

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 VII

SPECIFIC RULES IN RELATION TO THIRD COUNTRIES

Article 34

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

- 1 Member States shall ensure that an authorised EU AIFM may manage non-EU AIFs which are not marketed in the Union provided that:
 - a the AIFM complies with all the requirements established in this Directive except for Article 21 and 22 in respect of those AIFs; and
 - b appropriate cooperation arrangements are in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows competent authorities of the home Member State of the AIFM to carry out their duties in accordance with this Directive.
- 2 The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.
- 3 In order to ensure uniform application of this Article, ESMA shall develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1.

Article 35

Conditions for the marketing in the 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 Union units or shares of non-EU AIFs it manages and of EU feeder AIFs that do not fulfil the requirements referred to in the second subparagraph of Article 31(1) as soon as the conditions laid down in this Article are met.
- 2 AIFMs shall comply with all the requirements established in this Directive, with the exception of Chapter VI. In addition the following conditions shall be met:
 - a appropriate cooperation arrangements must be in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information, taking into account Article 50(4), that allows the competent authorities to carry out their duties in accordance with this Directive;

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- b the third country where the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF;
- c the third country where the non-EU AIF is established has signed an agreement with the home Member State of the authorised AIFM and with each other Member State in which the units or shares of the non-EU AIF are intended to be marketed, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements.

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

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

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

4 No later than 20 working days after receipt of a complete notification pursuant to paragraph 3, the competent authorities of the home Member State of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 3 in its territory. The competent authorities of the home Member State of the AIFM shall prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Directive or the AIFM otherwise does not or will not comply with this Directive. In the case of a positive decision, the AIFM may start marketing the AIF in its home Member State as of the date of the notification by the competent authorities to that effect.

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

5 If an AIFM intends to market units or shares of non-EU AIFs in a Member State other than its home Member State, the AIFM shall submit a notification to the competent authorities of its home Member State in respect of each non-EU AIF that it intends to market.

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

6 The competent authorities of the home Member State of the AIFM shall, no later than 20 working days after the date of receipt of the complete notification file referred to in paragraph 5, transmit that complete notification file to the competent authorities of the Member State where the AIF is intended to be marketed. Such transmission will occur only if the AIFM's management of the AIF complies and will continue to comply with this Directive and that the AIFM otherwise complies with this Directive.

The competent authorities of the home Member State of the AIFM shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

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

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

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

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

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

10 In the event of a material change to any of the particulars communicated in accordance with paragraph 3 or 5, the AIFM shall give written notice of that change to the competent authorities of its home Member State, at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

If pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would no longer comply with this Directive, the competent authorities of the home Member State of the AIFM shall inform the AIFM without undue delay that it is not to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs, or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with this Directive or the AIFM otherwise would no longer comply with this Directive, the competent authorities of the home Member State of the AIFM shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF.

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

11 The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in point (a) of paragraph 2 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

12 In order to ensure uniform application of this Article, ESMA may develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in point (a) of paragraph 2.

13 ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in point (a) of paragraph 2 so as to ensure that both the competent authorities of the home and the host Member States receive sufficient information in order to be able to exercise their supervisory and investigatory powers under this Directive.

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

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14 In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to specify the procedures for coordination and exchange of information between the competent authority of the home Member State and the competent authorities of the host Member States of the AIFM.

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

15 In case a competent authority rejects a request to exchange information in accordance with the regulatory technical standards referred to in paragraph 14, the competent authorities concerned may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

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

- a the form and content of a model for the notification letter referred to in paragraph 3;
- b the form and content of a model for the notification letter referred to in paragraph 5;
- c the form and content of a model for the statement referred to in paragraph 6;
- d the form of the transmission referred to in paragraph 6;
- e the form of the written notice referred to in paragraph 10.

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

17 Without prejudice to Article 43(1), Member States shall require that the AIFs managed and marketed by the AIFM be marketed only to professional investors.

