent authorities of the Member State of reference shall without undue delay inform ESMA on the outcome of the initial authorisation process, about any changes in the authorisation of the AIFM and any withdrawal of authorisation.

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 these data, which shall be at the disposal of EU competent authorities, on request. Competent authorities shall treat this information as confidential.

11. In principle, the Member State of reference will not be affected by the further business development of the AIFM in Europe. However, under the circumstances set forth below, the Member State of reference must, or as the case may be, may, be changed:

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

The initial Member State of reference shall assess whether the determination of the AIFM in accordance with subparagraph 1 of point (a) is correct and shall notify ESMA of their assessment thereof. ESMA shall issue an advice on the assessment made by the competent authorities. In their notification to ESMA, the competent authorities shall provide ESMA with the justification by the AIFM of its assessment regarding the Member State of reference and with information on the new marketing strategy of the AIFM.

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

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

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

If the competent authorities' final assessment is contrary to the ESMA advice referred to in subparagraph 3 of point (a) they shall inform ESMA thereof, stating its reasons. ESMA shall publish the fact that a competent authority does not comply or intend to comply with its advice. ESMA may also decide, on a case by case basis, to publish the reasons provided by the competent authorities for not complying with that advice. The competent authorities concerned shall receive advanced notice about such a publication.

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

(b) If it appears from the actual course of the business development of the AIFM in the European Union within two years after its authorisation that the marketing strategy as presented by the AIFM at the time of its authorisation was untrue or that the AIFM made false statements about it, or, if the AIFM changes its marketing strategy without complying with what is set forth point (a), the competent authorities of the initial Member State of reference shall request the AIFM to indicate the correct Member State of reference based on the actual marketing strategy. The procedure set forth in point (a) shall apply mutatis mutandis. If the AIFM does not comply with the request of the competent authorities, they shall withdraw its authorisation.

(c) If the AIFM changes its marketing strategy after the period set forth in point (a), and it wants to change its Member State of reference based on the new marketing strategy, the AIFM may submit a request to change its Member State of reference to the competent authorities of the initial Member State of reference. The procedure set forth in point (a) shall apply mutatis mutandis.

Where a competent authority of a Member State disagrees with the assessment made on the determination of the Member State of reference, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 11 of Regulation (EU) No .../2010 [ESMA].

12. Any disputes arising between the competent authorities of the Member State of reference of the AIFM and the AIFM shall be settled in accordance with the law of and subject to the jurisdiction of the Member State of reference.

Any disputes between the AIFM 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.

13. The Commission shall, in accordance with the regulatory procedure referred to in Article 57(2), adopt implementing measures with a view to specifying the procedure to be followed by the possible Member States of reference when determining the Member State of reference among each other in accordance with the second subparagraph of paragraph 4.

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

15. 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 paragraph 7(d).

16. ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in paragraph 7(d) 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 excercise their supervisory and investigatory powers under this Directive.

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

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

18. In case a competent authority rejects a request to exchange information in accordance with what is set forth in the technical standards set forth 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 11 of Regulation [ESMA].

19. In accordance with Article 14 of Regulation [ESMA], 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 of the applicable confidentiality and data protection provisions provided for in the relevant European Union legislation.

20. In accordance with Article 16 of Regulation [ESMA], 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;
b) determine the scope of the information that the competent authority of the Member State of reference should provide to hosts competent authorities 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 AIFM;

21. 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 paragraph 11(c).

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

22. In order to ensure the uniform application of this Article, ESMA shall develop draft regulatory technical standards on the following:

a) The manner in which the AIFM should comply with the requirements laid down in this Directive, taking into account that the AIFM is established in a third country. In particular, the presentation of the information required in Articles 22 to 24.
b) Under which conditions the law to which a non-EU AIFM or a non-EU AIF is submitted is considered to provide for an equivalent rule having the same regulatory purpose and offering the same level of protection to the relevant investors.

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

Article 37a

Peer review of authorisation and supervision of non-EU AIFM

1. ESMA shall, on an annual basis, conduct peer review analysis of the supervisory activities of the competent authorities in relation to the authorisation and the supervision of non-EU AIFM under the application of Articles 37, 38, 39 and 39bis, to further enhance consistency in supervisory outcomes, in accordance with Article 15 of Regulation …/… [ESMA Regulation].

2. By the date laid down in the first subparagraph of paragraph 1 of Article 63 ESMA shall develop methods to allow for objective assessment and comparison between the authorities reviewed.

3. In particular, the peer review assessment shall include an assessment of:
   (a) the degree of convergence in supervisory practices achieved in the authorisation and supervision of non-EU AIFM;
   (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 the provisions 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 sanctions imposed against non-EU AIFM where these provisions have not been complied with.

4. On the basis of the conclusions of the peer review, ESMA may issue guidelines and recommendations pursuant to Article 8 of Regulation …/… [ESMA regulation], with a view to establishing consistent, efficient and effective supervisory practices of non-EU AIFM.

5. The competent authorities shall make every effort to comply with those guidelines and recommendations.

6. Within two 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 advanced notice of such a publication.

8. In the report referred to in Article 28(4a) of the [ESMA regulation], ESMA shall inform the European Parliament, the Council and the Commission of the guidelines and recommendations that are issued pursuant to this Article, stating which competent authorities have not complied with them, and outlining how ESMA intends to ensure that the competent authority follows its recommendations and guidelines in the future.

9. The Commission will take these reports duly into account in its review of this Directive according to Article 64 and any subsequent evaluation it might conduct.

10. ESMA shall make the best practices that can be identified from those peer reviews publicly available. In addition, all other results of peer reviews may be disclosed publicly, subject to the agreement of the competent authority being the subject of the peer review.

Article 38

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

1. Member States shall ensure that a duly authorised non-EU AIFM may market the shares or units of an EU AIF it manages to professional investors in the European Union with a passport as soon as the conditions laid down in this Article are met.

2. In case the AIFM intends to market shares or units of the EU AIF in its Member State of reference, the AIFM shall submit a notification to the competent authorities of its Member State of reference in respect of each EU AIF that it intends to market.

