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)

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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Central Bank[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Managers of alternative investment funds (AIFMs) are responsible for the management of a significant amount of invested assets in the Union, account for significant amounts of trading in markets for financial instruments, and can exercise an important influence on markets and companies in which they invest.

(2) The impact of AIFMs on the markets in which they operate is largely beneficial, but recent financial difficulties have underlined how the activities of AIFMs may also serve to spread or amplify risks through the financial system. Uncoordinated national responses make the efficient management of those risks difficult. This Directive therefore aims at establishing common requirements governing the authorisation and supervision of AIFMs in order to provide a coherent approach to the related risks and their impact on investors and markets in the Union.

(3) Recent difficulties in financial markets have underlined that many AIFM strategies are vulnerable to some or several important risks in relation to investors, other market participants and markets. In order to provide comprehensive and common arrangements for supervision, it is necessary to establish a framework capable of addressing those risks taking into account the diverse range of investment strategies and techniques employed by AIFMs. Consequently, this Directive should apply to AIFMs managing all types of funds that are not covered by Directive 2009/65/EC of the European

Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to the undertakings for collective investment in transferable securities (UCITS)[(4)], irrespective of the legal or contractual manner in which the AIFMs are entrusted with this responsibility. AIFMs should not be entitled to manage UCITS within the meaning of Directive 2009/65/EC on the basis of an authorisation under this Directive.

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

(5) 4 years after the deadline for transposition of this Directive, the Commission should review the application and the scope of this Directive taking into account its objectives and should assess whether or not the Union harmonised approach has caused any ongoing major market disruption and whether or not this Directive functions effectively in light of the principles of the internal market and of a level playing field.

(6) The scope of this Directive should be limited to entities managing AIFs as a regular business – regardless of whether the AIF is of an open-ended or a closed-ended type, whatever the legal form of the AIF, and whether or not the AIF is listed – which raise capital from a number of investors with a view to investing that capital for the benefit of those investors in accordance with a defined investment policy.

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

(8) The entities not considered to be AIFMs pursuant to this Directive fall outside its scope. As a consequence, this Directive should not apply to holding companies as defined herein. However, managers of private equity funds or AIFMs managing AIFs whose shares are admitted to trading on a regulated market should not be excluded from its scope. Further, this Directive should not apply to the management of pension funds; employee participation or savings schemes; supranational institutions; national

central banks; national, regional and local governments and bodies or institutions which manage funds supporting social security and pension systems; securitisation special purpose entities; or insurance contracts and joint ventures.

(9) Investment firms authorised under Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments[(5)] and credit institutions authorised under Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions[(6)] should not be required to obtain an authorisation under this Directive in order to provide investment services such as individual portfolio management in respect of AIFs. However, investment firms should be able, directly or indirectly, to offer units or shares of an AIF to, or place such units or shares with, investors in the Union only to the extent that the units or shares can be marketed in accordance with this Directive. When transposing this Directive into national law, the Member States should take into account the regulatory purpose of that requirement and should ensure that investment firms established in a third country that, pursuant to the relevant national law, can provide investment services in respect of AIFs also fall within the scope of that requirement. The provision of investment services by those entities in respect of AIFs should never amount to a de facto circumvention of this Directive by means of turning the AIFM into a letter-box entity, irrespective of whether the AIFM is established in the Union or in a third country.

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

(11) Several provisions of this Directive require AIFMs to ensure compliance with requirements for which, in some fund structures, AIFMs are not responsible. An example of such fund structures is where the responsibility for appointing the depositary rests with the AIF or another entity acting on behalf of the AIF. In such cases, the AIFM has no ultimate control over whether a depositary is in fact appointed unless the AIF is internally managed. Since this Directive does not regulate AIFs, it cannot require an AIF to appoint a depositary. In cases of failure of an AIFM to ensure compliance with the applicable requirements of an AIF or another entity on its behalf, the competent authorities should require the AIFM to take the necessary steps to remedy the situation. If, despite such steps, the non-compliance persists, and in so far as it concerns an EU AIFM or an authorised non-EU AIFM managing an EU AIF, the AIFM should resign as

manager of that AIF. If the AIFM fails to resign, the competent authorities of its home Member State should require such resignation and the marketing in the Union of the AIF concerned should no longer be permitted. The same prohibition should apply to authorised non-EU AIFMs marketing non-EU AIFs in the Union.

(12) Unless specifically provided for otherwise, where this Directive refers to the interests of the investors of an AIF the investors' interests in their specific capacity as investors of the AIF, and not their individual interests, are envisaged.