Article 36

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

1 Without prejudice to Article 35, Member States may allow an authorised EU AIFM to market to professional investors, in their territory only, units or shares of non-EU AIFs it manages and of EU feeder AIFs that do not fulfil the requirements referred to in the second subparagraph of Article 31(1), provided that:

- a the AIFM complies with all the requirements established in this Directive with the exception of Article 21. That AIFM shall however ensure that one or more entities are appointed to carry out the duties referred to in Article 21(7), (8) and (9). The AIFM shall not perform those functions. The AIFM shall provide its supervisory authorities with information about the identity of those entities responsible for carrying out the duties referred to in Article 21(7), (8) and (9);
- b appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows the competent authorities of the home Member State of the AIFM to carry out their duties in accordance with this Directive;
- c the third country where the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF.

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

3 The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

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

Article 37

Authorisation of non-EU AIFMs intending to manage EU AIFs and/or market AIFs managed by them in the Union in accordance with Article 39 or 40

1 Member States shall require that non-EU AIFMs intending to manage EU AIFs and/or to market AIFs managed by them in the Union in accordance with Article 39 or 40 acquire prior authorisation by the competent authorities of their Member State of reference in accordance with this Article.

2 A non-EU AIFM intending to obtain prior authorisation as referred to in paragraph 1 shall comply with this Directive, with the exception of Chapter VI. If and to the extent that compliance with a provision of this Directive is incompatible with compliance with the law to which the non-EU AIFM and/or the non-EU AIF marketed in the Union is subject, there shall be no obligation on the AIFM to comply with that provision of this Directive if it can demonstrate that:

- a it is impossible to combine such compliance with compliance with a mandatory provision in the law to which the non-EU AIFM and/or the non-EU AIF marketed in the Union is subject;
- b the law to which the non-EU AIFM and/or the non-EU AIF is subject provides for an equivalent rule having the same regulatory purpose and offering the same level of protection to the investors of the relevant AIF; and
- c the non-EU AIFM and/or the non-EU AIF complies with the equivalent rule referred to in point (b).

3 A non-EU AIFM intending to obtain prior authorisation as referred to in paragraph 1 shall have a legal representative established in its Member State of reference. The legal representative shall be the contact point of the AIFM in the Union and any official correspondence between the competent authorities and the AIFM and between the EU investors of the relevant AIF and the AIFM as set out in this Directive shall take place through that legal representative. The legal representative shall perform the compliance function relating to the management and marketing activities performed by the AIFM under this Directive together with the AIFM.

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

- a if the non-EU AIFM intends to manage only one EU AIF, or several EU AIFs established in the same Member State, and does not intend to market any AIF in accordance with Article 39 or 40 in the Union, the home Member State of that or those AIFs is deemed to be the Member State of reference and the competent authorities of this Member State will be competent for the authorisation procedure and for the supervision of the AIFM;

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- b if the non-EU AIFM intends to manage several EU AIFs established in different Member States and does not intend to market any AIF in accordance with Article 39 or 40 in the Union, the Member State of reference is either:
 - (i) the Member State where most of the AIFs are established; or
 - (ii) the Member State where the largest amount of assets is being managed;
- c if the non-EU AIFM intends to market only one EU AIF in only one Member State, the Member State of reference is determined as follows:
 - (i) if the AIF is authorised or registered in a Member State, the home Member State of the AIF or the Member State where the AIFM intends to market the AIF;
 - (ii) if the AIF is not authorised or registered in a Member State, the Member State where the AIFM intends to market the AIF;
- d if the non-EU AIFM intends to market only one non-EU AIF in only one Member State, the Member State of reference is that Member State;
- e if the non-EU AIFM intends to market only one EU AIF, but in different Member States, the Member State of reference is determined as follows:
 - (i) if the AIF is authorised or registered in a Member State, the home Member State of the AIF or one of the Member States where the AIFM intends to develop effective marketing; or
 - (ii) if the AIF is not authorised or registered in a Member State, one of the Member States where the AIFM intends to develop effective marketing;
- f if the non-EU AIFM intends to market only one non-EU AIF, but in different Member States, the Member State of reference is one of those Member States;
- g if the non-EU AIFM intends to market several EU AIFs in the Union, the Member State of reference is determined as follows:
 - (i) in so far as those AIFs are all registered or authorised in the same Member State, the home Member State of those AIFs or the Member State where the AIFM intends to develop effective marketing for most of those AIFs;
 - (ii) in so far as those AIFs are not all registered or authorised in the same Member State, the Member State where the AIFM intends to develop effective marketing for most of those AIFs;
- h if the non-EU AIFM intends to market several EU and non-EU AIFs, or several non-EU AIFs in the Union, the Member State of reference is the Member State where it intends to develop effective marketing for most of those AIFs.

