

Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (Text with EEA relevance)

CHAPTER III

OPERATING CONDITIONS FOR AIFMs

SECTION 1

General requirements

Article 12

General principles

- 1 Member States shall ensure that, at all times, AIFMs:
- a act honestly, with due skill, care and diligence and fairly in conducting their activities;
 - b act in the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;
 - c have and employ effectively the resources and procedures that are necessary for the proper performance of their business activities;
 - d take all reasonable steps to avoid conflicts of interest and, when they cannot be avoided, to identify, manage and monitor and, where applicable, disclose, those conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors and to ensure that the AIFs they manage are fairly treated;
 - e comply with all regulatory requirements applicable to the conduct of their business activities so as to promote the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;
 - f treat all AIF investors fairly.

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

- 2 Each AIFM the authorisation of which also covers the discretionary portfolio management service referred to in point (a) of Article 6(4) shall:
- a not be permitted to invest all or part of the client's portfolio in units or shares of the AIFs it manages, unless it receives prior general approval from the client;
 - b with regard to the services referred to in Article 6(4), be subject to Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes⁽¹⁾.

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

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Article 13

Remuneration

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

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

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

Article 14

Conflicts of interest

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

- a the AIFM, including its managers, employees or any person directly or indirectly linked to the AIFM by control, and the AIF managed by the AIFM or the investors in that AIF;
- b the AIF or the investors in that AIF, and another AIF or the investors in that AIF;
- c the AIF or the investors in that AIF, and another client of the AIFM;
- d the AIF or the investors in that AIF, and a UCITS managed by the AIFM or the investors in that UCITS; or
- e two clients of the AIFM.

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

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

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

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

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

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

- a the types of conflicts of interest as referred to in paragraph 1;
- b the reasonable steps AIFMs are expected to take in terms of structures and organisational and administrative procedures in order to identify, prevent, manage, monitor and disclose conflicts of interest.

Article 15

Risk management

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

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

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

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

3 AIFMs shall at least:

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

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

- a the type of the AIF;

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- b the investment strategy of the AIF;
- c the sources of leverage of the AIF;
- d any other interlinkage or relevant relationships with other financial services institutions, which could pose systemic risk;
- e the need to limit the exposure to any single counterparty;
- f the extent to which the leverage is collateralised;
- g the asset-liability ratio;
- h the scale, nature and extent of the activity of the AIFM on the markets concerned.

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

- a the risk management systems to be employed by AIFMs in relation to the risks which they incur on behalf of the AIFs that they manage;
- b the appropriate frequency of review of the risk management system;
- c how the risk management function is to be functionally and hierarchically separated from the operating units, including the portfolio management function;
- d specific safeguards against conflicts of interest referred to in the second subparagraph of paragraph 1;
- e the requirements referred to in paragraph 3.

Article 16

Liquidity management

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

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

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

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

- a the liquidity management systems and procedures; and
- b the alignment of the investment strategy, liquidity profile and redemption policy set out in paragraph 2.

Article 17

Investment in securitisation positions

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 point (41) of Article 4 of Directive 2006/48/EC, and AIFMs that invest in those securities or other financial instruments on behalf of AIFs, the Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to

the conditions of Articles 57 and 58, measures 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 AIFs, including requirements that ensure that the originator, the sponsor or the original lender retains a net economic interest of not less than 5 %;
- (b) qualitative requirements that must be met by AIFMs which invest in these securities or other financial instruments on behalf of one or more AIFs.

SECTION 2

Organisational requirements

Article 18

General principles

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

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

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

Article 19

Valuation

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

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

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

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

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

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

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

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

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

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

- a the external valuer is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct;
- b the external valuer can provide sufficient professional guarantees to be able to perform effectively the relevant valuation function in accordance with paragraphs 1, 2 and 3; and
- c the appointment of the external valuer complies with the requirements of Article 20(1) and (2) and the delegated acts adopted pursuant to Article 20(7).

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

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

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

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

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

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

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

- a the criteria concerning the procedures for the proper valuation of the assets and the calculation of the net asset value per unit or share;
- b the professional guarantees the external valuer must be able to provide to effectively perform the valuation function;
- c the frequency of valuation carried out by open-ended AIFs which is both appropriate to the assets held by the AIF and its issuance and redemption policy.