That notification shall comprise the documentation and information as set forth in Annex III A.

3. No later than twenty 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 only prevent the marketing of the AIF if the AIFM's management of the AIF is not or will not be in accordance with one or more provisions of this Directive, or, in general the AIFM will not or does not comply with one or more provisions of this Directive. In case of a positive decision, the AIFM may start marketing the AIF in its Member State of reference as of the date of the notification by the competent authorities confirming that the AIFM may start marketing the AIF.

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

4. In case the AIFM intends to market shares or units of the EU AIF in other Member States than its Member State of reference, the AIFM shall submit a notification to the competent authorities of its Member State of reference in respect of each EU AIF that it intends to market.

That notification shall comprise the documentation and information as set forth in Annex III B.

5. The competent authorities of the Member State of reference shall, no later than twenty working days after the date of receipt of the complete notification file referred to in paragraph 4, transmit the complete notification file to the competent authorities of the Member States where the units or shares of the AIF are proposed to be marketed. Such transmission will only occur if the AIFM's management of the AIF is and will be in accordance with the provisions of this Directive and that in general the AIFM complies with the provisions of this Directive.

The competent authorities of the Member State of reference of the AIFM shall enclose an attestation that the AIFM concerned is authorised to manage AIF with that particular investment strategy.

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 State(s) of the AIFM as of the date of that notification.

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

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

8. Member States shall ensure that the notification letter by the AIFM referred to in paragraph 4 and the attestation 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 is accepted by their competent authorities.

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

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

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

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

10. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine:

(a) the form and content of a standard model of the notification letter referred to in paragraph 2 and 4;

(b) the form and content of a standard model of attestation referred to in paragraph 5;

(c) the form of the transmission referred to in paragraph 5;

(d) the form of the written notice referred to in paragraph 9.

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

11. Without prejudice to Article 41(1), Member States shall require that the AIF managed and marketed by the AIFM are only marketed to professional investors.

Article 39

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

1. Member States shall ensure that a duly authorised non-EU AIFM may market shares or units of a non-EU AIF it manages to professional investors in the European Union with a passport as soon as the conditions laid down in this Article are met.

2. The AIFM must comply with all the requirements established in this Directive. In addition the following conditions apply:

(a) Appropriate cooperation arrangements 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 according to this Directive.

(b) The third country where the non-EU AIF is established is not listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing.

(c) The third country where the non-EU AIF is established has signed an agreement with the Member State of reference and with each other Member State in which the shares or units of the non-EU AIF are proposed to be marketed, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention and ensures an effective exchange of information in tax matters including, if 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 this paragraph 2 by the competent authorities of the Member State of reference of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 11 of Regulation (EU) No .../2010 [ESMA].

3. The AIFM shall submit a notification to the competent authorities of its Member State of reference in respect of each non-EU AIF that it intends to market in its Member State of reference.

That notification shall comprise the documentation and information as set forth in Annex III A.

4. No later than twenty working days after receipt of a complete notification pursuant to paragraph 3, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 3 in its territory. The competent authorities of the Member State of reference of the AIFM may only prevent the marketing of the AIF if the AIFM's management of the AIF is not or will not be in accordance with one or more provisions of this Directive, or, in general the AIFM will not or does not comply with one or more provisions of this Directive. In case of a positive decision, the AIFM may start marketing the AIF in its Member State of reference as of the date of the notification by the competent authorities confirming that the AIFM may start marketing the AIF.

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

5. In case the AIFM intends to market the units or shares of non-EU AIF also in other Member States than its Member State of reference, the AIFM shall submit a notification to the competent authorities of its Member State of reference in respect of each non-EU AIF that it intends to market.

That notification shall comprise the documentation and information as set forth in Annex III B.

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

The competent authorities of the Member State of reference of the AIFM shall enclose an attestation that the AIFM concerned is authorised to manage AIF with that particular investment strategy.

7. Upon transmission of the notification file, the competent authorities of the Member State of reference of the AIFM shall without delay notify the AIFM about the transmission. The AIFM may start marketing the AIF in the relevant host Member State(s) of the AIFM as of the date of that notification.

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

8. Arrangements referred to in point (h) of Annex III B shall be subject to the laws and supervision of the host Member States of the AIFM, insofar these are different than the Member State of reference.

9. Member States shall ensure that the notification letter by the AIFM referred to in paragraph 5 and the attestation referred to in paragraph 6 are provided in a language customary in the sphere of international finance.

Member States shall ensure that electronic transmission and filing of the documents referred to in paragraph 6 is accepted by their competent authorities.

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

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

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

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

11. The Commission shall adopt by means of delegated acts, in accordance with Article 54 and subject to the conditions set forth in Articles 55 and 56, measures regarding the cooperation arrangements referred to in paragraph 2(a) in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

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 paragraph 2(a).

13. ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in paragraph 2(a) 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 excercise their supervisory and investigatory powers under this Directive.

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

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

15. In case a competent authority rejects a request to exchange information in accordance with what is set forth in the technical standards set forth 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 11 of Regulation [ESMA].

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 standard model of the notification letter referred to in paragraph 3 and 5;

(b) the form and content of a standard model of attestation referred to in paragraph 6;

(c) the form of the transmission referred to in paragraph 6;

(d) the form of the written notice referred to in paragraph 10.

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

17. Without prejudice to Article 41(1), Member States shall require that the AIF managed and marketed by the AIFM are only marketed to professional investors.

Article 39bis

Conditions for managing AIF established in Member States other than the Member State of reference by non-EU AIFM

1. Member States shall ensure that an authorised non-EU AIFM may manage EU AIF 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 AIF 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 AIF directly or establish a branch;
   (b) a programme of operations stating in particular the services which it intends to perform and identifying the AIF it intends to manage.

3. If the AIFM intends to establish a branch, it shall provide, in addition to 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 one month of receiving the complete documentation in accordance with paragraphs 2 or within two months of receiving the complete documentation in accordance with paragraph 3, transmit this complete documentation to the competent authorities of the host Member State of the AIFM. Such transmission shall only occur if the AIFM's management of the AIF is and will be in accordance with the provisions of this Directive and that the AIFM complies with the provisions of this Directive.