In accordance with the criteria set out in points (b), (c)(i), (e), (f), and (g)(i) of the first subparagraph, more than one Member State of reference is possible. In such cases, Member States shall require that the non-EU AIFM intending to manage EU AIFs without marketing them and/or market AIFs managed by it in the Union in accordance with Article 39 or 40 submit a request to the competent authorities of all of the Member States that are possible Member States of reference in accordance with the criteria set out in those points, to determine its Member State of reference from among them. Those competent authorities shall jointly decide the Member State of reference for the non-EU AIFM, within 1 month of receipt of such request. The competent authorities of the Member State that is appointed as Member State of reference shall, without undue delay, inform the non-EU AIFM of that appointment. If the non-EU AIFM is not duly informed of the decision made by the relevant competent authorities within 7 days of the decision

or if the relevant competent authorities have not made a decision within the 1-month period, the non-EU AIFM may itself choose its Member State of reference based on the criteria set out in this paragraph.

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

5 Member States shall require that a non-EU AIFM intending to manage EU AIFs without marketing them and/or to market AIFs managed by it in the Union in accordance with Article 39 or 40 submit a request for authorisation to its Member State of reference.

After receiving the application for authorisation, the competent authorities shall assess whether the determination by the AIFM as regards its Member State of reference complies with the criteria laid down in paragraph 4. If the competent authorities consider that this is not the case, they shall refuse the authorisation request of the non-EU AIFM explaining the reasons for their refusal. If the competent authorities consider that the criteria of paragraph 4 have been complied with, they shall notify ESMA, requesting advice on their assessment. In their notification to ESMA, the competent authorities shall provide ESMA with the justification by the AIFM of its assessment regarding the Member State of reference and with information on the marketing strategy of the AIFM.

Within 1 month of having received the notification referred to in the second subparagraph, ESMA shall issue advice to the relevant competent authorities about their assessment on the Member State of reference in accordance with the criteria set out in paragraph 4. ESMA shall issue a negative advice only if it considers that the criteria set out in paragraph 4 have not been complied with.

The term referred to in Article 8(5) shall be suspended during ESMA's deliberation in accordance with this paragraph.

If the competent authorities propose to grant authorisation contrary to ESMA's advice referred to in the third subparagraph they shall inform ESMA, stating their reasons. ESMA shall publish the fact that the competent authorities do not comply or intend to comply with its advice. ESMA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authorities for not complying with that advice. The competent authorities shall receive advance notice about such a publication.

If the competent authorities propose to grant authorisation contrary to ESMA's advice referred to in the third subparagraph and the AIFM intends to market units or shares of AIFs managed by it in Member States other than the Member State of reference, the competent authorities of the Member State of reference shall also inform the competent authorities of those Member States thereof, stating their reasons. In so far as applicable, the competent authorities of the Member State of reference shall also inform the competent authorities of the home Member States of the AIFs managed by the AIFM thereof, stating their reasons.