SECTION 3

Delegation of AIFM functions

Article 20

Delegation

1 AIFMs which intend to delegate to third parties the task of carrying out functions on their behalf shall notify the competent authorities of their home Member State before the delegation arrangements become effective. The following conditions shall be met:

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

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

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

- a the depositary or a delegate of the depositary; or

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

3 The AIFM's liability towards the AIF and its investors shall not be affected by the fact that the AIFM has delegated functions to a third party, or by any further sub-delegation, 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.

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

- a the AIFM consented prior to the sub-delegation;
- b the AIFM notified the competent authorities of its home Member State before the sub-delegation arrangements become effective;
- c the conditions set out in paragraph 1, on the understanding that all references to the 'delegate' are read as references to the 'sub-delegate'.

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

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

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

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

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

- a the conditions for fulfilling the requirements set out in paragraphs 1, 2, 4 and 5;
- b the conditions under which the AIFM shall be deemed to have delegated its functions to the extent that it becomes a letter-box entity and can no longer be considered to be the manager of the AIF as set out in paragraph 3.

SECTION 4

Depositary

Article 21

Depositary

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

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

- 3 The depositary shall be:
- a a credit institution having its registered office in the Union and authorised in accordance with Directive 2006/48/EC;
 - b an investment firm having its registered office in the Union, subject to capital adequacy requirements in accordance with Article 20(1) of Directive 2006/49/EC including capital requirements for operational risks and authorised in accordance with Directive 2004/39/EC and which also provides the ancillary service of safe-keeping and administration of financial instruments for the account of clients in accordance with point (1) of Section B of Annex I to Directive 2004/39/EC; such investment firms shall in any case have own funds not less than the amount of initial capital referred to in Article 9 of Directive 2006/49/EC; or
 - c another category of institution that is subject to prudential regulation and ongoing supervision and which, on 21 July 2011, falls within the categories of institution determined by Member States to be eligible to be a depositary under Article 23(3) of Directive 2009/65/EC.

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

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

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

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

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

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

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- 6 Without prejudice to the requirements set out in paragraph 3, the appointment of a depositary established in a third country shall, at all times, be subject to the following conditions:
- a the competent authorities of the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, in so far as different, of the home Member State of the AIFM, have signed cooperation and exchange of information arrangements with the competent authorities of the depositary;
 - b the depositary is subject to effective prudential regulation, including minimum capital requirements, and supervision which have the same effect as Union law and are effectively enforced;
 - c the third country where the depositary is established is not listed as a Non-Cooperative Country and Territory by FATF;
 - d the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, in so far as different, the home Member State of the AIFM, have signed an agreement with the third country where the depositary is established which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements;
 - e the depositary shall by contract be liable to the AIF or to the investors of the AIF, consistently with paragraphs 12 and 13, and shall expressly agree to comply with paragraph 11.

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

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

- 7 The depositary shall in general ensure that the AIF's cash flows are properly monitored, and shall in particular ensure that all payments made by or on behalf of investors upon the subscription of units or shares of an AIF have been received and that all cash of the AIF has been booked in cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the depositary acting on behalf of the AIF at an entity referred to in points (a), (b) and (c) of Article 18(1) of Directive 2006/73/EC, or another entity of the same nature, in the relevant market where cash accounts are required provided that such entity is subject to effective prudential regulation and supervision which have the same effect as Union law and are effectively enforced and in accordance with the principles set out in Article 16 of Directive 2006/73/EC.

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

- 8 The assets of the AIF or the AIFM acting on behalf of the AIF shall be entrusted to the depositary for safe-keeping, as follows:
- a for financial instruments that can be held in custody:

- (i) the depositary shall hold in custody all financial instruments that can be registered in a financial instruments account opened in the depositary's books and all financial instruments that can be physically delivered to the depositary;
 - (ii) for that purpose, the depositary shall ensure that all those financial instruments that can be registered in a financial instruments account opened in the depositary's books are registered in the depositary's books within segregated accounts in accordance with the principles set out in Article 16 of Directive 2006/73/EC, opened in the name of the AIF or the AIFM acting on behalf of the AIF, so that they can be clearly identified as belonging to the AIF in accordance with the applicable law at all times;
- b for other assets:
- (i) the depositary shall verify the ownership of the AIF or the AIFM acting on behalf of the AIF of such assets and shall maintain a record of those assets for which it is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership of such assets;
 - (ii) the assessment whether the AIF or the AIFM acting on behalf of the AIF holds the ownership shall be based on information or documents provided by the AIF or the AIFM and, where available, on external evidence;
 - (iii) the depositary shall keep its record up-to-date.
- 9 In addition to the tasks referred to in paragraphs 7 and 8, the depositary shall:
- a ensure that the sale, issue, re-purchase, redemption and cancellation of units or shares of the AIF are carried out in accordance with the applicable national law and the AIF rules or instruments of incorporation;
 - b ensure that the value of the units or shares of the AIF is calculated in accordance with the applicable national law, the AIF rules or instruments of incorporation and the procedures laid down in Article 19;
 - c carry out the instructions of the AIFM, unless they conflict with the applicable national law or the AIF rules or instruments of incorporation;
 - d ensure that in transactions involving the AIF's assets any consideration is remitted to the AIF within the usual time limits;
 - e ensure that an AIF's income is applied in accordance with the applicable national law and the AIF rules or instruments of incorporation.

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

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

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

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

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

- a the tasks are not delegated with the intention of avoiding the requirements of this Directive;
- b the depositary can demonstrate that there is an objective reason for the delegation;
- c the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it wants to delegate parts of its tasks, and keeps exercising all due skill, care and diligence in the periodic review and ongoing monitoring of any third party to whom it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it; and
- d the depositary ensures that the third party meets the following conditions at all times during the performance of the tasks delegated to it:
 - (i) the third party has the structures and the expertise that are adequate and proportionate to the nature and complexity of the assets of the AIF or the AIFM acting on behalf of the AIF which have been entrusted to it;
 - (ii) for custody tasks referred to in point (a) of paragraph 8, the third party is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned and the third party is subject to an external periodic audit to ensure that the financial instruments are in its possession;
 - (iii) the third party segregates the assets of the depositary's clients from its own assets and from the assets of the depositary in such a way that they can at any time be clearly identified as belonging to clients of a particular depositary;
 - (iv) the third party does not make use of the assets without the prior consent of the AIF or the AIFM acting on behalf of the AIF and prior notification to the depositary; and
 - (v) the third party complies with the general obligations and prohibitions set out in paragraphs 8 and 10.

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

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

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

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

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

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

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

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

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

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

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

- a the rules or instruments of incorporation of the AIF concerned expressly allow for such a discharge under the conditions set out in this paragraph;
- b the investors of the relevant AIF have been duly informed of that discharge and of the circumstances justifying the discharge prior to their investment;
- c the AIF or the AIFM on behalf of the AIF instructed the depositary to delegate the custody of such financial instruments to a local entity;
- d there is a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, which expressly allows such a discharge; and
- e there is a written contract between the depositary and the third party that expressly transfers the liability of the depositary to that local entity and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against that local entity in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf.

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

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

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

- a the particulars that need to be included in the written contract referred to in paragraph 2;
- b general criteria for assessing whether the prudential regulation and supervision of third countries as referred to in point (b) of paragraph 6 have the same effect as Union law and are effectively enforced;
- c the conditions for performing the depositary functions pursuant to paragraphs 7, 8 and 9, including:
 - (i) the type of financial instruments to be included in the scope of the depositary's custody duties in accordance with point (a) of paragraph 8;
 - (ii) the conditions subject to which the depositary is able to exercise its custody duties over financial instruments registered with a central depositary; and
 - (iii) the conditions subject to which the depositary is to safekeep the financial instruments issued in a nominative form and registered with an issuer or a registrar, in accordance with point (b) of paragraph 8;
- d the due diligence duties of depositaries pursuant to point (c) of paragraph 11;
- e the segregation obligation pursuant to point (d)(iii) of paragraph 11;
- f the conditions subject to which and circumstances in which financial instruments held in custody are to be considered as lost;
- g what is to be understood by external events beyond reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary pursuant to paragraph 12;
- h the conditions subject to which and circumstances in which there is an objective reason to contract a discharge pursuant to paragraph 13.

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(1) [OJ L 84, 26.3.1997, p. 22.](#)