(13) Subject to the exceptions and restrictions provided for, this Directive should be applicable to all EU AIFMs managing EU AIFs or non-EU AIFs, irrespective of whether or not they are marketed in the Union, to non-EU AIFMs managing EU AIFs, irrespective of whether or not they are marketed in the Union, and to non-EU AIFMs marketing EU AIFs or non-EU AIFs in the Union.

(14) This Directive lays down requirements regarding the manner in which AIFMs should manage AIFs under their responsibility. For non-EU AIFMs this is limited to the management of EU AIFs and other AIFs the units or shares of which are also marketed to professional investors in the Union.

(15) The authorisation of EU AIFMs in accordance with this Directive covers the management of EU AIFs established in the home Member State of the AIFM. Subject to further notification requirements, this also includes the marketing to professional investors within the Union of EU AIFs managed by the EU AIFM and the management of EU AIFs established in Member States other than the home Member State of the AIFM. This Directive also provides for the conditions subject to which authorised EU AIFMs are entitled to market non-EU AIFs to professional investors in the Union and the conditions subject to which a non-EU AIFM can obtain an authorisation to manage EU AIFs and/or to market AIFs to professional investors in the Union with a passport. During a period that is intended to be transitional, Member States should also be able to allow EU AIFMs to market non-EU AIFs in their territory only and/or to allow non-EU AIFMs to manage EU AIFs, and/or market AIFs to professional investors, in their territory only, subject to national law, in so far as certain minimum conditions pursuant to this Directive are met.

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

(17) This Directive further provides for a lighter regime for AIFMs where the cumulative AIFs under management fall below a threshold of EUR 100 million and for AIFMs that manage only unleveraged AIFs that do not grant investors redemption rights during a period of 5 years where the cumulative AIFs under management fall below a threshold of EUR 500 million. Although the activities of the AIFMs concerned are unlikely to have individually significant consequences for financial stability, it is possible that aggregation causes their activities to give rise to systemic risks. Consequently, those AIFMs should not be subject to full authorisation but to registration in their home Member States and should, inter alia, provide their competent authorities with

relevant information regarding the main instruments in which they are trading and on the principal exposures and most important concentrations of the AIFs they manage. However, in order to be able to benefit from the rights granted under this Directive, those smaller AIFMs should be allowed to be treated as AIFMs subject to the opt-in procedure provided for by this Directive. That exemption should not limit the ability of Member States to impose stricter requirements on those AIFMs that have not opted in.

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

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

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

(21) Management of AIFs should mean providing at least investment management services. The single AIFM to be appointed pursuant to this Directive should never be authorised to provide portfolio management without also providing risk management or vice versa. Subject to the conditions set out in this Directive, an authorised AIFM should not, however, be prevented from also engaging in the activities of administration and marketing of an AIF or from engaging in activities related to the assets of the AIF. An external AIFM should not be prevented from also providing the service of management of portfolios of investments with mandates given by investors on a discretionary, client-by-client basis, including portfolios owned by pension funds and institutions for occupational retirement provision which are covered by Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision[(7)], or from providing the non-core

services of investment advice, safe-keeping and administration in relation to units of collective investment undertakings and reception and transmission of orders. Pursuant to authorisation under Directive 2009/65/EC, an external AIFM should be allowed to manage UCITS.

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

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

(24) In order to address the potentially detrimental effect of poorly designed remuneration structures on the sound management of risk and control of risk-taking behaviour by individuals, there should be an express obligation for AIFMs to establish and maintain, for those categories of staff whose professional activities have a material impact on the risk profiles of AIFs they manage, remuneration policies and practices that are consistent with sound and effective risk management. Those categories of staff should at least include senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers.

(25) The principles governing remuneration policies should recognise that AIFMs are able to apply those policies in different ways according to their size and the size of the AIFs they manage, their internal organisation and the nature, the scope and the complexity of their activities.

(26) The principles regarding sound remuneration policies set out in the Commission Recommendation 2009/384/EC of 30 April 2009 on remuneration policies in the financial services sector[8] are consistent with and complement the principles of this Directive.

(27) In order to promote supervisory convergences in the assessment of remuneration policies and practices, the European Supervisory Authority (European Securities and Markets Authority), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council[9] (ESMA) should ensure the existence of guidelines on sound remuneration policies in the AIFM sector. The European Supervisory Authority (European Banking Authority) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council[10] should assist it in the elaboration of such guidelines.

(28) The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by the Treaties, in particular Article 153(5)

TFEU, general principles of national contract and labour law, applicable legislation regarding shareholders' rights and involvement and the general responsibilities of the administrative and supervisory bodies of the institution concerned, as well as the right, where applicable, of social partners to conclude and enforce collective agreements, in accordance with national laws and traditions.