6 Where a competent authority of a Member State disagrees with the determination of the Member State of reference by the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

7 Without prejudice to paragraph 8, no authorisation shall be granted unless the following additional conditions are met:

- a the Member State of reference is indicated by the AIFM in accordance with the criteria set out in paragraph 4 and supported by the disclosure of the marketing strategy, and

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- the procedure set out in paragraph 5 has been followed by the relevant competent authorities;
- b the AIFM has appointed a legal representative established in the Member State of reference;
 - c the legal representative shall, together with the AIFM, be the contact person of the non-EU AIFM for the investors of the relevant AIFs, for ESMA and for the competent authorities as regards the activities for which the AIFM is authorised in the Union and shall at least be sufficiently equipped to perform the compliance function pursuant to this Directive;
 - d appropriate cooperation arrangements are in place between the competent authorities of the Member State of reference, the competent authorities of the home Member State of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties in accordance with this Directive;
 - e the third country where the non-EU AIFM is established is not listed as a Non-Cooperative Country and Territory by FATF;
 - f the third country where the non-EU AIFM is established has signed an agreement with the Member State of reference, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements;
 - g the effective exercise by the competent authorities of their supervisory functions under this Directive is neither prevented by the laws, regulations or administrative provisions of a third country governing the AIFM, nor by limitations in the supervisory and investigatory powers of that third country's supervisory authorities.

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

Where a competent authority of an EU AIF does not enter into the required cooperation arrangements as set out in point (d) of the first subparagraph within a reasonable period of time, the competent authorities of the Member State of reference may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

8 The authorisation shall be given in accordance with Chapter II which shall apply *mutatis mutandis* subject to the following criteria:

- a the information referred to in Article 7(2) shall be supplemented by:
 - (i) a justification by the AIFM of its assessment regarding the Member State of reference in accordance with the criteria set out in paragraph 4 with information on the marketing strategy;
 - (ii) a list of the provisions of this Directive for which compliance by the AIFM is impossible as compliance by the AIFM with those provisions is, in accordance with paragraph 2, incompatible with compliance with a mandatory provision in the law to which the non-EU AIFM or the non-EU AIF marketed in the Union is subject;

- (iii) written evidence based on the regulatory technical standards developed by ESMA that the relevant third country law provides for a rule equivalent to the provisions for which compliance is impossible, which has the same regulatory purpose and offers the same level of protection to the investors of the relevant AIFs and that the AIFM complies with that equivalent rule; such written evidence being supported by a legal opinion on the existence of the relevant incompatible mandatory provision in the law of the third country and including a description of the regulatory purpose and the nature of the investor protection pursued by it; and
 - (iv) the name of the legal representative of the AIFM and the place where it is established;
- b the information referred to in Article 7(3) may be limited to the EU AIFs the AIFM intends to manage and to those AIFs managed by the AIFM that it intends to market in the Union with a passport;
 - c point (a) of Article 8(1) shall be without prejudice to paragraph 2 of this Article;
 - d point (e) of Article 8(1) shall not apply;
 - e the second subparagraph of Article 8(5) shall be read as including a reference to ‘the information referred to in point (a) of Article 37(8)’.

Where a competent authority of another Member State disagrees with the authorisation granted by the competent authorities of the Member State of reference of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

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

Within 1 month of receipt of the notification referred to in the first subparagraph, ESMA shall issue advice to the competent authorities about the application of the exemption for compliance with this Directive caused by the incompatibility in accordance with paragraph 2. The advice may, in particular, address whether the conditions for such exemption appear to be met based on the information provided by the AIFM in accordance with points (a)(ii) and (iii) of paragraph 8 and on the regulatory technical standards on equivalence. ESMA shall seek to build a common European supervisory culture and consistent supervisory practices and ensure consistent approaches among competent authorities in relation to the application of this paragraph.

The term referred to in Article 8(5) shall be suspended during the ESMA review in accordance with this paragraph.

If the competent authorities of the Member State of reference propose to grant authorisation contrary to ESMA’s advice referred to in the second subparagraph they shall inform ESMA, stating their reasons. ESMA shall publish the fact that the competent authorities do not comply or intend to comply with that advice. ESMA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authorities for not complying with that advice. The competent authorities concerned shall receive advance notice of such publication.

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

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

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

The competent authorities shall inform ESMA about the applications for authorisation that they have rejected, providing data about the AIFM having asked for authorisation and the reasons for the rejection. ESMA shall keep a central register of those data, which shall be at the disposal of competent authorities, on request. Competent authorities shall treat this information as confidential.