The competent authorities of the Member State of reference shall enclose an attestation 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 State 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 State(s) of the AIFM.

5. The host Member State of the AIFM shall not impose any additional requirements on the AIFM concerned in respect of the matters covered by this Directive.

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

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

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

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

7. In order to ensure consistent harmonisation of this Article, ESMA may develop draft regulatory technical standards to specify the information to be notified in accordance with paragraphs 2 and 3.

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

8. In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to establish standard forms, templates and procedures for the transmission of information in accordance with paragraphs 2 and 3.

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

Article 40

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

1. Without prejudice to Articles 37, 38 and 39, Member States may allow non-EU AIFM to market to professional investors, on their territory only, shares or units of AIF they manage subject at least to the following rules:

(a) Compliance with Article 22, 23 and 24 in respect of each AIF marketed by the AIFM pursuant to this Article and with Section 2 of Chapter V of the Directive where an AIF marketed by it pursuant to this Article falls under the description of Article 26 paragraph 1. Competent authorities and AIF investors referred to in these articles shall be deemed those of Member States where AIF are marketed.

(b) Appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the Member State where the AIF are marketed, insofar applicable, the competent authorities of the EU AIF concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, insofar 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 according to this Directive.

(c) The third country where the non-EU AIFM, and as the case may be, the non-EU AIF is established is not listed as Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing.

Where a competent authority of an EU AIF does not enter into the required cooperation arrangement as set forth in point (b) of this paragraph 1 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 the ESMA which may act in accordance with the powers conferred on it under Article 11 of Regulation (EU) No .../2010 [ESMA].

2. Member States may impose stricter rules on the AIFM in respect of the marketing of units or shares of AIF to investors on their territory for the purpose of this Article.

3. The Commission shall adopt by means of delegated acts, in accordance with Article 54 and subject to the conditions set forth in Articles 55 and 56, measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

4. In order to ensure uniform application of this Article, ESMA shall develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1.

CHAPTER VIII
MARKETING TO RETAIL INVESTORS

Article 41
Marketing of AIF by AIFM to retail investors

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

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

2. Member States that permit the marketing of AIF to retail investors on their territory, shall, within one year of the date referred to in Article 63 inform the Commission and ESMA of:

   (a) the types of AIF which AIFM may market to retail investors on their territory;
   (b) any additional requirements that the Member State imposes for the marketing of AIF to retail investors.

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

CHAPTER IX
COMPETENT AUTHORITIES

SECTION 1 : DESIGNATION, POWERS AND REDRESS PROCEDURES

Article 42
Designation of competent authorities

Member States shall designate the competent authorities which are to carry out the duties provided for in this Directive. They shall inform ESMA and the Commission thereof, indicating any division of duties.

The competent authorities shall be public authorities.

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

Article 43
Responsibility of competent authorities in Member States

1. The prudential supervision of an AIFM shall be the responsibility of the competent authorities of the home Member State of the AIFM, whether the AIFM manages and/or markets AIF in another Member State or not, without prejudice to those provisions of this Directive which confer responsibility to the competent authorities of the host Member State of the AIFM.

2. The supervision of compliance with Articles 12 and 14 shall be the responsibility of the competent authorities of the host Member State of the AIFM when an AIFM manages and/or markets AIF through a branch within the territory of that Member State.

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

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

4. Where the competent authorities of the host Member State of the AIFM ascertain that an AIFM managing and/or marketing AIF in their territory, whether this is done through a branch or not, is in breach of one of the rules under their responsibility, those authorities shall require the AIFM concerned to put an end to that breach and inform the competent authorities of the home Member State thereof.

5. If the AIFM concerned refuses to provide the competent authorities of its host Member State with information falling under its responsibility, or fails to take the necessary steps to put an end to the breach referred to in paragraph 4, the competent authorities of its host Member State shall inform the competent authorities of its home Member State accordingly. The competent authorities of the home Member State of the AIFM shall, at the earliest opportunity, (i) 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, and, as the case may be, (ii) request the necessary information from the relevant supervisory authorities outside the European Union. The nature of those measures shall be communicated to the competent authorities of the host Member State of the AIFM.

6. If, despite the measures taken by the competent authorities of the home Member State of the AIFM pursuant to paragraph 5 or because such measures prove to be inadequate or are not available in the Member State in question, the AIFM continues to refuse to provide the information requested by the competent authorities of its host Member State pursuant to paragraph 3, or persists in breaching the legal or regulatory provisions, referred to in the same paragraph, in force in its host Member State, the competent authorities of the host Member State of the AIFM may, after informing the competent authorities of the home Member State of the AIFM, take appropriate measures, including those laid down in Articles 44 and 46, to prevent or penalise further irregularities and, insofar as necessary, to prevent that AIFM from initiating any further transactions within its territory. Where the function carried out in the host Member State of the AIFM is the management of AIF, the host Member State may require the AIFM to cease managing those AIF.

7. Where the competent authorities of the host Member State of an AIFM have clear and demonstrable grounds for believing that such AIFM, the units or shares of which are marketed within the territory of such Member State, is in breach of the obligations arising from the provisions adopted pursuant to this Directive which are not under the responsibility of the competent authorities of the host Member State of the AIFM, they shall refer those findings to the competent authorities of the home Member State of the AIFM which shall take appropriate measures, including, if necessary, request additional information from the relevant supervisory authorities outside the European Union.

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 within the territory of the host Member State.

8bis. The procedure laid down in paragraphs 7 and 8 should 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.

9. Where the competent authorities concerned disagree on any of the measures taken by a competent authority pursuant to paragraphs 4, 5, 6, 7, 8 and 8bis above, they may bring the matter to the attention of ESMA, which may act in accordance with the powers conferred to it under Article 11 of Regulation (EU) no.../2010 [ESMA].

10. Where applicable, ESMA shall facilitate the negotiation and conclusion of the cooperation arrangements required by this Directive between the competent authorities of the Member States and the supervisory authorities of third countries.