(29) Reliable and objective asset valuation is crucial for the protection of investor interests. AIFMs employ different methodologies and systems for valuing assets, depending on the assets and markets in which they predominantly invest. It is appropriate to recognise those differences but, nevertheless, to require in all cases AIFMs to implement valuation procedures resulting in the proper valuation of assets of AIFs. The process for valuation of assets and calculation of the net asset value should be functionally independent from the portfolio management and the remuneration policy of the AIFM and other measures should ensure that conflicts of interest are prevented and that undue influence on the employees is prevented. Subject to certain conditions, AIFMs should be able to appoint an external valuer to perform the valuation function.

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

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

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

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

(34) For AIFs that have no redemption rights exercisable during the period of 5 years from the date of the initial investments and that, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with this Directive or generally invest in issuers or non-listed companies in order potentially to acquire control over such companies in accordance with this Directive, such as private equity, venture capital funds and real estate funds, Member States should

be able to allow a notary, a lawyer, a registrar or another entity to be appointed to carry out depositary functions. In such cases the depositary functions should be part of professional or business activities in respect of which the appointed entity is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct and can provide sufficient financial and professional guarantees to enable it to perform effectively the relevant depositary functions and meet the commitments inherent in those functions. This takes account of current practice for certain types of closed-ended funds. However, for all other AIFs, the depositary should be a credit institution, an investment firm or another entity permitted under Directive 2009/65/EC, given the importance of the custody function. For non-EU AIFs only, it should also be possible for the depositary to be a credit institution or any other entity of the same nature as the entities referred to in this recital as long as it is subject to effective prudential regulation and supervision which have the same effect as Union law and are effectively enforced.

(35) The depositary should have its registered office or a branch in the same country as the AIF. It should be possible for a non-EU AIF to have a depositary established in the relevant third country only if certain additional conditions are met. On the basis of the criteria set out in delegated acts, the Commission should be empowered to adopt implementing measures, stating that prudential regulation and supervision of a third country have the same effect as Union law and are effectively enforced. Further, the mediation procedure set out in Article 19 of Regulation (EU) No 1095/2010 should apply in the event that competent authorities disagree on the correct application of the other additional conditions. Alternatively, for non-EU AIFs, the depositary should also be able to be established in the home Member State or in the Member State of reference of the AIFM managing the AIF.

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

(37) The depositary should be responsible for the proper monitoring of the AIF’s cash flows, and, in particular, for ensuring that investor money and cash belonging to the AIF, or to the AIFM acting on behalf of the AIF, is booked correctly on accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the depositary acting on behalf of the AIF for the safe-keeping of the assets of the AIF, including the holding in custody of financial instruments that can be registered in a financial instruments account opened in the depositary’s books and all financial instruments that can be physically delivered to the depositary, and for the verification of ownership of all other assets by the AIF or the AIFM on behalf of the AIF. When ensuring investor money is booked in cash accounts, the depositary should take into account the principles set out in Article 16 of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive[11].

(38) A depositary should act honestly, fairly, professionally, independently and in the interest of the AIF or of the investors of the AIF.

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

(40) A third party to whom the safe-keeping of assets is delegated should be able to maintain a common segregated account for multiple AIFs, a so-called 'omnibus account'.

(41) Entrusting the custody of assets to the operator of a securities settlement system as designated for the purposes of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems[(12)] or entrusting the provision of similar services to third-country securities settlement systems should not be considered to be a delegation of custody functions.

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

(43) This Directive also takes account of the fact that many AIFs, and in particular hedge funds, currently make use of a prime broker. This Directive ensures that AIFs may continue to use the function of prime brokers. However, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as prime broker and the potential conflicts of interest are properly identified, managed and disclosed to the investors of the AIF, no prime broker should be appointed as a depositary, since prime brokers act as counterparties to AIFs and therefore cannot at the same time act in the best interest of the AIF as is required of a depositary. Depositaries should be able to delegate custody tasks to one or more prime brokers or other third parties. In addition to the delegated custody tasks prime brokers should be allowed to provide prime brokerage services to the AIF. Those prime brokerage services should not form part of the delegation arrangement.

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

be able to rely on internal situations such as a fraudulent act by an employee to discharge itself of liability.