11 The determination of the Member State of reference shall not be affected by the further business development of the AIFM in the Union. However, where the AIFM changes its marketing strategy within 2 years of its initial authorisation, and that change would have affected the determination of the Member State of reference if the modified marketing strategy had been the initial marketing strategy, the AIFM shall notify the competent authorities of the original Member State of reference of the change before implementing it and indicate its Member State of reference in accordance with the criteria set out in paragraph 4 and based on the new strategy. The AIFM shall justify its assessment by disclosing its new marketing strategy to its original Member State of reference. At the same time the AIFM shall provide information on its legal representative, including its name and the place where it is established. The legal representative shall be established in the new Member State of reference.

The original Member State of reference shall assess whether the determination of the AIFM in accordance with the first subparagraph is correct and shall notify ESMA thereof. ESMA shall issue advice on the assessment made by the competent authorities. In their notification to ESMA, the competent authorities shall provide the AIFM's justification of its assessment regarding the Member State of reference and information on the AIFM's new marketing strategy.

Within 1 month of receipt of the notification referred to in the second subparagraph, ESMA shall issue advice to the relevant competent authorities about their assessment. ESMA shall issue a negative advice only where it considers that the criteria set out in paragraph 4 have not been complied with.

After receipt of ESMA's advice in accordance with the third subparagraph, the competent authorities of the original Member State of reference shall inform the non-EU AIFM, its original legal representative and ESMA of their decision.

Where the competent authorities of the original Member State of reference agree with the assessment made by the AIFM, they shall also inform the competent authorities of the new Member State of reference of the change. The original Member State of reference shall, without undue delay, transfer a copy of the authorisation and the supervision file relating to the AIFM to the new Member State of reference. From the

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

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

- a the competent authorities shall inform ESMA thereof, stating reasons. ESMA shall publish the fact that the competent authorities do not comply, or intend not to comply, with its advice. ESMA may also decide, on a case-by-case basis, to publish the reasons for non-compliance provided by the competent authorities. The competent authorities concerned shall receive advance notice of such publication;
- b where the AIFM markets units or shares of AIFs managed by it in Member States other than the original Member State of reference, the competent authorities of the original Member State of reference shall inform the competent authorities of those other Member States thereof, stating reasons. Where applicable, the competent authorities of the Member State of reference shall also inform the competent authorities of the home Member States of the AIFs managed by the AIFM thereof, stating reasons.

12 Where it appears from the actual course of the business development of the AIFM in the Union within 2 years after its authorisation that the marketing strategy as presented by the AIFM at the time of its authorisation was not followed, the AIFM made false statements in relation thereto or the AIFM has failed to comply with paragraph 11 when changing its marketing strategy, the competent authorities of the original Member State of reference shall request that the AIFM indicate the Member State of reference based on its actual marketing strategy. The procedure set out in paragraph 11 shall apply *mutatis mutandis*. If the AIFM does not comply with the competent authorities' request, they shall withdraw its authorisation.

Where the AIFM changes its marketing strategy after the period referred to in paragraph 11 and intends to change its Member State of reference on the basis of its new marketing strategy, it may submit a request to change its Member State of reference to the competent authorities of the original Member State of reference. The procedure referred to in paragraph 11 shall apply *mutatis mutandis*.

Where a competent authority of a Member State disagrees with the assessment made on the determination of the Member State of reference under paragraph 11 or under this paragraph, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

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

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

14 The Commission shall adopt implementing acts with a view to specifying the procedure to be followed by the possible Member States of reference when determining the Member State of reference from among those Member States in accordance with the second subparagraph of paragraph 4. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 59(2).

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

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arrangements referred to in point (d) of paragraph 7 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

16 In order to ensure uniform application of this Article, ESMA may develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in point (d) of paragraph 7.

17 ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in point (d) of paragraph 7 so as to ensure that the competent authorities of the Member State of reference and the competent authorities of the host Member States receive sufficient information in order to be able to exercise their supervisory and investigatory powers under this Directive.

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

18 In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to specify the procedures for coordination and exchange of information between the competent authority of the Member State of reference and the competent authorities of the host Member States of the AIFM.