Article 44

Powers of competent authorities

1. Competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions. Such powers shall be exercised in any of the following ways:

(a) directly;

(b) in collaboration with other authorities;

(c) under their responsibility by delegation to entities to which tasks have been delegated;

(d) by application to the competent judicial authorities.

2. The competent authorities shall have the following powers:

(a) have access to any document in any form and to receive a copy of it;

(b) require information from any person related to the activities of the AIFM or the AIF and if necessary to summon and question a person with a view to obtaining information;

(c) carry out on-site inspections with or without prior announcements;

(d) require existing telephone and existing data traffic records;

(e) require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;

(f) request the freezing or the sequestration of assets;

(g) request the temporary prohibition of professional activity;

(h) require authorised AIFM, depositaries or auditors to provide information;

(i) adopt any type of measure to ensure that AIFM or depositaries continue to comply with the requirements of this Directive applicable to them;

(j) require the suspension of the issue, repurchase or redemption of units in the interest of the unit-holders or of the public;

(k) withdraw the authorisation granted to an AIFM or a depositary;

(l) refer matters for criminal prosecution;

(m) allow auditors or experts to carry out verifications or investigations.

3. Where the competent authority of the Member State of reference considers that an authorised non-EU AIFM is in breach of its obligations under this Directive, it shall give notice of that fact in a specific manner to ESMA as soon as possible.

4. Member States shall ensure that the competent authorities have the powers necessary to take all measures required in order to ensure the orderly functioning of markets in those cases where the activity of one or more AIF in the market for a financial instrument could jeopardise the orderly functioning of that market.

Article 45

Powers and competences of ESMA

1. ESMA may define 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 under Article 46 paragraph 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, the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Systemic Risk Board shall be considered confidential, except where ESMA or the competent authority or other authority or body concerned states at the time of communication that such information may be disclosed or where such disclosure is necessary for legal proceedings.

4. In accordance with Article 6a of [Regulation ESMA], ESMA may, where all the conditions in paragraph 5 are satisfied, request the competent authority or competent authorities to take any of the following measures, as appropriate:

a) prohibit the marketing of shares or units in the EU of AIF managed by non-EU AIFM or of non EU AIF managed by EU AIFM without the authorisation required in Article 37 or without the notification required in Article 38 and 39, or, as the case may be, without being allowed to do this by the relevant Member States in accordance with Article 40;

b) impose restrictions on non-EU AIFM relating to the management of the AIF in case of excessive concentration of risk in a specific market on a cross border basis;

c) impose restrictions on non EU-AIFM relating to the management of the AIF where their 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 forth in paragraph 6 if all of the following conditions are fulfilled:

a) a substantial threat exists, originating or aggravated by the respective activities of AIFM, 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 European 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 must:

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 European 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 measure.

7. Before requesting the competent authority to take or renew any measure referred to in paragraph 4, ESMA shall consult, where appropriate, with the European Systemic Risk Board 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 forth above, including the evidence supporting the reasons.

9. ESMA shall review its measures the competent authority or competent authorities have imposed pursuant to paragraph 4 at appropriate intervals and at least every three months. If a measure is not renewed after the three 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 can request ESMA to reconsider its decision. The procedure set forth in Article 29(1) subparagraph 2 of [ESMA regulation] shall apply.

Article 46

Administrative penalties

1. Member States shall lay down the rules on measures and penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that those rules are enforced. Without prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.

2. Member States shall provide that the competent authorities may disclose to the public any measure or sanction that will be imposed for infringement of the provisions adopted in the implementation of this Directive, unless such disclosure would seriously jeopardise the financial markets, be detrimental to the interests of the investors or cause disproportionate damage to the parties involved.

3. ESMA shall produce an annual report on the application of administrative measures and imposition of sanctions in case of breaches of the provisions adopted in the implementation of this Directive in the different Member States. Competent authorities shall provide ESMA with the necessary information for this purpose.

Article 47

Right of appeal

1. The competent authorities shall give written reasons for any decision to refuse or withdraw authorisation of AIFM to manage and/or market AIF, or any negative decision taken in the implementation of the measures adopted in application of this Directive, and communicate them to applicants.

2. Member States shall provide that any decision taken under laws, regulations or administrative provisions adopted in accordance with this Directive is properly reasoned and is the subject of the right of appeal to the courts.

That right to appeal to the courts shall apply also where, in respect of an application for authorisation which provides all the information required, no decision is taken within six months of the submission of the application.

SECTION 2 : CO-OPERATION BETWEEN DIFFERENT COMPETENT AUTHORITIES

Article 48

Obligation to co-operate

1. The competent authorities of the Member States shall co-operate with each other and with the ESMA and the ESRB whenever necessary for the purpose of carrying out their duties under this Directive or of exercising their powers under this Directive or under national law.

2. Member States shall facilitate the co-operation provided for in this section.

3. Competent authorities shall use their powers for the purpose of co-operation, even in cases where the conduct under investigation does not constitute an infringement of any regulation in force in that Member State.

4. The competent authorities of the Member States shall immediately supply one another and ESMA with the information required for the purposes of carrying out their duties under this Directive.

The competent authorities of the home Member State shall forward a copy of the relevant cooperation agreements entered into by them in accordance with Article 35 or Article 37 and/or 39 to the host Member States of the AIFM concerned. The competent authorities of the home Member State shall, in accordance with procedures set forth in the applicable regulatory technical standards set forth in Articles 35(14), 37(17) or 39(14), forward the information received from supervisory authorities outside the European Union in accordance with cooperation arrangements with supervisory authorities outside the European Union in respect of an AIFM, or as the case may be, pursuant to paragraphs 5 or 7 of Article 43, 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 or Article 37 and/or 39 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 11 of Regulation (EU) No .../2010 [ESMA].

5. Where the competent authorities of one Member State have clear and demonstrable grounds to suspect that acts contrary to the provisions of this Directive, are being or have been carried out by an AIFM not subject to supervision of those competent authorities, it shall notify ESMA and the competent authorities of the home and host Member States of the AIFM concerned thereof in as specific a manner as possible. The recipient authorities shall take appropriate action, shall inform ESMA and the notifying competent authorities of the outcome of that action and, to the extent possible, of significant interim developments. This paragraph shall be without prejudice to the competences of the notifying competent authority.

