

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 56*

**Exercise of the delegation**

1 The powers to adopt delegated acts referred to in Articles 3, 4, 9, 12, 14 to 25, 34 to 37, 40, 42, 53, 67 and 68 shall be conferred on the Commission for a period of 4 years from 21 July 2011. The Commission shall draw up a report in respect of the delegated powers no later than 6 months before the end of the 4-year period. The delegation of power shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it in accordance with Article 57.

2 As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

3 The powers to adopt delegated acts are conferred on the Commission subject to the conditions of Articles 57 and 58.

*Article 57*

**Revocation of the delegation**

1 The delegation of power referred to in Articles 3, 4, 9, 12, 14 to 25, 34 to 37, 40, 42, 53, 67 and 68 may be revoked at any time by the European Parliament or by the Council.

2 The institution which has commenced an internal procedure for deciding whether to revoke the delegation of power shall endeavour to inform the other institution and the Commission within a reasonable time before the final decision is taken, indicating the delegated power which could be subject to revocation and the possible reasons for a revocation.

3 The decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the *Official Journal of the European Union*.

*Article 58*

**Objections to delegated acts**

1 The European Parliament and the Council may object to a delegated act within a period of 3 months from the date of notification. At the initiative of the European Parliament or the Council that period shall be extended by 3 months.

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2 If, on expiry of the period referred to in paragraph 1, neither the European Parliament nor the Council has objected to the delegated act it shall be published in the *Official Journal of the European Union* and shall enter into force at the date stated therein.

The delegated act may be published in the *Official Journal of the European Union* and enter into force before the expiry of that period if, upon a justified request by the Commission, the European Parliament and the Council have both informed the Commission of their intention not to raise objections.

3 If either the European Parliament or the Council objects to the adopted delegated act within the period referred to in paragraph 1, it shall not enter into force. In accordance with Article 296 TFEU, the institution which objects shall state the reasons for objecting to the delegated act.

#### *Article 59*

### **Implementing measures**

1 The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC<sup>(1)</sup>. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2 Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

#### *Article 60*

### **Disclosure of derogations**

Where a Member State makes use of a derogation or option provided by Articles 6, 9, 21, 22, 28, 43 and Article 61(5), it shall inform the Commission thereof as well as of any subsequent changes. The Commission shall make the information public on a website or by other easily accessible means.

#### *Article 61*

### **Transitional provisions**

1 AIFMs performing activities under this Directive before 22 July 2013 shall take all necessary measures to comply with national law stemming from this Directive and shall submit an application for authorisation within 1 year of that date.

2 Articles 31, 32 and 33 shall not apply to the marketing of units or shares of AIFs that are subject to a current offer to the public under a prospectus that has been drawn up and published in accordance with Directive 2003/71/EC before 22 July 2013 for the duration of validity of that prospectus.

3 AIFMs in so far as they manage AIFs of the closed-ended type before 22 July 2013 which do not make any additional investments after 22 July 2013 may however continue to manage such AIFs without authorisation under this Directive.

4 AIFMs in so far as they manage AIFs of the closed-ended type whose subscription period for investors has closed prior to the entry into force of this Directive and are constituted

for a period of time which expires at the latest 3 years after 22 July 2013, may, however, continue to manage such AIFs without needing to comply with this Directive except for Article 22 and, where relevant, Articles 26 to 30, or to submit an application for authorisation under this Directive.

5 The competent authorities of the home Member State of an AIF or in case where the AIF is not regulated the competent authorities of the home Member State of an AIFM may allow institutions referred to in point (a) of Article 21(3) and established in another Member State to be appointed as a depositary until 22 July 2017. This provision shall be without prejudice to the full application of Article 21, with the exception of point (a) of paragraph 5 of that Article on the place where the depositary is to be established.

## <sup>F1</sup>Article 62

### [<sup>F1</sup>Amendments to Directive 2003/41/EC]

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#### Textual Amendments

- F1** Deleted by [Directive \(EU\) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision \(IORPs\) \(recast\) \(Text with EEA relevance\)](#).

## Article 63

### Amendments to Directive 2009/65/EC

Directive 2009/65/EC is amended as follows:

- (1) the following Article is inserted:

#### *Article 50a*

In order to ensure cross-sectoral consistency and to remove misalignment between the interest of firms that repackage loans into tradable securities and other financial instruments (originators) and UCITS that invest in those securities or other financial instruments, the Commission shall adopt, by means of delegated acts in accordance with Article 112a and subject to conditions of Articles 112b and 112c, measures laying down the requirements in the following areas:

- (a) the requirements that need to be met by the originator in order for a UCITS to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011, including requirements that ensure that the originator retains a net economic interest of not less than 5 %;
- (b) qualitative requirements that must be met by UCITS which invest in those securities or other financial instruments.;

- (2) Article 112(2) is replaced by the following:

2. The power to adopt the delegated acts referred to in Articles 12, 14, 23, 33, 43, 51, 60, 61, 62, 64, 75, 78, 81, 95 and 111 shall be conferred on the Commission for a period of 4 years from 4 January 2011. The power to adopt the delegated acts

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referred to in Article 50a shall be conferred on the Commission for a period of 4 years from 21 July 2011. The Commission shall draw up a report in respect of delegated powers at the latest 6 months before the end of the 4-year period. The delegation of power shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes them in accordance with Article 112a.;

(3) Article 112a(1) is replaced by the following:

1. The delegation of power referred to in Articles 12, 14, 23, 33, 43, 50a, 51, 60, 61, 62, 64, 75, 78, 81, 95 and 111 may be revoked at any time by the European Parliament or by the Council..

#### *Article 64*

### **Amendment to Regulation (EC) No 1060/2009**

In Regulation (EC) No 1060/2009, the first paragraph of Article 4(1) is replaced by the following:

1. Credit institutions as defined in Directive 2006/48/EC, investment firms as defined in Directive 2004/39/EC, insurance undertakings subject to the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the take-up and pursuit of the business of direct insurance other than life assurance<sup>(2)</sup>, assurance undertakings as defined in Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance<sup>(3)</sup>, reinsurance undertakings as defined in Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance<sup>(4)</sup>, UCITS as defined in 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 undertakings for collective investment in transferable securities (UCITS)<sup>(5)</sup>, institutions for occupational retirement provision as defined in Directive 2003/41/EC and alternative investment funds as defined in Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers<sup>(6)</sup> may use credit ratings for regulatory purposes only if they are issued by credit rating agencies established in the Union and registered in accordance with this Regulation..

#### *Article 65*

### **Amendment to Regulation (EU) No 1095/2010**

In Article 1(2) of Regulation (EU) No 1095/2010, the words ‘any future legislation in the area of Alternative Investment Fund Managers (AIFM)’ are replaced by the words ‘Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers<sup>(7)</sup>’

#### *Article 66*

### **Transposition**

- 1 By 22 July 2013, Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

2 Member States shall apply the laws, regulations and administrative provisions referred to in paragraph 1 from 22 July 2013.

3 Notwithstanding paragraph 2, Member States shall apply the laws, regulations and administrative provisions necessary to comply with Article 35 and Articles 37 to 41 in accordance with the delegated act adopted by the Commission pursuant to Article 67(6) and from the date specified therein.

4 Member States shall ensure that the laws, regulations and administrative provisions adopted by them in compliance with Articles 36 and 42 cease to apply in accordance with the delegated act adopted by the Commission pursuant to Article 68(6) and on the date specified therein.

5 When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication.

6 Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### *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;

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- 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;
  - (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.

### Article 68

#### **Delegated act on the termination of the application of Articles 36 and 42**

1 3 years after the entry into force of the delegated act referred to in Article 67(6) pursuant to which the rules set out in Article 35 and Articles 37 to 41 have become applicable in all Member States, ESMA shall issue to the European Parliament, the Council and the Commission:

- a an opinion on the functioning of the passport for EU AIFMs marketing non-EU AIFs in the Union pursuant to Article 35 and for non-EU AIFMs managing and/or marketing AIFs in the Union pursuant to Articles 37 to 41, 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 as set out in Articles 36 and 42; and
- b advice on the termination of the existence of the national regimes set out in Articles 36 and 42 in parallel with the existence of the passport 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 termination of the existence of the national regimes set out in Articles 36 and 42 inter alia:

- a as regards the functioning of the passport for EU AIFMs marketing non-EU AIFs in the Union and for non-EU AIFMs managing and/or marketing AIFs in the Union:
  - (i) the use made of the passport;
  - (ii) the problems encountered regarding:
    - effective cooperation among competent authorities,
    - effective functioning of the notification system,
    - the indication of the Member State of reference,
    - the effective exercise by the competent authorities of their supervisory functions being prevented by the laws, regulations or administrative provisions of a third country governing AIFMs, or by limitations in the supervisory and investigatory powers of the third country supervisory authorities,
    - investor protection,
    - investor access in the Union,
    - the impact on developing countries,
    - mediation by ESMA, including the number of cases and the effectiveness of the mediation;
  - (iii) the negotiation, conclusion, existence and effectiveness of the required cooperation arrangements;

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- (iv) the effectiveness of the collection and sharing of information in relation to the monitoring of systemic risks by national competent authorities, ESMA and the ESRB;
- (v) results of peer reviews referred to in Article 38;
- 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;
  - (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 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;
  - (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 the Union 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) and any potential negative effect on investor access or investment in or for the benefit of developing countries;
- d a quantitative assessment identifying the number of third-country jurisdictions in which there is established an AIFM that is marketing an AIF in a Member State either under the application of the passport regime referred to in Article 40 or under the national regimes referred to in Article 42.

3 To that end, as from the entry into force of the delegated act referred to in Article 67(6) and until the issuance of the ESMA opinion referred to in point (a) of paragraph 1 of this Article, the competent authorities 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.

4 If ESMA considers that there are no significant obstacles regarding investor protection, market disruption, competition or the monitoring of systemic risk, impeding the termination of the national regimes pursuant to Articles 36 and 42 and making the passport for the marketing of non-EU AIFs by EU AIFMs in the Union and the management and/or marketing of AIFs by non-EU AIFM in the Union in accordance with the rules set out in Article 35 and Articles 37 to 41 the sole possible regime for such activities by the relevant AIFMs in the Union, 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 national regimes set out in Articles 36 and 42 are to be terminated and the passport regime provided for in Article 35 and Articles 37 to 41 shall become the sole and mandatory regime 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 national regimes set out in Articles 36 and 42 are to be terminated and the passport regime provided for in Article 35 and Articles 37 to 41 shall become the sole and mandatory regime 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.

## *Article 69*

### **Review**

1 By 22 July 2017, the Commission shall, on the basis of public consultation and in the light of the discussions with competent authorities, start a review on the application and the scope of this Directive. That review shall analyse the experience acquired in applying this Directive, its impact on investors, AIFs or AIFMs, in the Union and in third countries, and the degree to which the objectives of this Directive have been achieved. The Commission shall, if necessary, propose appropriate amendments. The review shall include a general survey of the functioning of the rules in this Directive and the experience acquired in applying them, including:

- a the marketing by EU AIFMs of non-EU AIFs in the Member States taking place through national regimes;
- b the marketing of AIFs in the Member States by non-EU AIFMs taking place through national regimes;
- c the management and marketing of AIFs in the Union by AIFMs authorised in accordance with this Directive taking place through the passport regime provided for in this Directive;
- d the marketing of AIFs in the Union by or on behalf of persons or entities other than AIFMs;
- e the investment into AIFs by or on behalf of European professional investors;
- f the impact of the depositary rules set out in Article 21 on the depositary market in the Union;
- g the impact of the transparency and reporting requirements set out in Articles 22 to 24, 28 and 29 on the assessment of systemic risk;
- h the potential adverse impact on retail investors;
- i the impact of this Directive on the operation and viability of the private equity and venture capital funds;

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- j the impact of this Directive on the investor access in the Union;
- k the impact of this Directive on investment in or for the benefit of developing countries;
- l the impact of this Directive on the protection of non-listed companies or issuers provided by Articles 26 to 30 of this Directive and on the level playing field between AIFs and other investors after the acquisition of major holdings in or control over such non-listed companies or issuers.

When reviewing marketing and/or management of AIFs referred to in points (a), (b) and (c) of the first subparagraph, the Commission shall analyse the appropriateness of entrusting ESMA with further supervisory responsibilities in this area.

2 For the purposes of the review referred to in paragraph 1, Member States shall provide the Commission annually with information on the AIFMs that are managing and/or marketing AIFs under their supervision, either under the passport regime provided for in this Directive, or under their national regimes, with an indication of the date on which the passport regime has been transposed and, if relevant, applied, in their jurisdiction.

ESMA shall provide the Commission with information on all the non-EU AIFMs that have been authorised or have requested authorisation in accordance with Article 37.

The information referred to in the first and second subparagraphs shall include:

- a information on where the AIFMs concerned are established;
- b if applicable, identification of the EU AIFs managed and/or marketed by them;
- c if applicable, identification of the non-EU AIFs managed by EU AIFMs but not marketed in the Union;
- d if applicable, identification of the non-EU AIFs marketed in the Union;
- e information on the applicable regime, whether national or Union, under which the relevant AIFMs are performing their activities; and
- f any other information relevant to the understanding of how the management and the marketing of AIFs by AIFMs in the Union operates in practice.

3 The review referred to in paragraph 1 shall take due account of developments at international level and discussions with third countries and international organisations.

4 After finalising its review, the Commission shall, without undue delay, submit a report to the European Parliament and the Council. If appropriate, the Commission shall make proposals, including amendments to this Directive, taking into account the objectives of this Directive and its effects on investor protection, market disruption and competition, the monitoring of systemic risk and potential impacts on investors, AIFs or AIFMs in the Union and in third countries.

#### *Article 70*

#### **Entry into force**

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

*Article 71*

**Addressees**

This Directive is addressed to the Member States.

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- (1) OJ L 191, 13.7.2001, p. 45.
- (2) OJ L 228, 16.8.1973, p. 3.
- (3) OJ L 345, 19.12.2002, p. 1.
- (4) OJ L 323, 9.12.2005, p. 1.
- (5) OJ L 302, 17.11.2009, p. 32.
- (6) OJ L 174, 1.7.2011, p. 1.
- (7) OJ L 174, 1.7.2011, p. 1.