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

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

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

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

(49) Given that it is possible for an AIFM to employ leverage and, under certain conditions, to contribute to the build up of systemic risk or disorderly markets, special requirements should be imposed on AIFMs employing leverage. The information needed to detect, monitor and respond to those risks has not been collected in a consistent way throughout the Union, and shared across Member States so as to identify potential sources of risk

to the stability of financial markets in the Union. To remedy that situation, special requirements should apply to AIFMs which employ leverage on a substantial basis at the level of the AIF. Such AIFMs should be required to disclose information regarding the overall level of leverage employed, the leverage arising from borrowing of cash or securities and the leverage arising from positions held in derivatives, the reuse of assets and the main sources of leverage in their AIFs. Information gathered by competent authorities should be shared with other authorities in the Union, with ESMA and with the European Systemic Risk Board (ESRB) established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board[13] so as to facilitate a collective analysis of the impact of the leverage of AIFs managed by AIFMs on the financial system in the Union, as well as a common response. If one or more AIFs managed by an AIFM could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions in other Member States, such information should also be shared with the relevant authorities.

(50) In order to ensure a proper assessment of the risks induced by the use of leverage by an AIFM with respect to the AIFs it manages, the AIFM should demonstrate that the leverage limits for each AIF it manages are reasonable and that it complies with those limits at all times. Where the stability and integrity of the financial system may be threatened, the competent authorities of the home Member State of the AIFM should be able to impose limits to the level of leverage that an AIFM can employ in AIFs under its management. ESMA and the ESRB should be informed about any actions taken in this respect.

(51) It is also considered necessary to allow ESMA, after taking into account the advice of the ESRB, to determine that the leverage used by an AIFM or by a group of AIFMs poses a substantial risk to the stability and the integrity of the financial system and to issue advice to competent authorities specifying the remedial measures to be taken.

(52) It is necessary to ensure that the competent authorities of the home Member State of the AIFM, the companies over which AIFs managed by an AIFM exercise control and the employees of such companies receive certain information necessary for those companies to assess how that control will impact their situation.

(53) Where AIFMs manage AIFs which exercise control over an issuer whose shares are admitted to trading on a regulated market, information should generally be disclosed in accordance with Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids[14] and Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market[15]. Specific requirements should apply to AIFMs managing AIFs which exercise control over a non-listed company. In order to ensure transparency regarding the controlled company, enhanced transparency, disclosure and reporting requirements should apply. Further, the annual reports of the relevant AIF should be supplemented with regard to the controlled company or

such additional information should be included in the annual report of the controlled company. Such information should be made available to the employees' representatives or, where there are none, the employees themselves, and to the investors of the relevant AIF.

(54) Specific information requirements towards employees of certain companies apply in cases where AIFs acquire control over such companies in accordance with this Directive. However, in most cases the AIFM has no control over the AIF, unless it is an internally managed AIF. Furthermore, there is, in accordance with the general principles of company law, no direct relationship between the shareholders and the employees' representatives or, where there are none, the employees themselves. For those reasons, no direct information requirements towards the employees' representatives or, where there are none, the employees themselves, can be imposed pursuant to this Directive on a shareholder or its manager, namely the AIF and the AIFM. As regards the information requirements towards such employees' representatives or, where there are none, the employees themselves, this Directive should provide for an obligation on the AIFM concerned to use its best efforts to ensure that the board of directors of the company concerned discloses the relevant information to the employees' representatives or, where there are none, the employees themselves.

(55) The Commission is invited to examine the need and the possibilities to amend the information and disclosure requirements applicable in cases of control over non-listed companies or issuers set out in this Directive on a general level, regardless of the type of investor.

(56) Where an AIFM manages one or more AIFs which acquire control over a non-listed company, the AIFM should provide the competent authorities of its home Member State with information on the financing of the acquisition. That obligation to provide information on financing should also apply when an AIFM manages AIFs which acquire control over an issuer of shares admitted to trading on a regulated market.

(57) Where an AIFM manages one or more AIFs which acquire control over a non-listed company or an issuer, the AIFM should, for a period of 24 months following the acquisition of control of the company by the AIFs, first, not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company in accordance with this Directive; second, in so far as the AIFM is authorised to vote on behalf of the AIFs at the meetings of governing bodies of the company, not vote in favour of a distribution, capital reduction, share redemption and/or acquisition of own shares by the company in accordance with this Directive; and third, in any event, use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares by the company in accordance with this Directive. When transposing this Directive into national law, the Member States should take into account the regulatory purpose of the provisions of Section 2 of Chapter V of this Directive and take due account in this context of the need for a level playing field between EU AIFs and non-EU AIFs when acquiring control in companies established in the Union.