6. In order to ensure uniform application of the provisions in this Directive concerning the exchange of information, ESMA may develop draft implementing technical standards to determine the conditions of application with regard to the procedures for exchange of information between competent authorities and between the competent authorities and ESMA.

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

Article 49

Transfer and retention of personal data

1. With regard to transfer of personal data between competent authorities, competent authorities shall apply Directive 95/46/EC. With regard to transfer of personal data by ESMA to the competent authorities of a Member State or of a third country, ESMA shall comply with Regulation (EC) No 45/2001.

2. Data shall be retained for a maximum period of five years.

Article 50

Disclosure of information to third countries

1. The competent authority of a Member State may transfer to a third country data and the analysis of data when the conditions laid down in Article 25 or 26 of Directive 95/46/EC are fulfilled and only on a case-by-case basis. The competent authority of the Member State shall be satisfied that the transfer is necessary for the purpose of this Directive. The third country shall not transfer the data to another third country without the express written authorisation of competent authority of the Member State.

2. The competent authority of a Member State shall only disclose information received from a competent authority of another Member State to a 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 51

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

1. The competent authorities of the Member States responsible for the authorisation and/or supervision of AIFM under this Directive shall communicate information to the competent authorities of other Member States where this is relevant for monitoring and responding to the potential implications of the activities of individual AIFM or AIFM collectively for the stability of systemically relevant financial institutions and the orderly functioning of markets on which AIFM are active. The ESRB and the ESMA shall also be informed and shall forward this information to the competent authorities of the other Member States.

2. Subject to the conditions laid down in Article 15 of Regulation …/…/EC, aggregated information relating to the activities of AIFM under their responsibility shall be communicated by the competent authorities of the AIFM to ESMA and the ESRB.

3. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying the content of the information to be exchanged pursuant to paragraph 1.

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

Article 52

Co-operation in supervisory activities-

1. The competent authorities of one Member State, may request the co-operation of the competent authorities of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation on the territory of the latter within the framework of their powers pursuant to this Directive.

   Where the competent authorities receive a request with respect to an on-the-spot verification or an investigation, it shall perform one of the following:

   (a) carry out the verification or investigation itself;
   (b) allow the requesting authority to carry out the verification or investigation;
   (c) allow auditors or experts to carry out the verification or investigation.

2. In the case referred to in paragraph 1(a) the competent authority of the Member State which has requested co-operation, may ask that members of its own personnel assist the personnel carrying out the verification or investigation. The verification or investigation shall, however, be the subject of the overall control of the Member State on whose territory it is conducted.

   In the case referred to in paragraph 1(b) the competent authority of the Member State on whose territory the verification or investigation is carried out may request that members of its own personnel assist the personnel carrying out the verification or investigation.

3. Competent authorities may refuse to exchange information or to act on a request for co-operation in carrying out an investigation or on-the-spot verification only in the following cases:

(a) an investigation, on-the-spot verification or exchange of information might adversely affect the sovereignty, security or public order of the Member State addressed;

(b) judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of the Member State addressed;

(c) final judgment has already been delivered in the Member State addressed in respect of the same persons and the same actions.

The competent authorities shall inform the requesting competent authorities of any decision taken under the first subparagraph, stating the reasons therefore.

4. In order to ensure uniform application of this Article, ESMA may develop draft implementing technical standards to establish common procedures for competent authorities to cooperate in on-the-spot verifications and investigations.

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

Article 53

Dispute settlement

In case of disagreement between competent authorities of Member States on an assessment, action or omission of one competent authority in areas where this Directive requires cooperation or coordination between competent authorities from more than one Member State, competent authorities may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 11 of Regulation (EU) No .../2010 [ESMA].

CHAPTER X
TRANSITIONAL AND FINAL PROVISIONS

Article 54
Exercise of the delegation

1. The powers to adopt delegated acts referred to in Articles 3, 4, 9, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 34, 35, 36, 37, 39, 40, 51, 63bis and 63ter shall be conferred on the Commission for a period of 4 years following the entry into force of this Directive. The Commission shall make a report in respect of the delegated powers at the latest 6 months before the end of the 4 year period. The delegation of powers shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it in accordance with Article 55.

2. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

3. The powers to adopt delegated acts are conferred on the Commission subject to the conditions laid down in Articles 55 and 56.

Article 55
Revocation of the delegation

1. The delegation of power referred to in Articles 3, 4, 9, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 34, 35, 36, 37, 39, 40, 51, 63bis and 63ter 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 powers which could be subject to revocation and the reasons for a revocation.

3. The decision of revocation shall put an end to the delegation of the powers specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the Official Journal of the European Union.

Article 56

Objections to delegated acts

1. The European Parliament and the Council may object to the delegated act within a period of three months from the date of notification. At the initiative of the European Parliament or the Council this period shall be extended by three months.

2. If, on expiry of that period, neither the European Parliament nor the Council has objected to the delegated act it shall be published in the Official Journal of the European Union and shall enter into force at the date stated therein.

The delegated act may be published in the Official Journal of the European Union and enter into force before the expiry of that period if upon a justified request by the European Commission the European Parliament and the Council have both informed the Commission of their intention not to raise objections.

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

Article 57

Implementing measures

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

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

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

Article 58

Disclosure of derogations

Where a Member State makes use of a derogation or option provided by Articles 6, 9, 21, 22, 28, 41 and 57 of this Directive it shall inform the Commission thereof as well as of any subsequent changes. The Commission shall make the information public on a web-site or other easily accessible means.

Article 59

Transitional provision

1. AIFM performing activities under the Directive before the final transposition date set forth in Article 63 shall take all necessary measures to comply with national legislation stemming from this Directive and shall, as the case may be, submit an application for authorisation within one year of that date.

2. Articles 31 to 33 of this Directive shall not apply to the marketing of shares or units of AIF that are subject to a current offer to the public under a prospectus that has been drawn up and published in accordance with Directive 2003/71/EC before the final transposition date set forth in Article 63 as long as this prospectus is valid.