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

19 In case a competent authority rejects a request to exchange information in accordance with the regulatory technical standards referred to in paragraph 17, the competent authorities concerned may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

20 In accordance with Article 29 of Regulation (EU) No 1095/2010, ESMA shall promote an effective bilateral and multilateral exchange of information between the competent authorities of the Member State of reference of the non-EU AIFM and the competent authorities of the host Member States of the AIFM concerned, with full respect for the applicable confidentiality and data protection provisions provided for in the relevant Union legislation.

21 In accordance with Article 31 of Regulation (EU) No 1095/2010, ESMA shall fulfil a general coordination role between the competent authority of the Member State of reference of the non-EU AIFM and the competent authorities of the host Member States of the AIFM concerned. In particular, ESMA may:

- a facilitate the exchange of information between the competent authorities concerned;
- b determine the scope of the information that the competent authority of the Member State of reference must provide to the competent authorities of the host Member States concerned;
- c take all appropriate measures in case of developments which may jeopardise the functioning of the financial markets with a view to facilitating the coordination of actions undertaken by the competent authority of the Member State of reference and the competent authorities of the host Member States in relation to non-EU AIFMs.

22 In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to determine the form and content of the request referred to in the second subparagraph of paragraph 12.

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

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

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

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

Article 38

Peer review of authorisation and supervision of non-EU AIFMs

1 ESMA shall, on an annual basis, conduct a peer review analysis of the supervisory activities of the competent authorities in relation to the authorisation and the supervision of non-EU AIFMs under Articles 37, 39, 40 and 41, to further enhance consistency in supervisory outcomes, in accordance with Article 30 of Regulation (EU) No 1095/2010.

2 By 22 July 2013, ESMA shall develop methods to allow for objective assessment and comparison between the authorities reviewed.

3 In particular, the peer review analysis shall include an assessment of:

- a the degree of convergence in supervisory practices achieved in the authorisation and supervision of non-EU AIFMs;
- b the extent to which the supervisory practice achieves the objectives set out in this Directive;
- c the effectiveness and the degree of convergence achieved with regard to the enforcement of this Directive and its implementing measures and the regulatory and implementing technical standards developed by ESMA pursuant to this Directive, including administrative measures and penalties imposed against non-EU AIFMs where this Directive has not been complied with.

4 On the basis of the conclusions of the peer review, ESMA may issue guidelines and recommendations pursuant to Article 16 of Regulation (EU) No 1095/2010, with a view to establishing consistent, efficient and effective supervisory practices of non-EU AIFMs.

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

6 Within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or intend to comply, it shall inform ESMA, stating its reasons.

7 ESMA shall publish the fact that a competent authority does not comply or intend to comply with that guideline or recommendation. ESMA may also decide, on a case-by-case

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basis, to publish the reasons provided by the competent authority for not complying with that guideline or recommendation. The competent authority shall receive advance notice of such a publication.

8 In the report referred to in Article 43(5) of Regulation (EU) No 1095/2010, ESMA shall inform the European Parliament, the Council and the Commission of the guidelines and recommendations issued pursuant to this Article, stating which competent authorities have not complied with them, and outlining how ESMA intends to ensure that those competent authorities comply with its recommendations and guidelines in the future.

9 The Commission shall duly take those reports into account in its review of this Directive in accordance with Article 69 and in any subsequent evaluation that it conducts.

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

Article 39

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

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

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

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

3 No later than 20 working days after receipt of a complete notification pursuant to paragraph 2, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 2 in its territory. The competent authorities of the Member State of reference of the AIFM may prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Directive or if the AIFM otherwise does not or will not comply with this Directive. In the case of a positive decision, the AIFM may start marketing the AIF in its Member State of reference as of the date of the notification by the competent authorities to that effect.

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

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

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

5 The competent authorities of the Member State of reference shall, no later than 20 working days after the date of receipt of the complete notification file referred to in paragraph 4, transmit the complete notification file to the competent authorities of the Member States where the units or shares of the AIF are intended to be marketed. Such transmission shall be effected

only if the AIFM's management of the AIF complies and will continue to comply with this Directive and if the AIFM otherwise complies with this Directive.

The competent authorities of the Member State of reference of the AIFM shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

6 Upon transmission of the notification file, the competent authorities of the Member State of reference of the AIFM shall, without delay, notify the AIFM about the transmission. The AIFM may start marketing the AIF in the relevant host Member States as of the date of that notification.

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

7 The arrangements referred to in point (h) of Annex IV shall be subject to the laws and supervision of the host Member States of the AIFM.

8 Member States shall ensure that the notification letter by the AIFM referred to in paragraph 4 and the statement referred to in paragraph 5 are provided in a language customary in the sphere of international finance.

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

9 In the event of a material change to any of the particulars communicated in accordance with paragraph 2 and/or 4, the AIFM shall give written notice of that change to the competent authorities of its Member State of reference at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would otherwise no longer comply with this Directive, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM, without undue delay, that it is not to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with this Directive or the AIFM otherwise no longer complies with this Directive, the competent authorities of the Member State reference of the AIFM shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF.

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

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

- a the form and content of a model for the notification letter referred to in paragraphs 2 and 4;
- b the form and content of a model for the statement referred to in paragraph 5;
- c the form of the transmission referred to in paragraph 5; and

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

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

11 Without prejudice to Article 43(1), Member States shall require that the AIFs managed and marketed by the AIFM be marketed only to professional investors.

Article 40

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

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

2 In addition to the requirements in this Directive in relation to EU-AIFMs, for non-EU AIFMs the following conditions shall be met:

- a appropriate cooperation arrangements are in place between the competent authorities of the Member State of reference and the supervisory authority of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties in accordance with this Directive;
- b the third country where the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF;
- c the third country where the non-EU AIF is established has signed an agreement with the Member State of reference and with each other Member State in which the units or shares of the non-EU AIF are intended to be marketed which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements.

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

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

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

4 No later than 20 working days after receipt of a complete notification pursuant to paragraph 3, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph 3 in its territory. The competent authorities of the Member State of reference of the AIFM may prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Directive or the AIFM otherwise does not or will not comply with this Directive. In the case of a positive decision, the AIFM may start marketing

the AIF in its Member State of reference from the date of the notification by the competent authorities to that effect.

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

5 If the AIFM intends to market the units or shares of a non-EU AIF also in Member States other than its Member State of reference, the AIFM shall submit a notification to the competent authorities of its Member State of reference in respect of each non-EU AIF that it intends to market.

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

6 The competent authorities of the Member State of reference shall, no later than 20 working days after the date of receipt of the complete notification file referred to in paragraph 5, transmit the complete notification file to the competent authorities of the Member States where the units or shares of the AIF are intended to be marketed. Such transmission shall occur only if the AIFM's management of the AIF complies and will continue to comply with this Directive and that in general the AIFM complies with this Directive.

The competent authorities of the Member State of reference of the AIFM shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

7 Upon transmission of the notification file, the competent authorities of the Member State of reference of the AIFM shall, without delay, notify the AIFM of the transmission. The AIFM may start marketing the AIF in the relevant host Member States of the AIFM as of the date of that notification.

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

8 Arrangements referred to in point (h) of Annex IV shall be subject to the laws and supervision of the host Member States of the AIFM, in so far as those Member States are different than the Member State of reference.

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

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

10 In the event of a material change to any of the particulars communicated in accordance with paragraph 3 or 5, the AIFM shall give written notice of that change to the competent authorities of the Member State of reference at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive, or the AIFM would otherwise no longer comply with this Directive, the competent authorities of the Member State of reference of the AIFM shall inform the AIFM, without undue delay, that it is not to implement the change.

If the planned change is implemented notwithstanding the first and second subparagraphs, or if an unplanned change has taken place pursuant to which the AIFM's

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management of the AIF no longer complies with this Directive or the AIFM otherwise no longer complies with this Directive, the competent authorities of the Member State of reference of the AIFM shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF.

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

11 The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in point (a) of paragraph 2 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

12 In order to ensure uniform application of this Article, ESMA may develop guidelines to determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in point (a) of paragraph 2.

13 ESMA shall develop draft regulatory technical standards to determine the minimum content of the cooperation arrangements referred to in point (a) of paragraph 2 so as to ensure that the competent authorities of the Member State of reference and the competent authorities of the host Member States receive sufficient information in order to be able to exercise their supervisory and investigatory powers under this Directive.

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

14 In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to specify the procedures for coordination and exchange of information between the competent authority of the Member State of reference and the competent authorities of the host Member States of the AIFM.

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

15 In case a competent authority rejects a request to exchange information in accordance with the regulatory technical standards referred to in paragraph 14, the competent authorities concerned may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

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

- a the form and content of a model for the notification letter referred to in paragraphs 3 and 5;
- b the form and content of a model for the statement referred to in paragraph 6;
- c the form of the transmission referred to in paragraph 6; and
- d the form of the written notice referred to in paragraph 10.

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

17 Without prejudice to Article 43(1), Member States shall require that the AIFs managed and marketed by the AIFM be marketed only to professional investors.

Article 41

Conditions for managing AIFs established in Member States other than the Member State of reference by non-EU AIFMs

1 Member States shall ensure that an authorised non-EU AIFM may manage EU AIFs established in a Member State other than its Member State of reference either directly or via the establishment of a branch, provided that the AIFM is authorised to manage that type of AIF.

2 Any non-EU AIFM intending to manage EU AIFs established in another Member State than its Member State of reference for the first time shall communicate the following information to the competent authorities of its Member State of reference:

- a the Member State in which it intends to manage AIFs directly or establish a branch;
- b a programme of operations stating in particular the services which it intends to perform and identifying the AIFs it intends to manage.

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

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

4 The competent authorities of the Member State of reference shall, within 1 month of receiving the complete documentation in accordance with paragraph 2 or within 2 months of receiving the complete documentation in accordance with paragraph 3, transmit that documentation to the competent authorities of the host Member States of the AIFM. Such transmission shall occur only if the AIFM's management of the AIF complies and will continue to comply with this Directive and the AIFM otherwise complies with this Directive.

The competent authorities of the Member State of reference shall enclose a statement to the effect that the AIFM concerned is authorised by them.

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

The competent authorities of the Member State of reference shall also inform ESMA that the AIFM may start managing the AIF in the host Member States of the AIFM.

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

6 In the event of a change to any of the information communicated in accordance with paragraph 2 and, if relevant, paragraph 3, an AIFM shall give written notice of that change to the competent authorities of its Member State of reference at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

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If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Directive or the AIFM would otherwise no longer comply with this Directive, the competent authorities of the Member State of reference shall inform the AIFM without undue delay that it is not to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with this Directive or the AIFM otherwise no longer complies with this Directive, the competent authorities of the Member State of reference shall take all due measures in accordance with Article 46, including, if necessary, the express prohibition of marketing of the AIF.

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

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

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

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

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

Article 42

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

1 Without prejudice to Articles 37, 39 and 40, Member States may allow non-EU AIFMs to market to professional investors, in their territory only, units or shares of AIFs they manage subject at least to the following conditions:

- a the non-EU AIFM complies with Articles 22, 23 and 24 in respect of each AIF marketed by it pursuant to this Article and with Articles 26 to 30 where an AIF marketed by it pursuant to this Article falls within the scope of Article 26(1). Competent authorities and AIF investors referred to in those Articles shall be deemed those of the Member States where the AIFs are marketed;
- b appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the Member States where the AIFs are marketed, in so far as applicable, the competent authorities of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established in order to ensure

- an efficient exchange of information that allows competent authorities of the relevant Member States to carry out their duties in accordance with this Directive;
- c the third country where the non-EU AIFM or the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF.

Where a competent authority of an EU AIF does not enter into the required cooperation arrangements as set out in point (b) of the first subparagraph within a reasonable period of time, the competent authorities of the Member State where the AIF is intended to be marketed may refer the matter to ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

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

3 The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries.

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