(58) The notification and disclosure requirements and the specific safeguards against asset stripping in the case of control over a non-listed company or an issuer should be subject to a general exception for control over small and medium-sized enterprises and special purpose vehicles with the purpose of purchasing, holding or administrating real estate. Further, those requirements do not aim at making public proprietary information which would put the AIFM at a disadvantage vis-à-vis potential competitors such as sovereign wealth funds or competitors that may want to put the target company out of business by using the information to their advantage. The obligations to notify and disclose information should therefore apply subject to the conditions and restrictions relating to confidential information set out in Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community[16] and without prejudice to Directives 2004/25/EC and 2004/109/EC. This means that Member States should provide that within the limits and conditions laid down by national law the employees' representatives, and anyone assisting them, are not authorised to reveal to employees and to third parties any information affecting the legitimate interests of the company that has expressly been provided to them in confidence. Member States should, however, be able to authorise the employees' representatives and anyone assisting them to pass on confidential information to employees and to third parties bound by an obligation of confidentiality. Member States should provide that the relevant AIFMs do not request the communication of information by the board of directors to the employees' representatives or, where there are none, the employees themselves, when the nature of that information is such that, according to objective criteria, it would seriously harm the functioning of the company concerned or would be prejudicial to it. The notification and disclosure requirements and the specific safeguards against asset stripping should also apply without prejudice to any stricter rules adopted by Member States.

(59) This Directive also lays down the conditions subject to which EU AIFMs may market the units or shares of EU AIFs to professional investors in the Union. Such marketing by EU AIFMs should be allowed only in so far as the AIFM complies with this Directive and the marketing occurs with a passport, without prejudice to the marketing of AIFs by AIFMs falling below the thresholds provided for in this Directive. It should be possible for Member States to allow marketing of AIFs by AIFMs falling below those thresholds subject to national provisions.

(60) It should be possible for units or shares of an AIF to be listed on a regulated market in the Union, or offered or placed by third parties acting on behalf of the AIFM, in a particular Member State only if the AIFM which manages the AIF is itself permitted to market the units or shares of the AIF in that Member State. In addition, other national and Union law, such as Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading[17] and Directive 2004/39/EC, may also regulate the distribution of AIFs to investors in the Union.

(61) Many EU AIFMs currently manage non-EU AIFs. It is appropriate to allow authorised EU AIFMs to manage non-EU AIFs without marketing them in the Union without

imposing on them the strict depositary requirements and the requirements relating to the annual report provided for in this Directive, as those requirements have been included for the protection of Union investors.

(62) After the entry into force of a delegated act adopted by the Commission in this regard, which will, in principle, taking into account the advice provided by ESMA, occur 2 years after the deadline for transposition of this Directive, authorised EU AIFMs intending to market non-EU AIFs to professional investors in their home Member State and/or in other Member States should be allowed to do so with a passport in so far as they comply with this Directive. That right should be subject to notification procedures and conditions in relation to the third country of the non-EU AIF.

(63) During a transitional period, which will, in principle, taking into account ESMA's advice, be brought to an end by means of a delegated act 3 years after the establishment of the passport for non-EU AIFMs, EU AIFMs intending to market non-EU AIFs in certain Member States, but without a passport, should also be permitted to do so by the relevant Member States, but only in so far as they comply with this Directive with the exception of the depositary requirements. Such EU AIFMs should, however, ensure that one or more entities are appointed to carry out the duties of the depositary. In addition, appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards should be in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows the competent authorities of the home Member State of the AIFM to carry out their duties in accordance with this Directive. The cooperation arrangements should not be used as a barrier to impede non-EU AIFs from being marketed in a Member State. Further, the third country where the non-EU AIF is established should not be listed as a Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing (FATF).

(64) After the entry into force of a delegated act adopted by the Commission in that regard, which will, in principle, taking into account advice given by ESMA, occur 2 years after the deadline for transposition of this Directive, a basic principle of this Directive should be that a non-EU AIFM is to benefit from the rights conferred under this Directive, such as to market units or shares of AIFs throughout the Union with a passport, subject to its compliance with this Directive. This should ensure a level playing field between EU and non-EU AIFMs. This Directive therefore provides for an authorisation applicable to non-EU AIFMs which will become applicable after the entry into force of the delegated act adopted by the Commission in this regard. To ensure that such compliance is enforced, the competent authorities of a Member State should enforce compliance with this Directive. For such non-EU AIFMs the competent supervisory authorities should be the competent authorities of the Member State of reference, as defined in this Directive.

(65) Therefore, where a non-EU AIFM intends to manage EU AIFs and/or market AIFs in the Union with a passport, it should also be required to comply with this Directive, so that it is subject to the same obligations as EU AIFMs. In very exceptional circumstances, if and to the extent compliance with a provision of this Directive is

incompatible with compliance with the law to which the non-EU AIFM or the non-EU AIF marketed in the Union is subject, it should be possible for the non-EU AIFM to be exempted from compliance with the relevant provision of this Directive if it can demonstrate that: it is impossible to combine compliance with a provision of this Directive with compliance with a mandatory provision in the law to which the non-EU AIFM or the non- EU AIF marketed in the Union is subject; the law to which the non-EU AIFM or the non-EU AIF is subject provides for an equivalent rule having the same regulatory purpose and offering the same level of protection to the investors of the relevant AIF; and the non-EU AIFM or the non-EU AIF complies with that equivalent rule.