3. AIFM insofar as they manage AIF of the closed-ended type before the final transposition date set forth in Article 63 which do not make any additional investments after the final transposition date set forth in Article 63 may however continue to manage such AIF without authorisation under this Directive.

4. AIFM insofar as they manage AIF of the closed-ended type whose subscription period for investors has closed prior to the entry into force of the Directive and are constituted for a period of time which expires at the latest three years after the final transposition date set forth in Article 63, may however continue to manage such AIF 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 the AIF or in case where the AIF is not regulated the competent authorities of the home Member State of the AIFM may allow institutions referred to in Article 21(3)(a) and established in another Member State to be appointed as a depositary until 4 years after the date of implementation of this Directive. This provision shall be without prejudice to the full application of Article 21, with the exception of paragraph 5(a) of that Article on location of the depositary.

Article 60

Amendment of Directive 2003/41/EC

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

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

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

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

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

Article 61

Amendment of Directive 2009/65/EC

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

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

"In order to ensure cross-sectoral consistency and to remove misalignment between the interest of firms that 'repackage' loans into tradable securities and other financial instruments (originators) and UCITS that invest in these securities or other financial instruments, the Commission shall adopt by means of delegated acts in accordance with Article 112a and subject to conditions of Articles 112b and 112c measures laying down the requirements in the following areas:

(a) the requirements that need to be met by the originator in order for a UCITS to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011, including requirements that ensure that the originator retains a net economic interest of not less than 5 per cent;

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

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

"The power to adopt the delegated acts referred to in Articles 12, 14, 23, 33, 43, 50a, 51, 60, 61, 62, 64, 75, 78, 81, 95 and 111 shall be conferred on the Commission for a period of four years from ...* [date of entry into force of the amending Directive]. The Commission shall draw up a report in respect of delegated powers at the latest six months before the end of the four-year period. The delegation of power shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes them in accordance with Article 64c."

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

"The delegation of power referred to in Articles 12, 14, 23, 33, 43, 50a, 51, 60, 61, 62, 64, 75, 78, 81, 95 and 111 may be revoked at any time by the European Parliament or by the Council."

Article 62

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

In paragraph 2 of Article 1 of Regulation (EU) no.../2010 [ESMA] a reference to this Directive shall be included.

Article 63

Transposition

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

However, the laws, regulations and administrative provisions necessary to comply with Articles 35, 37, 37a, 38, 39 and 39bis of this Directive shall become applicable in the national law only under the condition precedent of the entry into force of the delegated act of the Commission adopted pursuant to paragraph 6 of Article 63bis.

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

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 63bis

Delegated act on the application of Articles 35, 37,37a, 38, 39 and 39bis

1. Two years after the date laid down in the first subparagraph of paragraph 1 of Article 63 ESMA shall issue to the Commission, the European Parliament and the Council:

(i) an opinion on the functioning of the European passport for EU AIFM managing and/or marketing EU AIF pursuant to the Articles 32 and 33 and on the functioning of the marketing of non-EU AIF by EU AIFM in the Member States and the management and/or marketing of AIF by non-EU AIFM in the Member States pursuant to the applicable national regimes as set forth in Articles 36 and 40; and

(ii) advice on the application of the European passport to the marketing of non-EU AIF by EU AIFM in the Member States and the management and/or marketing of AIF by non-EU AIFM in the Member States in accordance with the rules set forth in the Articles 35, 37, 37a, 38, 39 and 39bis.

2. ESMA shall base its opinion and advice on the application of the European passport to the marketing of non-EU AIF by EU AIFM in the Member States and the management and/or marketing of AIF by non-EU AIFM in the Member States inter alia on:

(a) as regards the functioning of the European passport for EU AIFM managing and/or marketing EU AIF,

(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 that might have occurred;
- 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 AIF by EU AIFM in the Member States and the management and/or marketing of AIF by non-EU AIFM in the Member States in accordance with the applicable national regimes:

(i) Compliance of EU AIFM with all the requirements established in this Directive with the exception of Article 21;

(ii) Compliance of non-EU AIFM with Articles 22, 23 and 24 in respect of each AIF marketed by the AIFM and, where relevant, with Section 2 of Chapter V of the Directive;

(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 AIF are marketed, insofar applicable, the competent authorities of the EU AIF and the supervisory authorities of the third country where the non-EU AIFM is established and, insofar 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 European 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) or any general or specific difficulties which EU AIFM encounter in establishing themselves or marketing AIF 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 ESMA opinion set forth in point (i) of paragraph 1, the competent authorities of the Member States shall provide ESMA quarterly with information on the AIFM that are managing and/or marketing AIF under their supervision, either under the application of the passport regime set forth in this Directive, or under their national regimes and with information needed for the assesment of the elements set forth in para 2.

4. In case 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 European passport to the marketing of non-EU AIF by EU AIFM in the Member States and the management and/or marketing of AIF by non-EU AIFM in the Member States in accordance with the rules set forth in the Articles 35, 37, 37a, 38, 39 and 39bis, it shall issue a positive advice in this regard.

5. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying the contents of the information to be provided pursuant to paragraph 3.

6. The Commission shall adopt a delegated act within three months after having received positive ESMA advice and opinion and taking into account the criteria listed in paragraph 2 and the objectives of this Directive, such as the internal market, investor protection and the effective monitoring of systemic risk, in accordance with Article 54 and subject to the conditions set forth in Articles 55 and 56, specifying the date when the rules set forth in Articles 35, 37, 37a, 38, 39 and 39bis shall become applicable in all Member States.

If the delegated act referred to in the first subparagraph is objected in accordance with Article 56, the Commission shall re-adopt the delegated act pursuant to which the rules set forth in Articles 35, 37, 37a, 38, 39 and 39bis shall become applicable in all Member States, in accordance with Article 54 and subject to the conditions set forth in Articles 55 and 56, 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 the internal market, investor protection and the effective monitoring of systemic risk.

7. If ESMA has not issued its advice within the time limit set forth in paragraph 1, the Commission shall request the advice to be given within a new time limit.

