

Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (Text with EEA relevance)

CHAPTER II

CONDITIONS FOR THE USE OF THE DESIGNATION ‘EuSEF’

Article 4

Managers of qualifying social entrepreneurship funds that comply with the requirements set out in this Chapter shall be entitled to use the designation ‘EuSEF’ in relation to the marketing of qualifying social entrepreneurship funds across the Union.

Article 5

1 Managers of qualifying social entrepreneurship funds shall ensure that, when acquiring assets other than qualifying investments, no more than 30 % of the qualifying social entrepreneurship fund’s aggregate capital contributions and uncalled committed capital is used for the acquisition of such assets. The 30 % threshold shall be calculated on the basis of amounts investible after the deduction of all relevant costs. Holdings in cash and cash equivalents shall not be taken into account for calculating that threshold as cash and cash equivalents are not to be considered as investments.

2 Managers of qualifying social entrepreneurship funds shall not employ at the level of the qualifying social entrepreneurship fund any method by which the exposure of the fund will be increased beyond the level of its committed capital, whether through borrowing of cash or securities, engaging in derivative positions or by any other means.

3 Managers of qualifying social entrepreneurship funds may only borrow, issue debt obligations or provide guarantees, at the level of the qualifying social entrepreneurship fund where such borrowings, debt obligations or guarantees are covered by uncalled commitments.

Article 6

1 Managers of qualifying social entrepreneurship fund shall market the units and shares of the qualifying social entrepreneurship fund exclusively to investors which are considered to be professional clients in accordance with Section I of Annex II to Directive 2004/39/EC, or which may, on request, be treated as professional clients in accordance with Section II of Annex II to Directive 2004/39/EC, or to other investors that:

- a commit to invest a minimum of EUR 100 000; and
- b state in writing, in a separate document from the contract that is concluded for the commitment to invest, that they are aware of the risks associated with the envisaged commitment.

2 Paragraph 1 shall not apply to investments made by executives, directors or employees involved in the management of a manager of a qualifying social entrepreneurship fund when investing in the qualifying social entrepreneurship funds that they manage.

Article 7

Managers of qualifying social entrepreneurship funds shall, in relation to the qualifying social entrepreneurship funds they manage:

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

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- (b) apply appropriate policies and procedures for preventing malpractices that can reasonably be expected to affect the interests of the investors and the qualifying portfolio undertakings;
- (c) conduct their business activities in such a way as to promote the positive social impact of the qualifying portfolio undertakings in which they have invested, the best interests of the qualifying social entrepreneurship funds that they manage, the investors therein and the integrity of the market;
- (d) apply a high level of diligence in the selection and ongoing monitoring of investments in qualifying portfolio undertakings and the positive social impact of those undertakings;
- (e) possess adequate knowledge and understanding of the qualifying portfolio undertakings in which they invest;
- (f) treat their investors fairly;
- (g) ensure that no investor obtains preferential treatment, unless such preferential treatment is disclosed in the rules or instruments of incorporation of the qualifying social entrepreneurship fund.

Article 8

1 Where a manager of a qualifying social entrepreneurship fund delegates functions to third parties, the manager's liability towards the qualifying social entrepreneurship fund or the investors therein shall remain unaffected. The manager shall not delegate functions to the extent that, in essence, it can no longer be considered to be the manager of the qualifying social entrepreneurship fund and to the extent that it becomes a letter-box entity.

2 Any delegation of functions under paragraph 1 shall not undermine the effectiveness of supervision of the manager of a qualifying social entrepreneurship fund, and, in particular, shall not prevent that manager from acting, or the qualifying social entrepreneurship fund from being managed, in the best interests of the investors therein.

Article 9

1 Managers of qualifying social entrepreneurship funds shall identify and avoid conflicts of interest and, where they cannot be avoided, manage and monitor and, in accordance with paragraph 4, disclose those conflicts of interest promptly in order to prevent them from adversely affecting the interests of the qualifying social entrepreneurship funds and the investors therein and to ensure that the qualifying social entrepreneurship funds that they manage are fairly treated.

2 Managers of qualifying social entrepreneurship funds shall identify in particular those conflicts of interest that may arise between:

- a managers of qualifying social entrepreneurship funds, persons who effectively conduct the business of those managers, employees of, or any person who directly or indirectly controls or is controlled by, those managers, and the qualifying social entrepreneurship fund managed by those managers, or the investors therein;
- b a qualifying social entrepreneurship fund or the investors therein, and another qualifying social entrepreneurship fund managed by the same manager, or the investors therein;
- c the qualifying social entrepreneurship fund or the investors therein, and a collective investment undertaking or UCITS managed by the same manager, or the investors therein.

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3 Managers of qualifying social entrepreneurship funds shall maintain and operate effective organisational and administrative arrangements in order to comply with the requirements laid down in paragraphs 1 and 2.

4 Disclosures of conflicts of interest as referred to in paragraph 1 shall be provided, where organisational arrangements made by a manager of a qualifying social entrepreneurship fund 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. A manager of a qualifying social entrepreneurship fund shall disclose in clear terms the general nature or sources of conflicts of interest to the investors before undertaking business on their behalf.

5 The Commission shall be empowered to adopt delegated acts in accordance with Article 26 specifying:

- a the types of conflicts of interest referred to in paragraph 2 of this Article;
- b the steps that managers of a qualifying social entrepreneurship fund must take, in terms of structures and organisational and administrative procedures, in order to identify, prevent, manage, monitor and disclose conflicts of interest.

Article 10

1 Managers of a qualifying social entrepreneurship fund shall employ for each qualifying social entrepreneurship fund that they manage, procedures to measure the extent to which the qualifying portfolio undertakings, in which the qualifying social entrepreneurship fund invests, achieve the positive social impact to which they are committed. The managers shall ensure that these procedures are clear and transparent and include indicators that may, depending on the social objective and nature of the qualifying portfolio undertaking, include one or more of the following subjects:

- a employment and labour markets;
- b standards and rights related to job quality;
- c social inclusion and protection of particular groups;
- d equal treatment, equal opportunities and non-discrimination;
- e public health and safety;
- f access to and effects on social protection and on health and educational systems.

2 The Commission shall be empowered to adopt delegated acts in accordance with Article 26 specifying the details of the procedures referred to in paragraph 1 of this Article, in relation to different qualifying portfolio undertakings.

Article 11

1 At all times, managers of qualifying social entrepreneurship funds shall have sufficient own funds and use adequate and appropriate human and technical resources as necessary for the proper management of the qualifying social entrepreneurship fund that they manage.

2 At all times, managers of qualifying social entrepreneurship funds shall ensure that they are able to justify the sufficiency of their own funds to maintain operational continuity and disclose their reasoning as to why those funds are sufficient as specified in Article 14.

Article 12

1 Rules for the valuation of assets shall be laid down in the rules or instruments of incorporation of the qualifying social entrepreneurship fund and shall ensure a sound and transparent valuation process.

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2 The valuation procedures used shall ensure that the assets are valued properly and that the asset value is calculated at least annually.

3 In order to ensure consistency in the valuation of qualifying portfolio undertakings, ESMA shall develop guidelines setting out common principles on the treatment of investments in such undertakings taking into account their primary objective of achieving a measurable positive social impact and the use of their profits first and foremost for the achievement of that impact.

Article 13

1 Managers of qualifying social entrepreneurship funds shall make available an annual report to the competent authority of the home Member State for each qualifying social entrepreneurship fund that they manage, by six months following the end of the financial year. The report shall describe the composition of the portfolio of the qualifying social entrepreneurship fund and the activities of the previous year. It shall also disclose the profits earned by the qualifying social entrepreneurship fund at the end of its life and, where applicable, the profits distributed during its life. It shall contain the audited financial accounts for the qualifying social entrepreneurship fund. The annual report shall be produced in accordance with existing reporting standards and the terms agreed between the managers of qualifying social entrepreneurship funds and the investors. Managers of qualifying social entrepreneurship funds shall provide the report to investors on request. Managers of qualifying social entrepreneurship funds and investors may agree additional disclosures to each other.

2 The annual report shall at least include the following:

- a details, as appropriate, of the overall social outcomes achieved by the investment policy and the method used to measure those outcomes;
- b a statement of any divestments in relation to qualifying portfolio undertakings that have occurred;
- c a description of whether divestments in relation to the other assets of the qualifying social entrepreneurship fund which are not invested into qualifying portfolio undertakings occurred on the basis of the criteria as referred to in point (f) of Article 14(1);
- d a summary of the activities that the manager of a qualifying social entrepreneurship fund has undertaken in relation to the qualifying portfolio undertakings as referred to in point (l) of Article 14(1);
- e information on the nature and purpose of the investments other than qualifying investments referred to in Article 5(1).

3 An audit of the qualifying social entrepreneurship fund shall be conducted at least annually. The audit shall confirm that money and assets are held in the name of the qualifying social entrepreneurship fund and that the manager of a qualifying social entrepreneurship fund has established and maintained adequate records and checks in respect of the use of any mandate or control over the money and assets of the qualifying social entrepreneurship fund and the investors therein.

4 Where the manager of a qualifying social entrepreneurship fund is required to make public an annual financial report in accordance with Article 4 of Directive 2004/109/EC of the European Parliament and Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers the securities of which are admitted to trading on a regulated market⁽¹⁾ in relation to the qualifying social entrepreneurship fund the information referred to in paragraphs 1 and 2 of this Article may be provided separately or as an additional part of the annual financial report.

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Article 14

1 Managers of qualifying social entrepreneurship funds shall, in relation to the qualifying social entrepreneurship funds that they manage, inform their investors, prior to the investment decision of the latter, in a clear and understandable manner, of the following:

- a the identity of that manager and of any other service providers contracted by that manager in relation to their management, and a description of their duties;
- b the amount of own funds available to that manager, as well as a detailed statement as to why that manager considers that amount to be sufficient for maintaining the adequate human and technical resources necessary for the proper management of its qualifying social entrepreneurship funds;
- c a description of the investment strategy and objectives of the qualifying social entrepreneurship fund, including:
 - (i) the types of qualifying portfolio undertakings in which it intends to invest;
 - (ii) any other qualifying social entrepreneurship fund in which it intends to invest;
 - (iii) the types of qualifying portfolio undertakings in which any other qualifying social entrepreneurship fund, as referred to in point (ii), intends to invest;
 - (iv) the non-qualifying investments which it intends to make;
 - (v) the techniques that it intends to employ; and
 - (vi) any applicable investment restrictions;
- d the positive social impact being targeted by the investment policy of the qualifying social entrepreneurship fund, including, where relevant, projections of such outcomes as may be reasonable, and information on past performance in this area;
- e the methodologies to be used to measure social impacts;
- f a description of the assets other than qualifying portfolio undertakings and the process and the criteria which are used for selecting these assets unless they are cash or cash equivalents;
- g a description of the risk profile of the qualifying social entrepreneurship fund and any risks associated with the assets in which the fund may invest or the investment techniques that may be employed;
- h a description of the qualifying social entrepreneurship fund's valuation procedure and of the pricing methodology for valuing assets, including the methods used for valuing qualifying portfolio undertakings;
- i a description of how the remuneration of the manager of a qualifying social entrepreneurship fund is calculated;
- j a description of all relevant costs and of the maximum amounts thereof;
- k where available, the historical financial performance of the qualifying social entrepreneurship fund;
- l the business support services and the other support activities the manager of a qualifying social entrepreneurship fund is providing or arranging through third parties in order to facilitate the development, growth or in some other respect the ongoing operations of the qualifying portfolio undertakings in which the qualifying social entrepreneurship fund invests, or, where these services or activities are not provided, an explanation of that fact;
- m a description of the procedures by which the qualifying social entrepreneurship fund may change its investment strategy or investment policy, or both.

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2 All of the information referred to in paragraph 1 shall be fair, clear and not misleading. It shall be kept up-to-date and reviewed regularly where relevant.

3 Where the manager of a qualifying social entrepreneurship fund 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⁽²⁾ or in accordance with national law in relation to the qualifying social entrepreneurship fund, the information referred to in paragraph 1 of this Article may be provided separately or as a part of the prospectus.

4 The Commission shall be empowered to adopt delegated acts in accordance with Article 26 specifying:

- a the content of the information referred to in points (c) to (f) and (l) of paragraph 1 of this Article;
- b how the information as referred to in points (c) to (f) and (l) of paragraph 1 of this Article can be presented in a uniform way in order to ensure the highest possible level of comparability.

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- (1) OJ L 390, 31.12.2004, p. 38.
- (2) OJ L 345, 31.12.2003, p. 64.