(66) Further, a non-EU AIFM intending to manage EU AIFs and/or market AIFs in the Union with a passport should comply with a specific authorisation procedure and certain specific requirements concerning the third country of the non-EU AIFM and, as appropriate, the third country of the non-EU AIF should be satisfied.

(67) ESMA should provide advice on the determination of the Member State of reference, and, where relevant, the exemption as regards compatibility with an equivalent rule. Specific requirements for the exchange of information between the competent authorities of the Member State of reference and the competent authorities of the host Member States of the AIFM should apply. Further, the mediation procedure provided for in Article 19 of Regulation (EU) No 1095/2010 should apply in case of disagreement between competent authorities of Member States on the determination of the Member State of reference, the application of the exemption in case of incompatibility between compliance with this Directive and compliance with equivalent rules of a third country, and the assessment regarding the fulfilment of the specific requirements concerning the third country of the non-EU AIFM and, as appropriate, the third country of the non-EU AIF.

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

(69) During a transitional period which will, in principle, taking into account ESMA's advice, be brought to an end by means of a delegated act 3 years after the establishment of the passport for non-EU AIFMs, a non-EU AIFM intending to market AIFs in certain Member States only and without such a passport should also be permitted to do so by the relevant Member States, but only in so far as certain minimum conditions are met. Those non-EU AIFMs should be subject at least to rules similar to those applicable to EU AIFMs managing EU AIFs with respect to the disclosure to investors. In order to facilitate the monitoring of systemic risk those non-EU AIFMs should also be subject to reporting obligations vis-à-vis the competent authorities of the Member State in which AIFs are marketed. Such AIFMs should therefore comply with the transparency requirements laid down in this Directive and the obligations on AIFMs managing AIFs which acquire control of non-listed companies and issuers. Further, appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with

international standards should be in place between the competent authorities of the Member States where the AIFs are marketed, if applicable, the competent authorities of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, if applicable, the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows competent authorities of the relevant Member States to carry out their duties in accordance with this Directive. The cooperation arrangements should not be used as a barrier to impede third country funds from being marketed in a Member State. Finally, the third country where the non-EU AIFM or the non-EU AIF is established should not be listed as a Non-Cooperative Country and Territory by FATF.

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

(71) Member States should be able to allow the marketing of all or certain types of AIFs managed by AIFMs to retail investors in their territory. If a Member State allows the marketing of certain types of AIF, the Member State should make an assessment on a case-by-case basis to determine whether a specific AIF should be considered as a type of AIF which may be marketed to retail investors in its territory. Without prejudice to the application of other instruments of Union law, Member States should in such cases be able to impose stricter requirements on AIFs and AIFMs as a precondition for marketing to retail investors than is the case for AIFs marketed to professional investors in their territory, irrespective of whether such AIFs are marketed on a domestic or cross-border basis. Where a Member State allows the marketing of AIFs to retail investors in its territory, this possibility should be available regardless of the Member State where the AIFM managing the AIFs is established, and Member States should not impose stricter or additional requirements on EU AIFs established in another Member State and marketed on a cross-border basis than on AIFs marketed domestically. In addition, AIFMs, investment firms authorised under Directive 2004/39/EC and credit institutions authorised under Directive 2006/48/EC which provide investment services to retail clients should take into account any additional requirements when assessing whether a certain AIF is suitable or appropriate for an individual retail client or whether it is a complex or non-complex financial instrument.

(72) It is necessary to clarify the powers and duties of the competent authorities responsible for implementing this Directive, and to strengthen the mechanisms necessary to ensure effective cross-border supervisory cooperation. Under certain circumstances it should be possible for the competent authorities of the host Member States of an AIFM to take direct action to supervise compliance with provisions for which they are responsible. For other provisions the competent authorities of the host Member States should under certain circumstances be allowed to request action from the competent authorities of the home Member State and to intervene if no such action is undertaken.

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

(74) ESMA should develop draft regulatory technical standards on the contents of the cooperation arrangements that must be concluded by the home Member State or by the Member State of reference of the AIFM and the relevant third-country supervisory authorities and on the procedures for the exchange of information. The draft regulatory technical standards should ensure that pursuant to those cooperation arrangements all necessary information is to be provided to enable the competent authorities of both the home and the host Member States to exercise their supervisory and investigatory powers under this Directive. ESMA should also have a facilitating role in the negotiation and conclusion of the cooperation arrangements. For example, ESMA should be able to use its facilitating role by providing for a standard format for such cooperation arrangements.

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

(76) This Directive respects the fundamental rights and observes the principles recognised, in particular, in the TFEU and in the Charter of Fundamental Rights of the European Union (Charter), in particular the right to the protection of personal data recognised in Article 16 TFEU and in Article 8 of the Charter. Any exchange or transmission of information by competent authorities should be in accordance with the rules on the transfer of personal data as laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[(18)]. Any exchange or transmission of information by ESMA should be in accordance with the rules on the transfer of personal data as laid down in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[(19)], which should be fully applicable to the processing of personal data for the purposes of this Directive.

(77) In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers[(20)].

(78) The Commission should be empowered to adopt delegated acts in accordance with Article 290 TFEU where expressly provided for in this Directive. In particular, the Commission should be empowered to adopt delegated acts to specify the methods of leverage as defined in this Directive, including any financial and/or legal structures involving third parties controlled by the relevant AIF where those structures are specifically set up to directly or indirectly create leverage at the level of the AIF. In particular for private equity and venture capital funds this means that leverage that exists at the level of a portfolio company is not intended to be included when referring to such financial or legal structures.

(79) Delegated acts should also be adopted to specify how to calculate the thresholds for the lighter regime and how to treat AIFMs whose assets under management, including any assets acquired through use of leverage, in one and the same calendar year occasionally exceed and/or fall below the relevant threshold; to specify the obligations to register for the AIFMs falling below the thresholds and to provide information in order to effectively monitor systemic risk and the obligation for such AIFMs to notify the relevant competent authorities where they no longer fulfil the conditions for application of the lighter regime.

(80) Delegated acts should also be adopted to clarify the methods of leverage, including any financial and/or legal structures involving third parties controlled by the relevant AIF and how leverage is to be calculated; to specify the risks the additional own funds or the professional indemnity insurance must cover, the conditions for determining the appropriateness of additional own funds or the coverage of the professional indemnity insurance, and the manner of determining ongoing adjustments of the additional own funds or of the coverage of the professional indemnity insurance. Delegated acts should also be adopted to specify the criteria to be used by competent authorities to assess whether AIFMs comply with their obligations as regards their conduct of business, their obligation to act in the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market; to have and employ effectively the resources and procedures that are necessary for the proper performance of their business activities; to take all reasonable steps to avoid conflicts of interest and, where such conflicts cannot be avoided, to identify, manage and monitor, and where applicable, disclose, those conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors and to ensure that the AIFs they manage are fairly treated; to comply with all regulatory requirements applicable to the conduct of their business activities so as to promote the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market; and to treat all AIF investors fairly.

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

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

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

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

(85) Depending on the advice of ESMA in this regard and the criteria set out in this Directive, a delegated act should also be adopted in order to extend the passport to EU AIFMs marketing non-EU AIFs in the Union and to non-EU AIFMs managing and/or marketing AIFs in the Union, and another delegated act should be adopted to terminate the application of national private placement regimes in this regard.

(86) The European Parliament and the Council should have 3 months from the date of notification to object to a delegated act. At the initiative of the European Parliament or the Council, it should be possible to prolong that period by 3 months in regard to significant areas of concern. It should also be possible for the European Parliament and the Council to inform the other institutions of their intention not to raise objections. Such early approval of delegated acts is particularly important where deadlines need to be met, for example to allow Member States to transpose delegated acts within the transposition period laid down in this Directive, where relevant.

(87) In the Declaration on Article 290 of the Treaty on the Functioning of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, the Conference took note of the Commission's intention to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area, in accordance with its established practice.

(88) 2 years after the deadline for transposition of this Directive, ESMA should issue an opinion on the functioning of the passport then in force and on the functioning of national private placement regimes. It should also issue advice on the extension of the passport to EU AIFMs marketing non-EU AIFs in the Union and to non-EU AIFMs managing and/or marketing AIFs in the Union. The Commission should adopt a delegated act within 3 months after having received that opinion and advice from ESMA and taking into account the criteria listed in, and the objectives of, this Directive, inter alia, regarding the internal market, investor protection and the effective monitoring of systemic risk, specifying the date when the rules relating to the extension of the passport provided for in this Directive should become applicable in all Member States.

(89) At the April 2009 summit in London, G20 Leaders agreed that hedge funds or their managers should be registered and should be required to disclose appropriate information on an ongoing basis to supervisors or regulators. They should be subject to oversight to ensure that they have adequate risk management. In June 2010, G20 Leaders in Toronto reaffirmed their commitment and also committed to accelerate the implementation of strong measures to improve transparency and regulatory oversight of hedge funds in an internationally consistent and non-discriminatory way. In order to support the G20 objectives, the International Organization of Securities Commissions issued high level principles of hedge fund oversight in June 2009 to guide the development of internationally consistent regulation in this area. On 16 September 2010 the European Council agreed on the need for Europe to promote its interest and values more assertively and in a spirit of reciprocity and mutual benefit in the context of the Union's external relations and to take steps to, inter alia, secure greater market access for European business and deepen regulatory cooperation with major trade partners. The Commission will endeavour to ensure that these commitments are implemented in a similar way by the Union's international partners.

(90) 3 years after the entry into force of the delegated act pursuant to which the passport is to apply to all AIFMs, ESMA should issue an opinion on the functioning of the passport then in force and on the functioning of national private placement regimes. It should also issue advice on the termination of those national regimes. The Commission should

adopt a delegated act within 3 months of receipt of the opinion and advice from ESMA, taking into account the criteria listed in, and the objectives of, this Directive, inter alia, relating to the internal market, investor protection and the effective monitoring of systemic risk, specifying the date when the national regimes referred to in this Directive should be brought to an end in all Member States.

(91) 4 years after the deadline for transposition of this Directive, the Commission should, on the basis of public consultation and in the light of the discussions with competent authorities, commence a review of the application and the scope of this Directive. That review should analyse the experience acquired in applying this Directive, its impact on investors, AIFs or AIFMs, in the Union and in third countries, and the extent to which the objectives of this Directive have been achieved, if necessary proposing appropriate amendments. That review should include a general survey of the functioning of the rules laid down in this Directive and the experience acquired in applying them. The Commission should in its review examine the functions of ESMA and the Union competent authorities in ensuring effective supervision of all AIFMs operating in the Union markets in the context of this Directive, including, inter alia – in accordance with Regulation (EU) No 1095/2010 – entrusting ESMA with further supervisory responsibilities in the field of authorisation and supervision of non-EU AIFMs. In this context the Commission should assess the costs and benefits of entrusting ESMA with such tasks.

(92) This Directive aims at establishing a framework capable of addressing the potential risks which might arise from the activities of AIFMs and ensuring the effective monitoring of those risks by the competent authorities within the Union. It is necessary to provide for a stringent regulatory and supervisory framework which leaves no gaps in financial regulation. In that regard reference is made to the existing due diligence requirements applicable to professional investors pursuant to the relevant regulation applicable to such investors. The Commission is invited to review the relevant legislation with respect to professional investors in order to assess the need for tighter requirements regarding the due diligence process to be undertaken by Union professional investors investing on their own initiative in non-EU financial products, such as non-EU AIFs.

(93) At the end of its review, the Commission should present a report to the European Parliament and the Council including, if appropriate, proposed amendments taking into account the objectives of this Directive and potential impacts on investors, AIFs or AIFMs, in the Union and in third countries.

(94) Since the objective of this Directive, namely to ensure a high level of investor protection by laying down a common framework for the authorisation and supervision of AIFMs, cannot be sufficiently achieved by the Member States, as evidenced by the deficiencies of existing nationally based regulation and oversight of those actors, and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(95) Directives 2003/41/EC and 2009/65/EC, Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies[21] and Regulation (EU) No 1095/2010 should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

(**1**) OJ C 272, 13.11.2009, p. 1.

(**2**) OJ C 18, 19.1.2011, p. 90.

(**3**) Position of the European Parliament of 11 November 2010 (not yet published in the Official Journal) and decision of the Council of 27 May 2011.

(**4**) OJ L 302, 17.11.2009, p. 32.

(**5**) OJ L 145, 30.4.2004, p. 1.

(**6**) OJ L 177, 30.6.2006, p. 1.

(**7**) OJ L 235, 23.9.2003, p. 10.

(**8**) OJ L 120, 15.5.2009, p. 22.

(**9**) OJ L 331, 15.12.2010, p. 84.

(**10**) OJ L 331, 15.12.2010, p. 12.

(**11**) OJ L 241, 2.9.2006, p. 26.

(**12**) OJ L 166, 11.6.1998, p. 45.

(**13**) OJ L 331, 15.12.2010, p. 1.

(**14**) OJ L 142, 30.4.2004, p. 12.

(**15**) OJ L 390, 31.12.2004, p. 38.

(**16**) OJ L 80, 23.3.2002, p. 29.

(**17**) OJ L 345, 31.12.2003, p. 64.

(**18**) OJ L 281, 23.11.1995, p. 31.

(**19**) OJ L 8, 12.1.2001, p. 1.

(**20**) OJ L 55, 28.2.2011, p. 13.

(**21**) OJ L 302, 17.11.2009, p. 1.