Article 63ter

Delegated act on the termination of the application of Articles 36 and 40

1. Three years after the entry into force of the delegated act referred to in paragraph 6 of Article 63bis pursuant to which the rules set forth in Articles 35, 37, 37a, 38, 39 and 39bis have become applicable in all Member States, ESMA shall issue to the Commission, the European Parliament and the Council:

(i) an opinion on the functioning of the European passport for EU AIFM marketing non-EU AIF in the European Union pursuant to Article 35 and for non-EU AIFM managing and/or marketing AIF in the European Union pursuant to Articles 37, 37a, 38, 39 and 39bis, and on the functioning of the marketing of non-EU AIF by EU AIFM in the Member States and the management and/or marketing of AIF by non-EU AIFM in the Member States pursuant to the applicable national regimes as set forth in Articles 36 and 40; and

(ii) advice on the termination of the existence of the national regimes set forth in Articles 36 and 40 next to the existence of the European passport in accordance with the rules set forth in the Articles 35, 37, 37a, 38, 39 and 39bis.

2. ESMA shall base its opinion and advice on the termination of the existence of the national regimes set forth in Articles 36 and 40 inter alia on:

(a) as regards the functioning of the European passport for EU AIFM marketing non-EU AIF in the European Union and for non-EU AIFM managing and/or marketing AIF in the European 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 the AIFM, or by limitations in the supervisory and investigatory powers of the third country supervisory authorities.
- Investor protection that might have occurred;
- Investor access in the European 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 ESRB;

(v) Results of a peer review referred to in Article 37a;

(b) as regards the functioning of the marketing of non-EU AIF by EU AIFM in the Member States and the management and/or marketing of AIF by non-EU AIFM in the Member States in accordance with the applicable national regimes:

(i) Compliance of EU AIFM with all the requirements established in this Directive with the exception of Article 21;

(ii) Compliance of non-EU AIFM with Articles 22, 23 and 24 in respect of each AIF marketed by the AIFM and, where relevant, with Section 2 of Chapter V of the Directive;

(ii) 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 AIF are marketed, insofar applicable, the competent authorities of the EU AIF concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, insofar applicable, the supervisory authorities of the third country where the non-EU AIF is established;

(iii) Any issues relating to investor protection that might have occurred;

(iv) Any features of a third country regulatory and supervisory framework which might prevent the effective exercise by the competent authorities of the European 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 jurisdictions outside the Union in which there is established an AIFM that is marketing an AIF in a Member State either under the application of the passport regime set forth in Article 39 or under the national regimes set forth in Article 40.

3. To that end, as from the entry into force of the delegated act referred to in paragraph 6 of Article 63bis and until the issuance of the ESMA opinion set forth in point (i) of paragraph 1, the competent authorities of the Member States shall provide ESMA quarterly with information on the AIFM that are managing and/or marketing AIF under their supervision, either under the application of the passport regime set forth in this Directive, or under their national regimes.

4. In case ESMA considers that there are no significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic risk, impeding the termination of the national regimes pursuant to the Articles 36 and 40 and to keep the European passport to the marketing of non-EU AIF by EU AIFM in the European Union and the management and/or marketing of AIF by non-EU AIFM in the European Union in accordance with the rules set forth in the Articles 35, 37, 37a, 38, 39 and 39bis as the sole possible regime for such activities by the relevant AIFM in the European Union, it shall issue a positive advice in this regard.

5. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying the contents of the information to be provided pursuant to paragraph 3.

6. The Commission shall adopt a delegated act within three months after having received a positive ESMA advice and opinion and taking into account the criteria listed in paragraph 2 and the objectives of this Directive, such as the internal market, investor protection and the effective monitoring of systemic risk, in accordance with Article 54 and subject to the conditions set forth in Articles 55 and 56, specifying the date when the national regimes set forth under the Articles 36 and 40 shall have to be terminated and the European passport regime set forth in Articles 35, 37, 37a, 38, 39 and 39bis shall become the sole and mandatory regime applicable in all Member States.

If the delegated act referred to in the first subparagraph is objected in accordance with Article 56, the Commission shall re-adopt the delegated act pursuant to which the national regimes set forth under the Articles 36 and 40 shall be terminated and the European passport regime set forth in Articles 35, 37, 37a, 38, 39 and 39bis shall become the sole and mandatory regime applicable in all Member States, in accordance with Article 54 and subject to the conditions set forth in Articles 55 and 56, 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 the internal market, investor protection and the effective monitoring of systemic risk.

7. If ESMA has not issued its advice within the time limit set forth in paragraph 1, the Commission shall request the advice to be given within a new time limit.

Article 64

Review

1. Four years after the date laid down in the first subparagraph of paragraph 1 of Article 63, 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. The review shall analyse the experience acquired in applying the Directive, its impact on investors, AIF or AIFM, both within and outside the Union, and in how far the objectives of the Directive have been achieved and, if necessary, propose appropriate amendments. The review shall include a general survey of the functioning of the rules in this Directive and the experience acquired in applying them, including:

(i) the marketing by EU AIFM of non-EU AIF in the Member States taking place through national regimes;

(ii) the marketing of AIF in the Member States by non-EU AIFM taking place through national regimes;

(iii) the management and marketing by AIFM authorised in accordance with this Directive of AIF in the European Union taking place through the passport regimes set forth in this Directive;

(iv) the marketing of AIF in the European Union by or on behalf of persons or entities other than AIFM;

(v) the investment into AIF by or on behalf of European professional investors;

(vi) the impact of the depositary rules in Article 21 on the depositary market in the Union ;

(vii) the impact of the transparency and reporting requirements in Articles 22 to 24, 28 and 29 on the assessment of systemic risk;

(viii) the potential adverse impact on retail investors;

(ix) the impact of the Directive on the operation and viability of the private equity and venture capital funds;

(x) the impact of the Directive on the investor access in the European Union; and

(xi) the impact of the Directive on investment in or for the benefit of developing countries.

When reviewing marketing and/or management of AIF referred to in points (i) to (iii) of the first subparagraph, the Commission shall analyse the appropriateness of entrusting ESMA with further supervisory responsibilities in this area.

