

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 X

TRANSITIONAL AND FINAL PROVISIONS

*Article 67*

**Delegated act on the application of Article 35 and Articles 37 to 41**

1 By 22 July 2015, ESMA shall issue to, the European Parliament, the Council and the Commission:

- a an opinion on the functioning of the passport for EU AIFMs managing and/or marketing EU AIFs pursuant to Articles 32 and 33 and on the functioning of the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States pursuant to the applicable national regimes set out in Articles 36 and 42; and
- b advice on the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the rules set out in Article 35 and Articles 37 to 41.

2 ESMA shall base its opinion and advice on the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States, inter alia, on:

- a as regards the functioning of the passport for EU AIFMs managing and/or marketing EU AIFs:
  - (i) the use made of the passport;
  - (ii) the problems encountered regarding:
    - effective cooperation among competent authorities,
    - effective functioning of the notification system,
    - investor protection,
    - mediation by ESMA, including the number of cases and the effectiveness of the mediation;
  - (iii) the effectiveness of the collection and sharing of information in relation to the monitoring of systemic risks by national competent authorities, ESMA and ESRB;
- b as regards the functioning of the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the applicable national regimes:
  - (i) compliance of EU AIFMs with all the requirements established in this Directive with the exception of Article 21;

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- (ii) compliance of non-EU AIFMs with Articles 22, 23 and 24 in respect of each AIF marketed by the AIFM and, where relevant, with Articles 26 to 30;
  - (iii) existence and effectiveness of cooperation arrangements for the purpose of systemic risk oversight and in line with international standards between the competent authorities of the Member State where the AIFs are marketed, in so far as applicable, the competent authorities of the home Member State of the EU AIF 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;
  - (iv) any issues relating to investor protection that might have occurred;
  - (v) any features of a third-country regulatory and supervisory framework which might prevent the effective exercise by the competent authorities of their supervisory functions under this Directive;
- c as regards the functioning of both systems, the potential market disruptions and distortions in competition (level playing field) or any general or specific difficulties which EU AIFMs encounter in establishing themselves or marketing AIFs they manage in any third country.

3 To that end, as from the entry into force of the national laws, regulations and administrative provisions necessary to comply with this Directive and until the issuance of the opinion of ESMA referred to in point (a) of paragraph 1, the competent authorities of the Member States shall, quarterly, provide ESMA with information on the AIFMs that are managing and/or marketing AIFs under their supervision, either under the application of the passport regime provided for in this Directive or under their national regimes, and with information needed for the assessment of the elements referred to in paragraph 2.

4 Where ESMA considers that there are no significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic risk, impeding the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the rules set out in Article 35 and Articles 37 to 41, it shall issue positive advice in this regard.

5 The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying the contents of the information to be provided pursuant to paragraph 2.

6 The Commission shall adopt a delegated act within 3 months after having received positive advice and an opinion from ESMA, and taking into account the criteria listed in paragraph 2 and the objectives of this Directive, such as those relating to the internal market, investor protection and the effective monitoring of systemic risk, in accordance with Article 56 and subject to the conditions of Articles 57 and 58, specifying the date when the rules set out in Article 35 and Articles 37 to 41 become applicable in all Member States.

If there is objection to the delegated act referred to in the first subparagraph in accordance with Article 58, the Commission shall re-adopt the delegated act pursuant to which the rules set out in Article 35 and Articles 37 to 41 shall become applicable in all Member States, in accordance with Article 56 and subject to the conditions of Articles 57 and 58, at a later stage which seems appropriate to it, taking into account the criteria listed in paragraph 2 and the objectives of this Directive, such as those relating to the internal market, investor protection and the effective monitoring of systemic risk.

7            If ESMA has not issued its advice within the time limit referred to in paragraph 1, the Commission shall request the advice to be provided within a new time limit.