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

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

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

(i) information on where the AIFM concerned are established;

(ii) if applicable, identification of the EU AIF managed and/or marketed by them;

(iii) if applicable, identification of the non-EU AIF managed by EU AIFM but not marketed in the European Union;

(iv) if applicable, identification of the non-EU AIF marketed in the European Union;

(v) information on the applicable regime under which the relevant AIFM are performing their activities (national or European); and

(vi) any other information relevant to the understanding of how the management and the marketing of AIF by AIFM in the European Union operates in practice.

3. This review shall also take due account of developments at international level and discussions with third countries and international organisations.

4. After finalisation of 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, which may be amendments to the Directive taking into account the objectives of the Directive, the effects on investor protection, market disruption and competition, the monitoring of systemic risk and potential impacts on investors, AIF or AIFM, both within and outside the Union in its report issued in accordance with this paragraph 4.

Article 65

Entry into force

With the exception of Article 61, this Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 61 shall enter into force on the later date of either the date set forth in paragraph 1, either the date the [Omnibus Directive] enters into force.

Article 66

Addressees

This Directive is addressed to the Member States.

ANNEX I

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

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

ANNEX II

REMUNERATION POLICY

1. When establishing and applying the total remuneration policies, inclusive of salaries and discretionary pension benefits, for those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile or the risk profiles of AIF they manage, AIFM shall comply with the following principles in a way and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities:

   (a) the remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk-taking which is inconsistent with the risk profiles, fund rules or instruments of incorporation of the AIF it manages;

   (b) the remuneration policy is in line with the business strategy, objectives, values and interests of the AIFM and the AIF it manages or the investors of the AIF, and includes measures to avoid conflicts of interest;

   (c) the management body in its supervisory function of the AIFM adopts and periodically reviews the general principles of the remuneration policy and is responsible for its implementation;

   (d) the implementation of the remuneration policy is, at least annually, subject to central and independent internal review for compliance with policies and procedures for remuneration adopted by the management body in its supervisory function;

(e) staff members engaged in control functions are compensated in accordance with the achievement of the objectives linked to their functions, independent of the performance of the business areas they control;

(f) the remuneration of the senior officers in the risk management and compliance functions is directly overseen by the remuneration committee;

(g) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit or AIF concerned and of the overall results of the AIFM, and when assessing individual performance, financial as well as non-financial criteria are taken into account;

(h) the assessment of performance is set in a multi-year framework appropriate to the life-cycle of the AIF managed by the AIFM in order to ensure that the assessment process is based on longer term performance and that the actual payment of performance-based components of remuneration is spread over a period which takes account of the redemption policy of the AIF it manages and their investment risks;

(i) guaranteed variable remuneration is exceptional and occurs only in the context of hiring new staff and is limited to the first year;

(j) fixed and variable components of total remuneration are appropriately balanced; the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy on variable remuneration components, including the possibility to pay no variable remuneration component;

(k) payments related to the early termination of a contract reflect performance achieved over time and are designed in a way that does not reward failure;

(l) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes a comprehensive adjustment mechanism to integrate all relevant types of current and future risks;

(m) subject to the legal structure of the AIF and its instruments of incorporation or fund rules, a substantial portion, which is at least 50 % of any variable remuneration shall consist of units or shares of the AIF concerned, or equivalent ownership interests, or share-linked instruments or equivalent non-cash instruments, unless the management of AIF accounts only for less than 50% of the total portfolio managed by the AIFM, in which case the minimum of 50% shall not apply;

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

Member States or their competent authorities may place restrictions on the types and designs of these instruments or ban certain instruments as appropriate;

This point shall be applied to both the portion of the variable remuneration component deferred in line with point (m) and the portion of the variable remuneration component not deferred;

(n) a substantial portion, which is at least 40 % of the variable remuneration component, is deferred over a period which is appropriate in view of the life cycle and redemption policy of the AIF concerned and is correctly aligned with the nature of the risks of the AIF in question. This period should be at least three to five year unless the life cycle of the AIF concerned is shorter; remuneration payable under deferral arrangements vests no faster than on a pro-rata basis; in the case of a variable remuneration component of a particularly high amount, at least 60 % of the amount is deferred;

(o) the variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the AIFM as a whole, and justified according to the performance of the business unit, the AIF and the individual concerned; the total variable remuneration is generally considerably contracted where subdued or negative financial performance of the AIFM or of the AIF concerned occurs, taking into account both current compensation and reductions in payouts of amounts previously earned, including through malus or claw back arrangements;

(p) the pension policy is in line with the business strategy, objectives, values and long-term interests of the AIFM and the AIF it manages. If the employee leaves the AIFM before retirement, discretionary pension benefits should be held by the AIFM for a period of five years in the form of instruments as defined in point (m). In case of an employee reaching retirement, discretionary pension benefits should be paid to the employee in the form of instruments defined in point (m) subject to a five year retention period;

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

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

2. The principles set out in paragraph 1 shall apply to the remuneration of any type paid by the AIFM, to any amount paid directly by the AIF itself, including carried interest, and to any transfer of shares or units of the AIF, made to the benefits of those categories staff, including senior management, 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 AIFs they manage.

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

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

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

(a) a notification letter, including a programme of operations identifying the AIF it intends to market and information on where the AIF are established;

(b) the AIF rules or instruments of incorporation;

(c) identification of the depositary of the AIF;

(d) a description of, or any information on, the AIF available to investors;

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

(f) any additional information referred to in Article 23(1) for each AIF the AIFM intends to market;

(g) where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF.

ANNEX III B

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

(a) a notification letter, including a programme of operations identifying the AIF it intends to market and information on where the AIF are established;

(b) the AIF rules or instruments of incorporation;

(c) identification of the depositary of the AIF;

(d) a description of, or any information on, the AIF available to investors;

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

(f) any additional information referred to in Article 23(1) for each AIF the AIFM intends to market;

(g) the indication of the Member State(s) in which it intends to market the shares or units of the AIF to professional investors;

(h) information made on arrangements made for the marketing of AIF and, where relevant, information on the arrangements established to prevent shares or units of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF.