

# Law of 12 July 2013 on alternative investment fund managers

consolidated version as of 28 July 2023



Please note that this is a non-official translation drawn up by Arendt & Medernach for information purposes only. In case of discrepancies between the French and the English texts, the French text, as published in the *Mémorial*, the Luxembourg official journal, shall prevail.

The expression “consolidated version as of 28 July 2023” includes amendments introduced by the law of 21 July 2023, published in *Mémorial A* N° 442 of 24 July 2023.

# Law of 12 July 2013 on Alternative Investment Fund Managers

## Chapter 1. - General provisions

### Art. 1. Definitions

For the purpose of this Law, the following definitions shall apply:

(1) "EBA": the European Banking Authority established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council;

(2) "ESMA": the European Securities and Market Authority established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council;

(3) "competent authorities": the national authorities of Member States which are empowered, by law or regulation, to supervise AIFMs. In Luxembourg, the CSSF is the competent authority for the supervision of AIFMs subject to this Law;

(4) "supervisory authorities" in relation to non-EU AIFMs: the national authorities of a third country which are empowered, by law or regulation, to supervise AIFMs;

(5) "competent authorities of an EU AIF": the national authorities of a Member State which are empowered, by law or regulation, to supervise the AIFs. The CSSF is the competent authority for the supervision of AIFs established in Luxembourg;

(6) "supervisory authorities" in relation to non-EU AIFs: the national authorities of a third country which are empowered, by law or regulation, to supervise the AIFs;

(7) "competent authorities" in relation to a depositary:

a) if the depositary is a credit institution authorised under Directive 2006/48/EC, the competent authorities as defined in point 4) of Article 4 thereof;

b) if the depositary is an investment firm authorised under Directive 2004/39/EC, the competent authorities as defined in paragraph (1), point 22) of Article 4 thereof;

c) if the depositary falls within a category of institution referred to in point c) of the first subparagraph of paragraph (3) of Article 21 of Directive 2011/61/EU, the national authorities of its home Member State which are empowered, by law or regulation, to supervise such categories of institution;

d) if the depositary is an entity referred to in paragraph (3), third subparagraph of Article 21 of Directive 2011/61/EU, the national authorities of the Member State in which that entity has its registered office and which are empowered, by law or regulation, to supervise such entity or the official body competent to register or supervise such entity pursuant to the rules of professional conduct applicable thereto;

e) if the depositary is appointed as depositary for a non-EU AIF in accordance with paragraph (5), point b) of Article 21 of Directive 2011/61/EU and does not fall within the scope of points

a) to d) of this point, the relevant national authorities of the third country where the depository has its registered office;

(8) "initial capital": the funds which are referred to in points a) and b) of the first paragraph of Article 57 of Directive 2006/48/EC;

(9) "marketing": a direct or indirect offering or placement, at the initiative of the AIFM or on behalf of the AIFM, of units or shares of an AIF it manages, to or with investors domiciled or with a registered office in the European Union;

(10) "control": control as defined in Article 22, paragraphs 1 and 2, of Directive 2013/34/EU;

(11) "prime broker": a credit institution, a regulated investment firm or another entity subject to prudential regulation and ongoing supervision, offering services to professional investors primarily to finance or execute transactions in financial instruments as counterparty and which may also provide other services such as clearing and settlement of trades, custodial services, securities lending, customised technology and operational support facilities;

(12) "ESRB": the European Systemic Risk Board established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council;

(13) "CSSF": the *Commission de Surveillance du Secteur Financier* (the Commission for the Supervision of the Financial Sector);

(14) "Directive 77/91/EEC": Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited companies<sup>1</sup> and the maintenance and alteration of their capital, with a view to making such safeguards equivalent;

(15) (...) <sup>2</sup>

(16) "Directive 95/46/EC": 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;

(17) "Directive 97/9/EC": Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes;

(18) "Directive 98/26/EC": 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;

(19) "Directive 2002/14/EC": 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;

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<sup>1</sup> *société anonyme*

<sup>2</sup> Repealed by the Law of 21 July 2023.

(20) "Directive 2003/41/EC": 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;

(21) "Directive 2003/71/EC": 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 and amending Directive 2001/34/EC;

(22) "Directive 2004/25/EC": Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids;

(23) "Directive 2004/39/EC": Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments;

(24) "Directive 2004/109/EC": 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 and amending Directive 2001/34/EC;

(25) "Directive 2006/48/EC": 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;

(26) "Directive 2006/49/EC": Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions;

(27) "Directive 2006/73/EC": 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;

(28) "Directive 2009/65/EC": 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);

(29) "Directive 2011/61/EU": 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;

(29-1) "Directive 2013/34/EU": Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC;

(30) "leverage": any method by which the AIFM increases the exposure of an AIF it manages whether through borrowing of cash or transferable securities, or leverage embedded in derivative positions or by any other means;

(31) "issuer": an issuer within the meaning of paragraph (1), point d) of Article 2 of Directive 2004/109/EC, where that issuer has its registered office in the European Union, and where its shares are admitted to trading on a regulated market within the meaning of paragraph (1), point 14) of Article 4 of Directive 2004/39/EC;

(32) "parent undertaking": a parent undertaking within the meaning of Article 22, paragraphs 1 to 5, of Directive 2013/34/EU;

(33) "established":

- a) for AIFMs, "having its registered office in";
- b) for AIFs, "being authorised or registered in" or, if the AIF is not authorised or registered, "having its registered office in";
- c) for depositaries, "having its registered office or branch in";
- d) for legal representatives that are legal persons, "having its registered office or branch in";
- e) for legal representatives that are natural persons, "domiciled in";

(34) "Member State": a Member State of the European Union. The States that are contracting parties to the Agreement creating the European Economic Area other than the Member States of the European Union, within the limits set forth by this Agreement and related acts, are considered as equivalent to Member States of the European Union.

(35) "home Member State of the AIF":

- a) the Member State in which the AIF is authorised or registered under applicable national law, or in case of multiple authorisations or registrations, the Member State in which the AIF has been authorised or registered for the first time; or
- b) if the AIF is neither authorised nor registered in a Member State, the Member State in which the AIF has its registered office and/or head office;

(36) "home Member State of the AIFM": the Member State in which the AIFM has its registered office; for non-EU AIFMs, all references to "home Member State of the AIFM" in this Law shall be read as the "Member State of reference", as provided for in Chapter 7;

(37) "host Member State of the AIFM": any of the following:

- a) a Member State, other than the home Member State, in which an EU AIFM manages EU AIFs;
- b) a Member State, other than the home Member State, in which an EU AIFM markets units or shares of an EU AIF;
- c) a Member State, other than the home Member State, in which an EU AIFM markets units or shares of a non-EU AIF;
- d) a Member State, other than the Member State of reference, in which a non-EU AIFM manages EU AIFs;
- e) a Member State, other than the Member State of reference, in which a non-EU AIFM markets units or shares of an EU AIF;

- f) a Member State, other than the Member State of reference, in which a non-EU AIFM markets units or shares of a non-EU AIF;
- g) the Member State, other than the home Member State, in which an EU AIFM provides the services referred to in paragraph 4 of Article 6 of Directive 2011/61/EU.

(38) "Member State of reference": the Member State determined in accordance with paragraph (4) of Article 37 of Directive 2011/61/EU;

(39) "Alternative Investment Funds (AIFs)": collective investment undertakings, including investment compartments thereof, which:

- a) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- b) do not require authorisation pursuant to Article 5 of Directive 2009/65/EC;

(40) "EU AIF":

- a) an AIF which is authorised or registered in a Member State under the applicable national law; or
- b) an AIF which is not authorised or registered in a Member State, but has its registered office and/or head office in a Member State;

(41) "non-EU AIF": an AIF which is not an EU AIF;

(42) "feeder AIF": an AIF which:

- a) invests at least 85% of its assets in units or shares of another AIF (hereafter the "master AIF");
- b) invests at least 85% of its assets in more than one master AIF where those master AIFs have identical investment strategies; or
- c) has otherwise an exposure of at least 85% of its assets to such a master AIF;

(43) "master AIF": an AIF in which another AIF invests or has an exposure in accordance with point (42);

(44) "subsidiary": a subsidiary undertaking as defined in Article 22, paragraphs 1 to 5, of Directive 2013/34/EU;

(45) "own funds": own funds as referred to in Articles 56 to 67 of Directive 2006/48/EC. For the purposes of applying this definition, Articles 13 to 16 of Directive 2006/49/EC are applied *mutatis mutandis*;

(46) "Alternative Investment Fund Managers (AIFMs)": legal persons whose regular business is managing one or more AIFs;

(47) "EU AIFM": an AIFM which has its registered office in a Member State;

(48) "non-EU AIFM": an AIFM which is not an EU AIFM;

(49) "external AIFM": an AIFM which is the legal person appointed by the AIF or on behalf of the AIF and which, through this appointment, is responsible for managing the AIF;

(50) "managing AIFs": performing at least investment management functions referred to in point 1a) or b) of Annex I of Directive 2011/61/EU for one or more AIFs;

(51) "financial instrument": an instrument as specified in Section C of Annex I to Directive 2004/39/EC;

(52) "carried interest": a share in the profits of the AIF accrued to the AIFM as compensation for the management of the AIF and excluding any share in the profits of the AIF accrued to the AIFM as a return on any investment by the AIFM into the AIF;

(53) "professional investor": an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to Directive 2004/39/EC;

(54) "retail investor": an investor who is not a professional investor;

(55) "close links": a situation in which two or more natural or legal persons are linked by:

- a) participation, namely ownership, directly or by way of control, of 20% or more of the voting rights or capital of an undertaking;
- b) control, namely the relationship between a parent undertaking and a subsidiary, as referred to in Article 22, paragraphs 1 and 2, of Directive 2013/34/EU, or a similar relationship between a natural or legal person and an undertaking; for the purposes of this point a subsidiary undertaking of a subsidiary undertaking shall also be considered to be a subsidiary of the parent undertaking of those subsidiaries.

A situation in which two or more natural or legal persons are permanently linked to the same person by a control relationship shall also be regarded as constituting a "close link" between such persons;

(56) "UCITS": an undertaking for collective investment in transferable securities authorised in accordance with Article 5 of Directive 2009/65/EC;

(57) "qualifying holding": a direct or indirect holding in an AIFM which represents 10% or more of the capital or of the voting rights, in accordance with Articles 9 and 10 of Directive 2004/109/EC, taking into account the conditions regarding aggregation of the holding laid down in paragraphs (4) and (5) of Article 12 thereof, or which makes it possible to exercise a significant influence over the management of the AIFM in which that holding subsists;

(58) "third country": a State which is not a Member State;

(58-1) "pre-marketing": provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM or on its behalf, to potential professional investors domiciled or with a registered office in the European Union in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with Article 31 or 32 of Directive 2011/61/EU, in that Member State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment;

(59) "legal representative": a natural person domiciled in the European Union or a legal person with its registered office in the European Union, and which, expressly designated by a non-EU AIFM, acts on behalf of such non-EU AIFM *vis-à-vis* the authorities, clients, bodies and counterparties to the non-EU AIFM in the European Union with regard to the non-EU AIFM's obligations under Directive 2011/61/EU;

(60) "employees' representatives": employees' representatives as defined in point e) of Article 2 of Directive 2002/14/EC;

(61) "UCITS management company": a management company authorised pursuant to Chapter 15 of the amended Law of 17 December 2010 on undertakings for collective investment;

(62) "holding company": a company with shareholdings in one or more other companies, the commercial purpose of which is to carry out a business strategy or strategies through its subsidiaries, associated companies or participations in order to contribute to their long-term value, and which is either a company:

- a) operating on its own account and whose shares are admitted to trading on a regulated market in the European Union; or
- b) not established for the main purpose of generating returns for its investors by means of divestment of its subsidiaries or associated companies, as evidenced in its annual report or other official documents;

(63) "non-listed company": a company which has its registered office in the European Union and the shares of which are not admitted to trading on a regulated market within the meaning of paragraph (1), point 14) of Article 4 of Directive 2004/39/EC;

(64) "securitisation special purpose entities": entities whose sole purpose is to carry on a securitisation or securitisations within the meaning of point 2) of Article 1 of Regulation (EC) No 24/2009 of the European Central Bank of 19 December 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions and other activities which are appropriate to accomplish that purpose;

(65) "branch": when relating to an AIFM, a place of business which is a part of an AIFM, which has no legal personality and which provides the services for which the AIFM has been authorised; all the places of business established in the same Member State by an AIFM with its registered office in another Member State or in a third country shall be regarded as a single branch.

## **Art. 2. Subject matter and scope**

(1) This Law lays down the rules for the authorisation, ongoing operation and the requirements of transparency of AIFMs established in Luxembourg which manage and/or market AIFs in the European Union.

Subject to paragraph (2) of this Article and to Article 3, this Law shall apply to every legal person governed by Luxembourg law, the regular business of which is to manage one or more AIFs irrespective of whether these AIFs are AIFs established in Luxembourg, AIFs established in another Member State of the European Union or AIFs established in third countries, the AIF belongs to the open-ended or closed-ended type and whatever the legal form of the AIF or the legal structure of the AIFM.

This Law shall also apply to non-EU AIFMs which manage and/or market one or more AIFs established in the European Union or in a third country, where Luxembourg is defined as the Member State of reference of the AIFM within the meaning of Article 38 of this Law.

The AIFMs referred to in this paragraph must comply at all times with the provisions of this Law.

Without prejudice to the provisions relating to monitoring provided by this Law, if they are part of a financial conglomerate within the meaning of Article 2, point 14, of Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council, the managers referred to in this paragraph are also submitted to the supplementary supervision undertaken by the CSSF as per the provisions provided for in Chapter 3<sup>ter</sup> of Part III of the amended Law of 5 April 1993 on the financial sector.

(2) This Law shall not apply to:

- a) holding companies;
- b) institutions for occupational retirement provision which are covered by Directive 2003/41/EC, including, where applicable, the authorised entities responsible for managing such institutions and acting on their behalf referred to in paragraph (1) of Article 2 of that Directive, or the investment managers appointed pursuant to paragraph (1) of Article 19 of that Directive, in so far as they do not manage AIFs;
- c) supranational institutions, such as the European Central Bank, the European Investment Bank, the European Investment Fund, the European Financial Stability Facility S.A., the European Stability Mechanism, the European Development Finance Institutions and bilateral development banks, the International Monetary Fund and other supra-national institutions and other similar international organisations, in the event that such institutions or organisations manage AIFs and in so far as those AIFs act in the public interest;
- d) the Central Bank of Luxembourg and other national central banks;
- e) national, regional and local governments and bodies or other organisations or institutions which manage funds supporting social security and pension systems;
- f) employee participation schemes and employee savings schemes;
- g) securitisation special purpose entities.

### **Art. 3. Exemptions**

(1) This Law shall not apply to AIFMs established in Luxembourg in so far as they manage one or more AIFs whose only investors are the AIFM or the parent undertakings or the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, provided that none of those investors is itself an AIF.

(2) Without prejudice to the application of Article 50, only paragraphs (3) and (4) of this Article shall apply to the following AIFMs:

- a) AIFMs established in Luxembourg which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management, including any assets acquired through use of leverage, in total do not exceed a total threshold of EUR 100,000,000; or
- b) AIFMs established in Luxembourg which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management in total do not exceed a threshold of EUR 500,000,000 when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of five years following the date of initial investment in each AIF.

(3) The AIFMs referred to in paragraph (2) must:

- a) be registered with the CSSF;
- b) identify themselves and the AIFs that they manage to the CSSF at the time of registration;
- c) provide information on the investment strategies of the AIFs that they manage to the CSSF at the time of registration;
- d) regularly communicate to the CSSF information on the main instruments in which they are trading and on the principal exposures and most important concentrations of the AIFs that they manage in order to enable the CSSF to monitor systemic risk effectively; and
- e) inform the CSSF in the event that they no longer meet the conditions referred to in paragraph (2).

Where the conditions set out in paragraph (2) are no longer met, the AIFM concerned must apply for authorisation within 30 calendar days in accordance with the procedures laid down in this Law.

(4) AIFMs referred to in paragraph (2) shall not benefit from any of the rights granted under this Law unless they choose to opt in under this Law. Where AIFMs opt in, this Law shall become applicable in its entirety.

(5) In the event of failure to comply with the provisions of paragraph (3) of this Article, the CSSF may impose the fines provided for in paragraph (2) of Article 51 of this Law.

#### **Art. 4. Determination of the AIFM**

(1) Each AIF established in Luxembourg managed within the scope of this Law must have a single AIFM, which shall be responsible for ensuring compliance with the provisions of this Law. The AIFM shall be:

- a) either an external AIFM; the external AIFM may be an AIFM established in Luxembourg, in another Member State or in a third country which is duly authorised pursuant to Directive 2011/61/EU;

- b) or, where the legal form of the AIF permits an internal management and where the AIF's governing body chooses not to appoint an external AIFM, the AIF itself, which shall then be authorised as AIFM.

(2) In cases where an authorised AIFM established in Luxembourg has been designated as the external AIFM of an AIF, whether the AIF is an AIF established in Luxembourg, an AIF established in another Member State or an AIF established in a third country, and this AIFM is unable to ensure compliance with requirements of this Law for which this AIF or another entity on its behalf is responsible, it shall immediately inform the CSSF and, if applicable, the competent authorities of the home Member State of the AIF concerned. The CSSF shall require the AIFM to take the necessary steps to remedy the situation.

(3) If, despite the steps referred to in paragraph (2), the non-compliance with the requirements of this Law persists, the CSSF shall require that the AIFM resign as external AIFM of the AIF concerned. In that case, the AIF shall no longer be marketed in the European Union. If it concerns a non-EU AIFM managing a non-EU AIF, the AIF shall no longer be marketed in the European Union. The CSSF, when it is the competent authority of the home Member State of the AIFM shall immediately inform the competent authorities of the host Member States of the AIFM thereof.

## **Chapter 2. - Authorisation of AIFMs**

### **Art. 5. Conditions for taking up activities as AIFMs**

(1) No person referred to in paragraph (1) of Article 2 may exercise in Luxembourg the activity of AIFM responsible for the management of AIF unless it is authorised in accordance with this Chapter.

The persons referred to in this paragraph shall meet the conditions for authorisation set for in this Law at all times.

(2) An external AIFM shall not engage in activities other than those referred to in Annex I to this Law and the additional management of UCITS subject to authorisation under Directive 2009/65/EC.

(3) An internally managed AIF shall not engage in any activities other than the activities of internal management of that AIF as referred to in Annex I of this Law.

(4) By way of derogation from paragraph (2), external AIFMs may, in addition, provide the following services:

- a) management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement provision in accordance with paragraph (1) of Article 19 of Directive 2003/41/EC, in accordance with mandates given by investors on a discretionary, client-by-client basis;
- b) non-core services comprising:
  - i) investment advice;
  - ii) safe-keeping and administration in relation to shares or units of collective investment undertakings;

iii) reception and transmission of orders in relation to financial instruments.

(5) AIFMs shall not be authorised under this Chapter to provide:

- a) only the services referred to in paragraph (4);
- b) non-core services referred to in point b) of paragraph (4) without also being authorised for the services referred to in point a) of paragraph (4);
- c) only the activities referred to in point 2 of Annex I; or
- d) the services referred to in point 1 a) of Annex I of this Law without also providing the services referred to in point 1 b) of Annex I of this Law or *vice versa*.

(6) Articles 1-1, 37-1 and 37-3 of the amended Law of 5 April 1993 relating to the financial sector shall also apply to the provision of the services referred to in paragraph (4) of this Article by AIFMs.

In addition, sub-paragraph 2 of paragraph 4 of Article 101 of the amended Law of 17 December 2010 on undertakings for collective investment applies to AIFMs which provide the service referred to in point a) of paragraph (4) of this Article.

(7) AIFMs must provide the CSSF, on request, with all the information necessary to allow the CSSF to monitor compliance with the conditions referred to in this Law at all times.

(8) Credit institutions and investment firms authorised under the amended Law of 5 April 1993 relating to the financial sector shall not be required to obtain an authorisation under this Law in order to provide investment services such as individual portfolio management in respect of AIFs. However, investment firms shall, directly or indirectly, offer units or shares of AIFs to investors in the European Union, or place such units or shares with investors in the European Union, only to the extent that the units or shares can be marketed in accordance with Directive 2011/61/EU.

## **Art. 6. Application for authorisation**

(1) The taking up of the activity of AIFMs established in Luxembourg is subject to an authorisation by the CSSF.

(2) The application for authorisation shall include the following information:

- a) information on the persons effectively conducting the business of the AIFM;
- b) information on the identities of the AIFM's shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and on the amounts of those holdings;
- c) a programme of activity setting out the organisational structure of the AIFM, including information on how the AIFM intends to comply with its obligations under Chapters 2, 3 and 4 and, where applicable, Chapters 5, 6, 7 and 8 of this Law;
- d) information on the remuneration policies and practices pursuant to Article 12;

- e) information on arrangements made for the delegation and sub-delegation to third parties of functions as referred to in Article 18.

(3) In addition, the application for authorisation shall include the following information on the AIFs that the AIFM intends to manage:

- a) information about the investment strategies including the types of underlying funds if the AIF is a fund of funds, and the AIFM's policy as regards the use of leverage, and the risk profiles and other characteristics of the AIFs it manages or intends to manage, including information about the Member States or third countries in which such AIFs are established or are expected to be established;
- b) information on where the master AIF is established if the AIF is a feeder AIF;
- c) the management regulations or instruments of incorporation of each AIF the AIFM intends to manage;
- d) information on the arrangements made for the appointment of the depositary in accordance with Article 19 for each AIF the AIFM intends to manage;
- e) any additional information referred to in paragraph (1) of Article 21 for each AIF the AIFM manages or intends to manage.

(4) Where a UCITS management company, authorised pursuant to Chapter 15 of the amended Law of 17 December 2010 on undertakings for collective investment, or a management company authorised pursuant to paragraph (1) of Article 125 of that Law, applies for authorisation as an AIFM under this Law, the management company concerned shall not be required to provide information or documents which it has already provided to the CSSF when applying for authorisation under the amended Law of 17 December 2010, provided that such information or documents remain up-to-date.

#### **Art. 7. Conditions for granting authorisation**

(1) The CSSF shall not grant authorisation to the AIFM established in Luxembourg unless the following conditions are met:

- a) the CSSF considers that the AIFM will be able to meet the conditions of this Law;
- b) the AIFM has sufficient initial capital and own funds in accordance with Article 8;
- c) the persons who effectively conduct the business of the AIFM are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the AIFs managed by the AIFM, the names of those persons and of every person succeeding them in office being communicated forthwith to the CSSF; the conduct of the business of the AIFM must be decided by at least two persons meeting such conditions;
- d) the shareholders or partners of the AIFM that have qualifying holdings are suitable taking into account the need to ensure the sound and prudent management of the AIFM; and
- e) for each AIFM established in Luxembourg, if the head office and the registered office of each AIFM are located in Luxembourg.

Authorisation granted to an AIFM by the CSSF pursuant to this Chapter shall be valid for all Member States.

Authorised AIFMs shall be entered by the CSSF on a list. That entry shall be tantamount to authorisation and shall be notified by the CSSF to the AIFM concerned. This list and any amendments made thereto will be published by the CSSF in the *Mémorial*<sup>3</sup>.

(2) The relevant competent authorities of the other Member States involved shall be consulted by the CSSF before authorisation is granted to the following AIFMs:

- a) a subsidiary of another AIFM, of a UCITS management company, of an investment firm, of a credit institution or of an insurance undertaking authorised in another Member State;
- b) a subsidiary of the parent undertaking of another AIFM, of a UCITS management company, of an investment firm, of a credit institution or of an insurance undertaking authorised in another Member State; and
- c) a company controlled by the same natural or legal persons as those that control another AIFM, a UCITS management company, an investment firm, a credit institution or an insurance undertaking authorised in another Member State.

(3) Where close links exist between the AIFM and other natural or legal persons, the CSSF shall only grant authorisation if those links do not prevent the effective exercise of its supervisory functions.

The CSSF shall also refuse authorisation if the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the AIFM has close links, or difficulties involved in their enforcement, prevent the effective exercise of its supervisory functions.

(4) The CSSF may restrict the scope of the authorisation, in particular as regards the investment strategies of AIFs the AIFM is allowed to manage.

(5) The AIFM shall be informed in writing, within three months of the submission of a complete application, whether or not authorisation has been granted. The CSSF may prolong this period for up to three additional months, where it considers it necessary due to the specific circumstances of the case and after having notified the AIFM accordingly.

For the purpose of this paragraph an application is deemed complete if the AIFM has at least submitted the information referred to in paragraph (2), points a) to d) of Article 6 and paragraph (3), points a) and b) of Article 6.

The AIFM may start managing AIFs in Luxembourg with investment strategies described in the application for authorisation in accordance with paragraph (3), point a) of Article 6 as soon as the authorisation is granted, but not earlier than one month after having submitted any missing information referred to in paragraph (2), point e) of Article 6 and paragraph (3), points c), d) and e) of Article 6.

(6) No person shall make use of designations or of a description giving the impression that its activities are subject to this Law if it has not obtained the authorisation provided for in this Article.

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<sup>3</sup> The *Mémorial B, Recueil Administratif et Economique* is the part of the Luxembourg official gazette in which certain administrative publications are made.

**Art. 7bis.**

(1) Without prejudice to the provisions provided for in Article 7, the authorisation of an AIFM is subject to the condition that the latter entrusts the audit of its annual accounting documents to one or more independent auditors<sup>4</sup> who can prove that they have adequate professional experience.

(2) Any change regarding the independent auditors must be previously approved by the CSSF.

(3) The institution of statutory auditors<sup>5</sup> provided for by the Law of 10 August 1915 concerning commercial companies, as amended, and by Article 900-3<sup>6</sup> of that Law, shall not apply to AIFMs subject to this Chapter.

The institution of statutory auditors provided for by Article 1100-15 of the Law of 10th August 1915 on commercial companies, as amended, shall not apply to the AIFMs referred to in this Chapter. Upon completion of the liquidation, a report on the liquidation is drawn up by the independent auditor. This report is tabled at the general meeting at which the liquidators report on the application of the corporate assets and submit the accounts and supporting documents. The same meeting resolves on the approval of the accounts of the liquidation, the discharge and the closure of the liquidation.

Where the AIFM intends to appoint an independent auditor who is not the independent auditor of the AIFM appointed pursuant to paragraph 1, this appointment must be authorised in advance by the CSSF.

(4) Every AIFM subject to the supervision of the CSSF whose accounts are audited by an independent auditor, must communicate spontaneously the reports and written comments issued by the independent auditor in the context of its audit of the annual accounting documents to the CSSF.

The CSSF may regulate the scope of the mandate for the audit of annual accounting documents and the content of the reports and written comments of the independent auditor referred to in the preceding sub-paragraph, without prejudice to the legal provisions governing the content of the independent auditor's<sup>7</sup> report.

(5) The independent auditor must report promptly to the CSSF any fact or decision which he has become aware of while carrying out the audit of the accounting information contained in the annual report of an AIFM or any other legal task concerning an AIFM or an AIF, where any such fact or decision is likely to:

- constitute a material breach of this Law or the regulations adopted for its execution; or
- impair the continuous functioning of the AIFM, or of an undertaking contributing towards its business activity; or
- lead to a refusal to certify the accounts or to the expression of reservations thereon.

The independent auditor has also a duty to promptly report to the CSSF in the accomplishment of its duties referred to in the preceding sub-paragraph in respect of an AIFM, any fact or decision concerning the AIFM and meeting the criteria listed in the preceding sub-paragraph, of which it has become aware

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<sup>4</sup> *réviseurs d'entreprises agréés*. Note that Art. 26-1 of the law of 10 August 1915 on commercial companies has been amended by the law of 23 July 2016 on the reform of the audit profession. The notion "*réviseur d'entreprises agréé*" has been replaced by "*réviseur d'entreprises*".

<sup>5</sup> *commissaires aux comptes*

<sup>6</sup> Former Article 140 (Renumbering by the Grand-Ducal Regulation of 5 December 2017).

<sup>7</sup> *contrôleur légal des comptes*

while carrying out the audit of the accounting information contained in its annual report or while carrying out any other legal task related to another undertaking having close links resulting from a control relationship with this AIFM or an undertaking contributing towards its business activity.

If, in the discharge of its duties, the independent auditor becomes aware that the information provided to investors or to the CSSF in the reports or other documents of the AIFM does not truly describe the financial situation and the assets and liabilities of the AIFM, it is obliged to inform the CSSF forthwith.

The independent auditor is also obliged to provide the CSSF with all information or certificates which it may require on any matters of which the independent auditor has or ought to have knowledge in connection with the discharge of its duties.

The disclosure to the CSSF in good faith by the independent auditor of any fact or decision referred to in this paragraph does not constitute a breach of professional secrecy or of any restriction on disclosure of information imposed by contract and shall not result in liability of any kind of the approved statutory auditor.

The CSSF may request an independent auditor to perform a control of one or several particular aspects of the activities and operations of an AIFM. This control shall be carried out at the expense of the AIFM concerned.

(6) Where a UCITS management company, authorised pursuant to Chapter 15 of the amended Law of 17 December 2010 on undertakings for collective investment, or a management company authorised pursuant to Article 125-2 of that Law, applies for authorisation as an AIFM under Chapter 2, the independent auditor of the management company concerned may also be mandated to accomplish the missions referred to in this Article.

#### **Art. 8. Initial capital and own funds**

(1) An AIFM which is an internally managed AIF, within the meaning of paragraph (1), point b) of Article 4, must have an initial capital of at least EUR 300,000.

(2) An AIFM which is appointed as external manager of one or more AIFs, within the meaning of paragraph (1), point a) of Article 4, must have an initial capital of at least EUR 125,000 in accordance with the following provisions.

(3) Where the value of the portfolios of AIFs managed by the AIFM exceeds EUR 250,000,000, the AIFM must provide an additional amount of own funds. That additional amount of own funds shall be equal to 0.02% of the amount by which the value of the portfolios of the AIFM exceeds EUR 250,000,000. The required total of the initial capital and the additional amount shall not, however, exceed EUR 10,000,000.

(4) For the purpose of applying paragraph (3), AIFs managed by the AIFM, including AIFs for which the AIFM has delegated functions in accordance with Article 18 but excluding AIF portfolios that the AIFM is managing under delegation, shall be deemed to be the portfolios of the AIFM.

(5) Irrespective of paragraph (3), the own funds of the AIFM shall never be less than the amount required under Article 13 of Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014.

(6) AIFMs may not provide up to 50% of the additional amount of own funds referred to in paragraph (3) if they benefit from a guarantee of the same amount given by a credit institution or an insurance undertaking which has its registered office in a Member State, or in a third country where it is subject to prudential rules considered by the CSSF as equivalent to those provided by Union law.

(7) To cover potential professional liability risks resulting from activities AIFMs may carry out pursuant to this Law, both internally managed AIFs and external AIFMs shall either:

- a) have additional own funds which are appropriate to cover potential liability risks arising from professional negligence; or
- b) hold a professional indemnity insurance against liability arising from professional negligence which is appropriate to the risks covered.

(8) Own funds, including any additional own funds as referred to in point a) of paragraph (7), shall be invested in liquid assets or assets readily convertible to cash in the short term and must not include speculative positions.

9) With the exception of paragraphs (7) and (8), this Article shall not apply to AIFMs which are also UCITS management companies authorised in accordance with Chapter 15 of the amended Law of 17 December 2010 on undertakings for collective investment.

#### **Art. 9. Changes in the scope of the authorisation**

(1) The granting of authorisation implies an obligation for the AIFMs, before implementation, to notify the CSSF of any material changes, in particular to the information provided in accordance with Article 6 upon which the CSSF based itself to grant the authorisation.

(2) If the CSSF decides to impose restrictions or reject the changes to the conditions for initial authorisation, the AIFM shall be informed thereof within one month of receipt of the notification referred to in paragraph (1). The CSSF may prolong that period for up to one month where it considers this to be necessary because of the specific circumstances of the case and after having notified the AIFM accordingly. The changes shall be implemented if the CSSF does not oppose the changes within the relevant assessment period.

#### **Art. 10. Withdrawal of the authorisation and liquidation**

(1) The CSSF may withdraw the authorisation issued to an AIFM, on the basis of this Chapter, where that AIFM:

- a) does not make use of the authorisation within twelve months, expressly renounces the authorisation or has ceased the activity covered by this Law for the preceding six months;
- b) obtained the authorisation by making false statements or by any other irregular means;
- c) no longer meets the conditions under which authorisation was granted;
- d) no longer complies with the provisions of the amended Law of 5 April 1993 relating to the financial sector, resulting from the transposition of Directive 2006/49/EC, if its authorisation

also covers the discretionary portfolio management service referred to in paragraph (4), point a) of Article 5 of this Law;

- e) has seriously or systematically infringed the provisions of this Law or of its implementing regulations; or
- f) falls within any of the cases where Luxembourg law, in respect of matters outside the scope of this Law, provides for withdrawal.

(2) The decision of the CSSF regarding the withdrawal from the list referred to in paragraph (1) of Article 7, shall, as from the notification thereof to the AIFM concerned and at its expense, until the judgment ordering liquidation provided for in paragraph (3), *ipso jure* entail the suspension of any payment by this AIFM and a prohibition, on penalty of nullity, of taking any measures other than protective measures, except with the authorisation of the supervisory commissioner<sup>8</sup>. The function of supervisory commissioner is carried out by one or more supervisory commissioners appointed by the judge presiding over the District Court<sup>9</sup> dealing with commercial matters ruling on a request made by the CSSF. The request is made in accordance with the procedure applicable to summary proceedings before the Court in the district where the AIFM has its registered office. The supervisory commissioners must have the skills and professional experience required to perform their duties. The CSSF shall *ipso jure* hold the office of supervisory commissioner pending the appointment of the supervisory commissioner(s) by the Court.

The written authorisation of the supervisory commissioners is required for all actions and decisions of the AIFM and, failing such authorisation, they shall be void.

The Court may, however, limit the scope of operations subject to authorisation.

The supervisory commissioners may submit for consideration to the relevant bodies of the AIFM any proposals which they consider appropriate. They may attend proceedings of the administrative, management, executive or supervisory bodies of the AIFM.

The Court shall decide as to the expenses and fees of the supervisory commissioners. It may grant them advances.

The judgment pronouncing dissolution and ordering liquidation provided for in paragraph (3) shall terminate the functions of the supervisory commissioner. Before deciding on the appointment of one or more liquidators, the Court shall receive a report from the supervisory commissioners on the use made of the assets of the AIFM. In the absence of a judgment pronouncing dissolution and ordering liquidation within one year of notification to the AIFM concerned of the decision of withdrawal from the list, the supervisory commissioners shall report to the Court on an annual basis. Within one month after their replacement, the supervisory commissioners shall report to the liquidators appointed in such judgment on the use of the AIFM's assets and submit the accounts and supporting documents to them.

If the withdrawal decision is reversed on appeal in accordance with Article 52, paragraph (2), the supervisory commissioner shall be deemed to have resigned.

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<sup>8</sup> *commissaire de surveillance*

<sup>9</sup> *tribunal d'arrondissement*

(3) The District Court dealing with commercial matters shall, at the request of the Public Prosecutor<sup>10</sup> acting on its own initiative or at the request of the CSSF, pronounce the dissolution and liquidation of the AIFMs whose entry on the list referred to in paragraph (1) of Article 7, has definitely been refused or withdrawn.

When ordering the liquidation, the Court shall appoint a reporting judge<sup>11</sup> and one or more liquidators. It shall determine the method of liquidation. It may render applicable as far as it may determine, the rules governing bankruptcy. The method of liquidation may be changed by subsequent decision, either at the Court's own motion or at the request of the liquidator(s).

The Court shall decide as to the expenses and fees of the liquidators. It may grant advances to them. The judgment pronouncing dissolution and ordering liquidation shall be enforceable on a provisional basis.

(4) The liquidator(s) may bring and defend all actions on behalf of the AIFM, receive all payments, grant releases with or without discharge, realise all the assets of the AIFM and reemploy the proceeds therefrom, issue or endorse any negotiable instruments, and compound or compromise all claims. They may alienate immovable property of the AIFM by public auction.

They may also, but only with the authorisation of the Court, mortgage and pledge its assets and alienate its immovable property by private treaty.

(5) As from the day of the judgment, no legal actions relating to movable or immovable property nor any enforcement procedures relating to movable or immovable property may be pursued, commenced or exercised otherwise than against the liquidators.

The judgment ordering the liquidation shall terminate all seizures effected at the request of general creditors who are not secured by charges<sup>12</sup> on movable and immovable property.

(6) After payment or deposit of the sums necessary for the discharge of the debts, the liquidators shall distribute to the creditors the sums or assets due to them.

(7) The Court's decisions pronouncing the dissolution and ordering the liquidation of an AIFM shall be published in the *Recueil électronique des sociétés et associations* and in two newspapers with adequate circulation specified by the Court, at least one of which must be a Luxembourg newspaper. The liquidator(s) shall arrange for such publications.

(8) If there are no or insufficient assets, as ascertained by the reporting judge, the documents relating to the proceedings shall be exempt from any registry and registration duties and the expenses and fees of the liquidators shall be borne by the Treasury and paid as judicial costs.

(9) The liquidators shall be liable both to third parties and to the AIFM for the discharge of their duties and for any faults committed in the conduct of their activities.

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<sup>10</sup> *procureur d'État*

<sup>11</sup> *juge-commissaire*

<sup>12</sup> *créanciers chirographaires et non-privilégiés*

(10) When the liquidation is completed, the liquidators shall report to the Court on the use made of the assets of the AIFM and shall submit the accounts and supporting documents thereof. The Court shall appoint auditors<sup>13</sup> to examine the documents.

After receipt of the auditors' report, a ruling shall be given on the management of the liquidators and the closure of the liquidation.

The closure of the liquidation shall be published in accordance with paragraph (7). That publication shall also indicate:

- (a) the place designated by the Court where the books and records must be kept for at least five years;
- (b) the measures taken with a view to the deposit<sup>14</sup> of the sums and assets due to creditors or shareholders to whom it has not been possible to deliver the same.

(11) Any legal actions against the liquidators of AIFMs, in their capacity as such, shall be prescribed five years after publication of the closure of the liquidation provided for in paragraph (10).

Legal actions against the liquidators in connection with the performance of their duties shall be prescribed five years after the date of the facts or, in the event of concealment thereof by wilful deceit, five years after the discovery thereof.

#### **Art. 10-1. Non-judicial liquidation**

(1) AIFMs shall, after their dissolution, be deemed to exist for the purpose of their liquidation. In the case of a non-judicial liquidation, they shall remain subject to supervision by the CSSF.

(2) All documents issued by an AIFM in liquidation shall indicate that it is in liquidation.

(3) In the event of a non-judicial liquidation of an AIFM, the liquidator(s) shall be approved by the CSSF. The liquidator(s) must provide all guarantees of good repute and professional skill.

(4) Where a liquidator does not accept its appointment or is not approved, the District Court dealing with commercial matters shall, at the request of any interested party or of the CSSF, appoint the liquidator(s). The judgment appointing the liquidator(s) shall be provisionally enforceable, on the production of the original thereof and before registration, notwithstanding any appeal or objection.

(5) No decision to proceed with the non-judicial liquidation of an AIFM may be taken before it has ceased all AIF management activities. This means that the AIFM must have terminated all contractual links with AIFs and that it no longer acts, as the case may be, as the manager or general partner of any AIF.

An AIFM which is also authorised to carry out the discretionary management activity and non-core services referred to in Article 5, paragraph (4), must terminate those activities and services before any decision is taken on the non-judicial liquidation of that AIFM.

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<sup>13</sup> *commissaires*

<sup>14</sup> *consignation*

## Chapter 3. - Operating conditions for AIFMs

### Section 1 - General requirements

#### Art. 11. General principles

(1) In the context of their activities, AIFMs must at all times:

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

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

(2) Each AIFM the authorisation of which also covers the discretionary portfolio management service referred to in point a) of paragraph (4) of Article 5 of this Law shall:

- a) not be permitted to invest all or part of the client's portfolio in units or shares of the AIFs it manages, unless it receives prior general approval from the client;
- b) with regard to the services referred to in paragraph (4) of Article 5, be subject to the provisions of Part III, Title III of the Law of 18 December 2015 on the resolution, reorganisation and winding up measures of credit institutions and certain investment firms and article 22-1 of the amended Law of 5 April 1993 relating to the financial sector.

#### Art. 12. Remuneration

AIFMs must have remuneration policies and practices for those categories of staff, including senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the AIFMs or of the AIFs they manage, that are consistent with and promote sound and effective risk management and do not encourage risk-taking

which is inconsistent with the risk profiles, management regulations<sup>15</sup> or instruments of incorporation of the AIFs they manage.

They must determine the remuneration policies and practices in accordance with Annex II of this Law.

### **Art. 13. Conflicts of interest**

(1) AIFMs must take all reasonable steps to identify conflicts of interest that arise in the course of managing AIFs between:

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

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

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

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

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

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

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<sup>15</sup> *règlement*

#### **Art. 14. Risk management**

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

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

(2) AIFMs are required to implement adequate risk-management systems in order to identify, measure, manage and monitor appropriately all risks relevant to each AIF investment strategy and to which each AIF is or may be exposed. In particular, the AIFMs shall not solely or mechanically rely on the credit ratings issued by credit rating agencies as defined in Article 3, paragraph 1, point b) of Regulation (EC) No. 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies for assessing the creditworthiness of the AIFs' assets.

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

(3) AIFMs are required at least to:

- a) implement an appropriate, documented and regularly updated due diligence process when investing on behalf of the AIF, according to the investment strategy, the objectives and risk profile of the AIF;
- b) ensure that the risks associated with each investment position of the AIF and their overall effect on the AIF's portfolio can be properly identified, measured, managed and monitored on an ongoing basis, including through the use of appropriate stress testing procedures;
- c) ensure that the risk profile of the AIF shall correspond to the size, portfolio structure and investment strategies and objectives of the AIF as laid down in the AIF management regulations<sup>16</sup> or instruments of incorporation, prospectuses and offering documents.

(3bis) The CSSF shall, taking into account the nature, scale and complexity of the AIFs' activities, monitor the adequacy of the credit assessment processes of the AIFMs, assess the use of references to credit ratings, as referred to in paragraph 2, first subparagraph, in the AIFs' investment policies and encourage where appropriate mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on such credit ratings.

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

- a) the type of AIF;

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<sup>16</sup> règlement

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

### **Art. 15. Liquidity management**

(1) AIFMs must, for each AIF that they manage other than for an unleveraged closed-ended AIF, employ an appropriate liquidity management system and adopt procedures which enable them to monitor the liquidity risk of the AIF and to ensure that the liquidity profile of the investments of the AIF complies with its underlying obligations.

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

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

## **Section 2 - Organisational requirements**

### **Art. 16. General principles**

AIFMs must use, at all times, adequate and appropriate human and technical resources that are necessary for the proper management of AIFs.

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

### **Art. 17. Valuation**

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

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

(3) AIFMs are also required to ensure that the net asset value per unit or share of AIFs is calculated and disclosed to the investors in accordance with this Article, the applicable national law and the AIF management regulations<sup>17</sup> or instruments of incorporation.

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

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

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

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

(4) AIFMs must ensure that the valuation function is either performed by:

- a) an external valuer, which must be a legal or natural person independent from the AIF, the AIFM and any other persons with close links to the AIF or the AIFM; or
- b) the AIFM itself, provided that the valuation task is functionally independent from the portfolio management and the remuneration policy and other measures ensure that conflicts of interest are mitigated and that undue influence upon the employees is prevented.

The appointment of the depositary appointed for an AIF as external valuer of that AIF, is subject to the condition that it has functionally and hierarchically separated the performance of its depositary functions from its tasks as external valuer and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

(5) Where an external valuer performs the valuation function, the AIFM must be able to demonstrate that:

- a) the external valuer is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct;
- b) the external valuer can provide sufficient professional guarantees to be able to perform effectively the relevant valuation function in accordance with paragraphs (1), (2) and (3); and
- c) the appointment of the external valuer complies with the requirements of paragraphs (1) and (2) of Article 18 of this Law and the delegated acts adopted pursuant to paragraph (7) of Article 20 of Directive 2011/61/EU.

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<sup>17</sup> règlement

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

(7) AIFMs are required to notify the appointment of the external valuer to the CSSF. The CSSF shall require that another external valuer be appointed, where the conditions laid down in paragraph (5) are not met.

(8) The valuation must be performed impartially and with all due skill, care and diligence.

(9) Where the valuation function is not performed by an independent external valuer, the CSSF may require the AIFM to have its valuation procedures and/or valuations verified by an external valuer or, where appropriate, by an independent auditor.

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

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

### **Section 3 - Delegation of AIFM functions**

#### **Art. 18. Delegation**

(1) Where AIFMs intend to delegate to third parties the task of carrying out functions on their behalf, they shall notify the CSSF thereof before the delegation arrangements become effective. The following conditions must be met:

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

to the delegate and to withdraw the delegation with immediate effect when this is in the interest of investors.

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

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

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

(3) The AIFM's liability towards the AIF and its investors shall not be affected by the fact that the AIFM has delegated functions to a third party, or by any further sub-delegation. In addition, the AIFM shall not delegate its functions to the extent that, in essence, it can no longer be considered to be the manager of the AIF and to the extent that it would become a letter-box entity.

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

- a) the AIFM consented prior to the sub-delegation;
- b) the AIFM notified the CSSF of the terms of the sub-delegation arrangements before they become effective;
- c) the conditions set out in paragraph (1) must be fulfilled, on the understanding that all references to the 'delegate' are read as references to the 'sub-delegate'.

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

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

The relevant delegate must control the services provided by each sub-delegate on an ongoing basis.

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

#### **Art. 18bis Tied agent**

(1) AIFMs established in Luxembourg are authorised to appoint tied agents within the meaning of point 1) of Article 1 of the amended Law of 5 April 1993 on the financial sector.

(2) Where an AIFM decides to appoint tied agents, the AIFM must, within the limits of activities permitted under this Law, comply with the same rules as those applicable to investment firms under Article 37-8 of the amended Law of 5 April 1993 on the financial sector.

## Section 4 - Depositary

### Art. 19. Depositary

(1) For each AIF it manages, the AIFM must ensure that a single depositary is appointed in accordance with the provisions of this Article.

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

(3) i) For AIFs established in Luxembourg, the depositary must be a credit institution or an investment firm within the meaning of the amended Law of 5 April 1993 on the financial sector. An investment firm shall only be eligible as depositary of an AIF if all the following conditions have been fulfilled:

- the authorisation of the investment firm covers the ancillary service of safe-keeping and administration of financial instruments for the account of clients referred to in point 1 of Section C of Annex II of the amended Law of 5 April 1993 on the financial sector;
- the investment firm is a legal person;
- it must have a fully paid-up minimum capital of EUR 730,000;
- it must have internal governance procedures, including an organisational and administrative structure and internal control procedures which are appropriate for the depositary's activity;
- it fulfils the requirements for own funds provided for in point b) of paragraph (3) of Article 21 of Directive 2011/61/EU. These requirements for own funds are clarified by the CSSF.

Any investment firm which intends to exercise the functions of depositary for one or more AIFs established in Luxembourg must first notify the CSSF thereof. The CSSF has a maximum period of 2 months from the date of notification to object if the conditions mentioned in this paragraph are not fulfilled. If the CSSF decides to object, the CSSF informs without delay the investment firm thereof in writing indicating the reasons for its decision. In the absence of a decision by the CSSF, the investment firm may start the activity of depositary after expiry of the 2-month period from the date of the notification. The decision of the CSSF may be referred to the administrative court, which will deal with the substance of the case, within a period of one month, after which it shall be time-barred.

The depositary must either have its registered office in Luxembourg or have a branch there if its registered office is in another Member State.

In relation to AIFs established in Luxembourg, which have no redemption rights exercisable during a period of five years from the date of the initial investments and which, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with paragraph (8), point a) of Article 19 of this Law or generally invest in issuers or non-listed companies in

order to potentially acquire control over such companies in accordance with Article 24 of this Law, the depositary may also be an entity which has the status of a professional depositary of assets other than financial instruments within the meaning of Article 26*bis* of the amended Law of 5 April 1993 on the financial sector.

The provisions referred to under point i) apply, unless otherwise provided by a specific law or a provision of EU law.

ii) For AIFs established in another Member State, the depositary must belong to one of the following categories of institutions mentioned in paragraph (3) of Article 21 of Directive 2011/61/EU, unless otherwise provided by the national law applicable to the AIF concerned or by a provision of EU law:

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

For AIFs established in another Member State which have no redemption rights exercisable during the period of five years from the date of the initial investments and which, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with paragraph (8), point a) of Article 21 of Directive 2011/61/EU or generally invest in issuers or non-listed companies in order to potentially acquire control over such companies in accordance with Article 26 of the aforementioned Directive, the depositary may be an entity which carries out depositary functions as part of its professional or business activities in respect of which such entity is subject to mandatory professional registration recognised by the national law applicable to the AIF established in another Member State.

iii) For non-EU AIFs only, and without prejudice to point b) of paragraph (5) of this Article, the depositary may also be a credit institution or any other entity of the same nature as the entities referred to in points a) and b) of paragraph (3), first subparagraph of Article 21 of Directive 2011/61/EU provided that the conditions of paragraph (6), point b) of Article 21 of that Directive are met.

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

- a) an AIFM is not allowed to act as depositary;

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

(5) The depositary must be established:

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

(6) Without prejudice to the requirements set out in paragraph (3), the appointment of a depositary established in a third country shall, at all times, be subject to the following conditions:

- a) the competent authorities of the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and the CSSF, as competent authority of the home Member State of the AIFM, have signed cooperation and exchange of information arrangements with the competent authorities of the depositary;
- b) the depositary is subject to effective prudential regulation, including minimum capital requirements, and supervision which have the same effect as European Union law and are effectively enforced;
- c) the third country where the depositary is established is not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force (FATF);
- d) the Member States in which the units or shares of the non-EU AIF are intended to be marketed and Luxembourg, as the home Member State of the AIFM, have signed an agreement with the third country where the depositary is established which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements;
- e) the depositary shall by contract be liable to the AIF or to the investors of the AIF, consistently with paragraphs (12) and (13), and shall expressly agree to comply with the provisions of paragraph (11).

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

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

(8) The assets of the AIF or the AIFM acting on behalf of the AIF must be entrusted to the depositary for safe-keeping, taking into account the following elements:

- a) for financial instruments that can be held in custody:
  - i) the depositary must hold in custody all financial instruments that can be registered in a financial instruments account opened in the depositary's books and all financial instruments that can be physically delivered to the depositary;
  - ii) for that purpose, the depositary must ensure that all those financial instruments that can be registered in a financial instruments account opened in the depositary's books are registered in the depositary's books within segregated accounts, in accordance with the principles set out in Article 16 of Directive 2006/73/EC, opened in the name of the AIF or the AIFM acting on behalf of the AIF, so that they can be clearly identified as belonging to the AIF in accordance with the applicable law at all times;
- b) for other assets:
  - i) the depositary must verify the ownership of the AIF or the AIFM acting on behalf of the AIF of such assets and shall maintain a record of those assets for which it is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership of such assets;
  - ii) the assessment whether the AIF or the AIFM acting on behalf of the AIF, holds the ownership shall be based on information or documents provided by the AIF or the AIFM and, where available, on external evidence;
  - iii) the depositary must keep its record up-to-date.

(9) In addition to the tasks referred to in paragraphs (7) and (8), the depositary must:

- a) ensure that the sale, issue, re-purchase, redemption and cancellation of units or shares of the AIF are carried out in accordance with the applicable national law and the AIF management regulations<sup>18</sup> or instruments of incorporation;
- b) ensure that the value of the units or shares of the AIF is calculated in accordance with the applicable national law, the AIF management regulations<sup>19</sup> or instruments of incorporation and the procedures laid down in Article 19 of Directive 2011/61/EU;
- c) carry out the instructions of the AIFM, unless they conflict with the applicable national law or the AIF management regulations<sup>20</sup> or instruments of incorporation;

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<sup>18</sup> *règlement*

<sup>19</sup> *règlement*

<sup>20</sup> *règlement*

- d) ensure that in transactions involving the AIF's assets any consideration is remitted to the AIF within the usual time limits;
- e) ensure that an AIF's income is applied in accordance with the applicable national law and the AIF management regulations<sup>21</sup> or instruments of incorporation.

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

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

The depositary is not allowed to reuse assets referred to in paragraph (8) without the prior consent of the AIF or the AIFM acting on behalf of the AIF.

(11) The depositary is not allowed to delegate to third parties the functions as described in this Article, save for those referred to in paragraph (8).

The depositary may delegate to third parties the functions referred to in paragraph (8) provided that the following conditions are fulfilled:

- a) the tasks are not delegated with the intention of avoiding the requirements of Directive 2011/61/EU;
- b) the depositary can demonstrate that there is an objective reason for the delegation;
- c) the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it wants to delegate parts of its tasks, and keeps exercising all due skill, care and diligence in the periodic review and ongoing monitoring of any third party to whom it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it; and
- d) the depositary ensures that the third party meets the following conditions at all times during the performance of the tasks delegated to it:
  - i) the third party has the structures and the expertise that are adequate and proportionate to the nature and complexity of the assets of the AIF or the AIFM acting on behalf of the AIF which have been entrusted to it;
  - ii) for custody tasks referred to in point a) of paragraph (8), the third party is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned and the third party is subject to an external periodic audit to ensure that the financial instruments are in its possession;

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<sup>21</sup> règlement

- iii) the third party segregates the assets of the depositary's clients from its own assets and from the assets of the depositary in such a way that they can at any time be clearly identified as belonging to clients of a particular depositary;
- iv) the third party does not make use of the assets without the prior consent of the AIF or the AIFM acting on behalf of the AIF and without first informing the depositary; and
- v) the third party complies with the general obligations and prohibitions set out in paragraphs (8) and (10).

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

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

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

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

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

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

The depositary shall also be liable to the AIF, or to the investors of the AIF, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations pursuant to Directive 2011/61/EU.

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

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

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

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

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

(15) Liability to the investors of an AIF which has no legal personality may be invoked through the AIFM. Should the AIFM fail to act despite a request from an investor, within a period of three months following such a request, that investor may directly invoke the liability of the depositary.

(16) Where the depositary is established in Luxembourg, it shall make available to the CSSF, on request, all information which it has obtained while performing its tasks and that may be necessary for the supervision of the AIF or the AIFM. If the CSSF is not the competent authority for the supervision of the AIF or the AIFM concerned, it shall communicate the information received to the competent authorities.

## Chapter 4. - Transparency requirements

### Art. 20. Annual report

(1) An AIFM established in Luxembourg must, for each of the EU AIFs it manages and for each of the AIFs it markets in the European Union, make available an annual report for each financial year no later than six months following the end of the financial year to which the report refers. The annual report must be provided to investors on request. The annual report must be made available to the CSSF, and, where applicable, the home Member State of the AIF.

Where the AIF is required to make public an annual financial report in accordance with Directive 2004/109/EC only such additional information referred to in paragraph (2) hereafter needs to be provided to investors on request, either separately or as an additional part of the annual financial report. In the latter case the annual financial report must be made public no later than four months following the end of the financial year to which it refers.

(2) The annual report must at least contain the following:

- a) a balance-sheet or a statement of assets and liabilities;
- b) an income and expenditure account for the financial year;
- c) a report on the activities of the financial year;
- d) any material changes in the information listed in Article 21 during the financial year to which the report refers;
- e) the total amount of remuneration for the financial year, split into fixed and variable remuneration, paid by the AIFM to its staff, and number of beneficiaries, and, where relevant, carried interest paid by the AIF;
- f) the aggregate amount of remuneration broken down by senior management and members of staff of the AIFM whose actions have a material impact on the risk profile of the AIF.

(3) The accounting information given in the annual report must be prepared in accordance with the accounting standards of the home Member State of the AIF or in accordance with the accounting standards of the third country where the AIF is established and with the accounting rules laid down in the AIF management regulations or instruments of incorporation. For the purposes of this paragraph, the accounting standards applicable to a Luxembourg AIF which takes the form of a special limited partnership are the accounting standards provided for by the amended law of 19 December 2002 on the trade and companies register and the accounting and annual accounts of companies, as well as the accounting standards considered as equivalent by the amended Commission decision of 12 December 2008 on the use by third countries' issuers of securities of certain third country's national accounting standards and International Financial Reporting Standards to prepare their consolidated financial statements.

The accounting information given in the annual report must be audited by one or more persons empowered by law to audit accounts in accordance with Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated

accounts. The auditor's report, including any qualifications, shall be reproduced in full in the annual report.

By way of derogation from the second subparagraph, AIFMs marketing non-EU AIFs may subject the annual reports of those AIFs to an audit meeting international auditing standards in force in the country where the AIF has its registered office.

#### **Art. 21. Disclosure to investors**

(1) AIFMs must for each of the EU AIFs that they manage and for each of the AIFs that they market in the European Union make available to AIF investors, before they invest in the AIF, in accordance with the AIF management regulations or instruments of incorporation, the following information, as well as any material changes thereof:

- a) a description of the investment strategy and objectives of the AIF, information on where any master AIF is established and where the underlying funds are established if the AIF is a fund of funds, a description of the types of assets in which the AIF may invest, the techniques it may employ and all associated risks, any applicable investment restrictions, the circumstances in which the AIF may use leverage, the types and sources of leverage permitted and the associated risks, any restrictions on the use of leverage and any collateral and asset reuse arrangements, and the maximum level of leverage which the AIFM is entitled to employ on behalf of the AIF;
- b) a description of the procedures by which the AIF may change its investment strategy or investment policy, or both;
- c) a description of the main legal implications of the contractual relationship entered into for the purpose of investment, including information on jurisdiction, on the applicable law and on the existence or not of any legal instruments providing for the recognition and enforcement of judgments in the territory where the AIF is established;
- d) the identity of the AIFM, the AIF's depositary, auditor and any other service providers and a description of their duties and the investors' rights;
- e) a description of how the AIFM is complying with the requirements of paragraph (7) of Article 8;
- f) a description of any delegated management function as referred to in Annex I by the AIFM and of any safe-keeping function delegated by the depositary, the identification of the delegate and any conflicts of interest that may arise from such delegations;
- g) a description of the AIF's valuation procedure and of the pricing methodology for valuing assets, including the methods used in valuing hard-to-value assets in accordance with Article 17;
- h) a description of the AIF's liquidity risk management, including the redemption rights both in normal and in exceptional circumstances, and the existing redemption arrangements with investors;

- i) a description of all fees, charges and expenses and of the maximum amounts thereof which are directly or indirectly borne by investors;
- j) a description of how the AIFM ensures a fair treatment of investors and, whenever an investor obtains preferential treatment or the right to obtain preferential treatment, a description of that preferential treatment, the type of investors who obtain such preferential treatment and, where relevant, their legal or economic links with the AIF or AIFM;
- k) the latest annual report referred to in Article 20;
- l) the procedure and conditions for the issue and sale of units or shares;
- m) the latest net asset value of the AIF or the latest market price of the unit or share of the AIF, established in accordance with Article 17;
- n) where available, the historical performance of the AIF;
- o) the identity of the prime broker and a description of any material arrangements of the AIF with its prime brokers and the way the conflicts of interest in relation thereto are managed and the provision in the contract with the depositary on the possibility of transfer and reuse of AIF assets, and information about any transfer of liability to the prime broker that may exist;
- p) a description of how and when the information required under paragraphs (4) and (5) will be disclosed.

(2) The AIFM shall inform the investors before they invest in the AIF of any arrangement made by the depositary to contractually discharge itself of liability in accordance with paragraph (13) of Article 19. The AIFM shall also inform investors of any changes with respect to depositary liability without delay.

(3) Where the AIF is required to publish a prospectus in accordance with Directive 2003/71/EC or in accordance with national law, only such information referred to in paragraphs (1) and (2) which is in addition to that contained in the prospectus needs to be disclosed separately or as additional information in the prospectus.

(4) AIFMs must, for each of the EU AIFs that they manage and for each of the AIFs that they market in the European Union, periodically disclose to investors:

- a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
- b) any new arrangements for managing the liquidity of the AIF;
- c) the current risk profile of the AIF and the risk management systems employed by the AIFM to manage those risks.

(5) AIFMs managing EU AIFs employing leverage or marketing in the European Union AIFs employing leverage must, for each such AIF disclose, on a regular basis:

- a) any changes to the maximum level of leverage which the AIFM may employ on behalf of the AIF as well as any right of the reuse of collateral or any guarantee granted under the leveraging arrangement;
- b) the total amount of leverage employed by that AIF.

#### **Art. 22. Reporting obligations to the CSSF**

(1) AIFMs must regularly report to the CSSF on the principal instruments in which they trade on behalf of the AIFs they manage, as well as on the principal markets in which they trade.

They must provide information on the main instruments in which they are trading, on markets of which they are a member or where they actively trade, and on the principal exposures and most important concentrations of each of the AIFs they manage.

(2) An AIFM must, for each of the EU AIFs it manages and for each of the AIFs it markets in the European Union, provide the following information to the CSSF:

- a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
- b) any new arrangements for managing the liquidity of the AIF;
- c) the current risk profile of the AIF and the risk management systems employed by the AIFM to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk;
- d) information on the main categories of assets in which the AIF invested; and
- e) the results of the stress tests performed in accordance with paragraph (3), point b) of Article 14 and paragraph (1), second subparagraph of Article 15.

(3) The AIFM must, on request, provide the following documents to the CSSF:

- a) an annual report of each EU AIF managed by the AIFM and of each AIF marketed by it in the European Union, for each financial year, in accordance with paragraph (1) of Article 20;
- b) for the end of each quarter a detailed list of all AIFs which the AIFM manages.

(4) An AIFM managing AIFs employing leverage on a substantial basis shall make available to the CSSF information about the overall level of leverage employed by each AIF it manages, a break-down between leverage arising from borrowing of cash or securities and leverage embedded in financial derivatives and the extent to which the AIF's assets have been reused under leveraging arrangements.

That information shall include the identity of the five largest sources of borrowed cash or securities for each of the AIFs managed by the AIFM, and the amounts of leverage received from each of those sources for each of those AIFs.

(5) If the CSSF considers that such communication is necessary for the effective monitoring of systemic risk, it may require the AIFM to communicate information in addition to that described in this Article, on a periodic as well as on an *ad-hoc* basis.

## **Chapter 5. - AIFMs managing specific types of AIFs**

### **Section 1 - AIFMs managing leveraged AIFs**

#### **Art. 23. Use of information by competent authorities, supervisory cooperation and limits to leverage**

(1) The CSSF shall use the information to be gathered under Article 22 of this Law for the purposes of identifying the extent to which the use of leverage contributes to the build-up of systemic risk in the financial system, risks of disorderly markets or risks to the long-term growth of the economy.

(2) The CSSF shall ensure that all information gathered under Article 22 of this Law in respect of all AIFMs that it supervises and the information gathered under Article 6 of this Law is made available to competent authorities of other relevant Member States, ESMA and the ESRB by means of the procedures set out in Article 50 of Directive 2011/61/EU on supervisory cooperation. It shall, without delay, also provide information by means of those procedures, and bilaterally to the competent authorities of other Member States directly concerned, if an AIFM under its responsibility, or AIF managed by that AIFM could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions in other Member States.

(3) The AIFM must provide proof that the leverage limits set by it for each AIF it manages are reasonable and that it complies with those limits at all times. The CSSF shall assess the risks that the use of leverage by an AIFM with respect to the AIFs it manages could entail. If the CSSF deems such action necessary in order to ensure the stability and integrity of the financial system, it shall, after having notified ESMA, the ESRB and, if applicable, the competent authorities of the relevant AIF, impose limits to the level of leverage that an AIFM is entitled to employ or other restrictions on the management of the AIF with respect to the AIFs under its management to limit the extent to which the use of leverage contributes to the build up of systemic risk in the financial system or risks of disorderly markets. The CSSF shall duly inform ESMA, the ESRB and, if applicable, the competent authorities of the AIF, of actions taken in this respect, through the procedures set out in Article 50 of Directive 2011/61/EU.

(4) The notification referred to in paragraph (3) shall be made not less than ten working days before the proposed measure is intended to take effect or to be renewed. The notification shall include details of the proposed measure, the reasons for the measure and when the measure is intended to take effect. In exceptional circumstances, the CSSF may decide that the proposed measure takes effect within the period referred to in the first sentence.

### **Section 2 - Obligations for AIFMs managing AIFs which acquire control of non-listed companies and issuers**

#### **Art. 24. Scope**

(1) This Section shall apply to the following:

- a) AIFMs managing one or more AIFs, which either individually or jointly, on the basis of an agreement aimed at acquiring control, acquire control of a non-listed company in accordance with paragraph (5);
- b) AIFMs cooperating with one or more other AIFMs on the basis of an agreement pursuant to which the AIFs managed by those AIFMs jointly, acquire control of a non-listed company in accordance with paragraph (5).

(2) This Section shall not apply where the non-listed companies concerned are:

- a) small and medium-sized enterprises within the meaning of paragraph (1) of Article 2 of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises; or
- b) special purpose vehicles with the purpose of purchasing, holding or managing real estate.

(3) Without prejudice to paragraphs (1) and (2) of this Article, paragraph (1) of Article 25 shall also apply to AIFMs managing AIFs that acquire a non-controlling participation in a non-listed company.

(4) Paragraphs (1), (2) and (3) of Article 26 and Article 28 shall apply also to AIFMs managing AIFs that acquire control over issuers. For the purposes of those Articles, paragraphs (1) and (2) of this Article shall apply *mutatis mutandis*.

(5) For the purpose of this Section, for non-listed companies, control shall mean more than 50% of the voting rights of the company.

When calculating the percentage of voting rights held by the relevant AIF, in addition to the voting rights held directly by the relevant AIF, the voting rights of the following entities shall be taken into account, subject to control as referred to in the first subparagraph being established:

- a) an undertaking controlled by the AIF; and
- b) a natural or legal person acting in its own name but on behalf of the AIF or on behalf of an undertaking controlled by the AIF.

The percentage of voting rights shall be calculated on the basis of all the shares to which voting rights are attached even if the exercise thereof is suspended.

Notwithstanding point 10 of Article 1, for the purpose of paragraphs (1), (2) and (3) of Article 26 and Article 28 in regard to issuers, control shall be determined in accordance with paragraph (3) of Article 5 of Directive 2004/25/EC.

(6) This Section shall apply subject to the conditions and restrictions set out in Article 6 of Directive 2002/14/EC.

(7) This Section shall apply without prejudice to stricter Luxembourg law provisions applying to the acquisition of participations in issuers and in non-listed companies on its territory.

#### **Art. 25. Notification of the acquisition of major holdings and control of non-listed companies**

(1) When an AIF acquires, disposes of or holds shares of a non-listed company, the AIFM managing such an AIF is required to notify the CSSF of the proportion of voting rights of the non-listed company held by the AIF any time when that proportion reaches, exceeds or falls below the thresholds of 10%, 20%, 30%, 50% and 75%.

(2) When an AIF acquires, individually or jointly, control over a non-listed company pursuant to paragraph (1) of Article 24, in conjunction with paragraph (5) of that Article, the AIFM managing such an AIF is required to notify the acquisition of control by the AIF:

- a) to the non-listed company;
- b) to the shareholders of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access; and
- c) to the CSSF.

(3) The notification required under paragraph (2) must contain the following additional information:

- a) the resulting situation in terms of voting rights;
- b) the conditions subject to which control was acquired, including information about the identity of the different shareholders involved, any natural person or legal entity entitled to exercise voting rights on their behalf and, if applicable, the chain of undertakings through which voting rights are effectively held;
- c) the date on which control was acquired.

(4) In its notification to the non-listed company, the AIFM must request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the acquisition of control by the AIF managed by the AIFM and of the information referred to in paragraph (3). The AIFM is required to use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this Article.

(5) The notifications referred to in paragraphs (1), (2) and (3) shall be made as soon as possible, but no later than ten working days after the date on which the AIF has reached, exceeded or fallen below the relevant threshold or has acquired control over the non-listed company.

#### **Art. 26. Disclosure in case of acquisition of control**

(1) When an AIF acquires, individually or jointly, control of a non-listed company or an issuer pursuant to paragraph (1) of Article 24, in conjunction with paragraph (5) of that Article, the AIFM managing such AIF is required to make the information referred to in paragraph (2) below available to:

- a) the company concerned;

- b) the shareholders of the company of which the identities and addresses are available to the AIFM or can be made available by the company or through a register to which the AIFM has or can obtain access; and
- c) the CSSF.

(2) The AIFM must make available in accordance with paragraph (1):

- a) the identity of the AIFMs which either individually or in agreement with other AIFMs manage the AIFs that have acquired control;
- b) the policy for preventing and managing conflicts of interest, in particular between the AIFM, the AIF and the company, including information about the specific safeguards established to ensure that any agreement between the AIFM and/or the AIF and the company is concluded at arm's length; and
- c) the policy for external and internal communication relating to the company in particular as regards employees.

(3) In its notification to the company pursuant to point a) of paragraph (1), the AIFM is required to request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the information referred to in paragraph (1). The AIFM is required to use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this Article.

(4) When an AIF acquires, individually or jointly, control of a non-listed company pursuant to paragraph (1) of Article 24, in conjunction with paragraph (5) of that Article, the AIFM managing such AIF must ensure that the AIF, or the AIFM acting on behalf of the AIF, discloses its intentions with regard to the future business of the non-listed company and the likely repercussions on employment, including any material change in the conditions of employment, to:

- a) the non-listed company; and
- b) the shareholders of the non-listed company of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access.

In addition, the AIFM managing the relevant AIF must use its best efforts to ensure that the board of directors of the non-listed company makes available the information set out in the first subparagraph to the employees' representatives or, where there are none, the employees themselves, of the non-listed company.

(5) When an AIF acquires control of a non-listed company pursuant to paragraph (1) of Article 24, in conjunction with paragraph (5) of that Article, the AIFM managing such an AIF must provide the CSSF and the AIF's investors with information on the financing of the acquisition.

### **Art. 27. Specific provisions regarding the annual report of AIFs exercising control of non-listed companies**

(1) When an AIF acquires, individually or jointly, control of a non-listed company pursuant to paragraph (1) of Article 24, in conjunction with paragraph (5) of that Article, the AIFM managing such an AIF must either:

- a) request and use its best efforts to ensure that the annual report of the non-listed company drawn up in accordance with paragraph (2) is made available by the board of directors of the company to the employees' representatives or, where there are none, to the employees themselves within the period such annual report has to be drawn up in accordance with the national applicable law; or
- b) for each such AIF include in the annual report provided for in Article 20 the information referred to in paragraph (2) relating to the relevant non-listed company.

(2) The additional information to be included in the annual report of the company or the AIF, in accordance with paragraph (1), must include at least a fair review of the development of the company's business representing the situation at the end of the period covered by the annual report. The report must also give an indication of:

- a) any important events that have occurred since the end of the financial year;
- b) the company's likely future development; and
- c) the information concerning acquisitions of own shares prescribed by paragraph (2) of Article 22 of Council Directive 77/91/EEC.

(3) The AIFM managing the relevant AIF must either:

- a) request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information referred to in point b) of paragraph (1) relating to the company concerned to the employees' representatives of the company concerned or, where there are none, to the employees themselves within the period referred to in paragraph (1) of Article 20; or
- b) make available the information referred to in point a) of paragraph (1) to the investors of the AIF, in so far as already available, within the period referred to in paragraph (1) of Article 20 and, in any event, no later than the date on which the annual report of the non-listed company is drawn up in accordance with the national applicable law.

### **Art. 28. Asset stripping**

(1) When an AIF, individually or jointly, acquires control of a non-listed company or an issuer pursuant to paragraph (1) of Article 24, in conjunction with paragraph (5) of that Article, the AIFM managing such an AIF shall for a period of twenty-four months following the acquisition of control of the company by the AIF:

- a) not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in paragraph (2);

- b) in so far as the AIFM is authorised to vote on behalf of the AIF at the meetings of the governing bodies of the company, not be allowed to vote in favour of a distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in paragraph (2); and
- c) in any event use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares by the company as described in paragraph (2).

(2) The obligations imposed on AIFMs pursuant to paragraph (1) shall relate to the following:

- a) any distribution to shareholders made when on the closing date of the last financial year the net asset value as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may be not distributed under the law or the articles of association, on the understanding that where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital;
- b) any distribution to shareholders the amount of which would exceed the amount of the profits at the end of the last financial year, plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the articles of association;
- c) to the extent that acquisitions of own shares are permitted, any acquisition by the company, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, that would have the effect of reducing the net assets below the amount mentioned in point a).

(3) For the purposes of paragraph (2):

- a) the term "distribution" referred to in points a) and b) of paragraph (2) shall include, in particular, the payment of dividends and of interest relating to shares;
- b) the provisions on capital reductions shall not apply on a reduction in the subscribed capital, the purpose of which is to offset losses incurred or to include sums of money in a non-distributable reserve provided that, following that operation, the amount of such reserve is not more than 10% of the reduced subscribed capital; and
- c) the restriction set out in point c) of paragraph (2) shall be subject to points b) to h) of paragraph (1) of Article 20 of Directive 77/91/EEC.

#### **Chapter 5bis. – Conditions applicable to pre-marketing in the European Union by an EU AIFM**

##### **Art. 28-1. AIFMs established in Luxembourg pre-marketing in Luxembourg or in another Member State**

(1) An AIFM established in Luxembourg authorised under this Law may engage in pre-marketing in Luxembourg or in another Member State, except where the information presented to potential professional investors:

- a) is sufficient to allow investors to commit to acquiring units or shares of a particular AIF;
- b) amounts to subscription forms or similar documents whether in a draft or a final form;
- c) amounts to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.

Where a draft prospectus or offering documents are provided, they shall not contain information sufficient to allow professional investors to take an investment decision and shall clearly state that:

- a) they do not constitute an offer or an invitation to subscribe to units or shares of an AIF; and
- b) the information presented therein should not be relied upon because it is incomplete and may be subject to change.

An AIFM shall not be obliged to notify the content or the addressees of the pre-marketing to the CSSF or to the competent authorities of the Member States in which the AIFM undertakes or has undertaken pre-marketing activities, or to fulfil any conditions or requirements other than those set out in this Article, before it engages in pre-marketing.

(2) AIFMs referred to in paragraph (1) shall ensure that professional investors do not acquire units or shares in an AIF through pre-marketing and that investors contacted as part of pre-marketing may only acquire units or shares in that AIF through marketing permitted under Article 29 or Article 30.

Any subscription by professional investors, within 18 months of the AIFM having begun pre-marketing, to units or shares of an AIF referred to in the information provided in the context of pre-marketing, or of an AIF established as a result of the pre-marketing, shall be considered to be the result of marketing and shall be subject to the applicable notification procedures referred to in Article 29 or Article 30.

(3) An AIFM shall send, within two weeks of it having begun pre-marketing, an informal letter, in paper form or by electronic means, to the CSSF. That letter shall specify the Member States in which and the periods during which the pre-marketing is taking or has taken place, a brief description of the pre-marketing including the information on the investment strategies presented and, where relevant, a list of the AIFs and compartments of AIFs which are or were the subject of pre-marketing.

AIFMs shall ensure that pre-marketing is adequately documented.

(4) Following receipt of the letter referred to in paragraph (3), the CSSF shall promptly inform the competent authorities of the other Member States in which the AIFM is or was engaged in pre-marketing.

The CSSF may, at the request of the competent authorities of the Member States in which the AIFM is or was engaged in pre-marketing, provide further information on the pre-marketing that is taking or has taken place on its territory.

(5) A third party shall only engage in pre-marketing on behalf of an AIFM established in Luxembourg authorised in accordance with this Law where it is authorised as an investment firm in accordance with Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (hereinafter "Directive 2014/65/EU"), as a credit institution in accordance with Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the

prudential supervision of credit institutions<sup>22</sup>, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (hereinafter “Directive 2013/36/EU”), as a UCITS management company in accordance with Directive 2009/65/EC, as an AIFM in accordance with Directive 2011/61/EU, or acts as a tied agent in accordance with Directive 2014/65/EU. Such third party shall be subject to the conditions set out in this Article.

#### **Art. 28-2. AIFMs established in another Member State pre-marketing in Luxembourg**

(1) After having received the information referred to in paragraph (2), third subparagraph of Article 30a of Directive 2011/61/EU from the competent authorities of the home Member State of an authorised AIFM established in another Member State which is or was engaged in pre-marketing in Luxembourg, the CSSF may ask those competent authorities to provide it with further information on the pre-marketing that is taking or has taken place in Luxembourg.

(2) An AIFM is not required to notify the CSSF of the content or of the addressees of pre-marketing, or to fulfil any conditions or requirements other than those set out in Article 30a of Directive 2011/61/EU, before it engages in pre-marketing.

### **Chapter 6. - Rights of EU AIFMs to market and manage EU AIFs in the European Union**

#### **Section 1 - Conditions applicable to the marketing of units or shares in the European Union of EU AIFs managed by EU AIFMs**

#### **Art. 29. AIFMs established in Luxembourg marketing in Luxembourg units or shares of EU AIFs they manage**

(1) An AIFM established in Luxembourg authorised under this Law which intends to market units or shares of any EU AIF that it manages to professional investors in Luxembourg is required to comply with the provisions laid down in this Article.

Where the EU AIF is a feeder AIF the marketing referred to in the first subparagraph is in addition subject to the condition that the master AIF is also an EU AIF which is managed by an authorised EU AIFM.

Where an AIFM established in Luxembourg intends to market AIFs that it manages to professional investors in Luxembourg and which are subject to authorisation and prudential supervision by an official Luxembourg supervisory authority, the provisions of this Article regarding the obligation of notification do not apply.

(2) The AIFM referred to in this Article which intends to market units or shares of EU AIFs that it manages in Luxembourg shall first submit a notification to the CSSF in respect of each AIF that it intends to market.

That notification must comprise the documentation and information set out in Annex III of this Law.

(3) Within twenty working days at the latest following receipt of a complete notification file pursuant to paragraph (2), the CSSF shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph (2). The CSSF shall prevent the marketing of the AIF only when the AIFM's management of the AIF does not or will not comply with the provisions of this Law or the AIFM

<sup>22</sup> Should read „and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC“

otherwise does not or will not comply with the provisions of this Law. Should the CSSF agree, the AIFM may start marketing the AIF in Luxembourg from the date of the notification of the decision of the CSSF. Where the AIF concerned is established in a Member State other than Luxembourg, the CSSF shall also inform the competent authorities of the AIF that the AIFM may start marketing units or shares of the AIF in Luxembourg.

(4) In the event of a material change to any of the particulars communicated in accordance with paragraph (2), the AIFM must give written notice of that change to the CSSF at least one month before implementing the change as regards any changes planned by the AIFM, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with the provisions of this Law or the AIFM would otherwise no longer comply with the provisions of this Law, the CSSF shall inform the AIFM without undue delay that it is not allowed to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with the provisions of this Law or the AIFM otherwise no longer complies with the provisions of this Law, the CSSF shall take all due measures in accordance with Article 50, including, if necessary, the express prohibition of marketing of the AIF.

(5) Without prejudice to the provisions of Article 46 of this Law, AIFs managed and marketed by AIFMs referred to in this Article may only be marketed to professional investors.

**Art. 29-1. Withdrawal by AIFMs established in Luxembourg of the notification relating to the marketing in Luxembourg of units or shares of EU AIFs they manage**

(1) An AIFM established in Luxembourg authorised under this Law which has made a notification in accordance with Article 29 may withdraw the notification of the arrangements for the marketing of units or shares of some or all of the EU AIFs in Luxembourg, when all of the following conditions are met:

- a) except in the case of closed-ended AIFs and funds regulated by Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (hereinafter "Regulation (EU) 2015/760"), a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such AIF units or shares held by investors in Luxembourg, is publicly available for at least 30 working days, and is addressed, to the extent that their identity is known, directly or through financial intermediaries, individually to all investors in Luxembourg;
- b) the intention to terminate arrangements made for marketing units or shares of some or all of its AIFs in Luxembourg is made public by means of a publicly available medium which is customary for marketing AIFs and suitable for a typical AIF investor, including by electronic means;
- c) any contractual arrangements with financial intermediaries or delegates are modified or terminated with effect from the date of de-notification in order to prevent any new or further, direct or indirect, offering or placement of the units or shares identified in the notification referred to in paragraph (2).

As of the date referred to in point c) of the first subparagraph, the AIFM shall cease any new or further, direct or indirect, offering or placement of units or shares of the AIF it manages in Luxembourg.

(2) If the AIFM wishes to withdraw the notification of the arrangements for the marketing of the units or shares of some or all of the AIFs in Luxembourg in accordance with paragraph (1), it shall submit to the CSSF a notification containing information on compliance with the conditions referred to in paragraph (1), first subparagraph, points a), b) and c). The CSSF shall verify whether this notification is complete.

(3) The AIFM shall provide Luxembourg investors who remain invested in the EU AIF as well as the CSSF with the information required under Articles 20 and 21. For this purpose, the use of any electronic or other distance communication means shall be authorised.

(4) For a period of 36 months from the date referred to in point c) of the first subparagraph of paragraph (1), the AIFM shall not engage in pre-marketing of units or shares of the EU AIFs referred to in the notification, or in respect of similar investment strategies or investment ideas, in Luxembourg.

**Art. 30. AIFMs established in Luxembourg marketing in another Member State units or shares of EU AIFs they manage**

(1) An AIFM established in Luxembourg authorised under this Law which intends to market units or shares of an EU AIF that it manages to professional investors in another Member State is required to comply with the provisions laid down in this Article.

Where the EU AIF is a feeder AIF, the marketing referred to in the first subparagraph is in addition subject to the condition that the master AIF is also an EU AIF and is managed by an authorised EU AIFM.

(2) The AIFM which intends to market in another Member State units or shares of an EU AIF that it manages shall first submit a notification to the CSSF in respect of each AIF that it intends to market.

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

(3) If it considers that the management of the AIF by the AIFM complies with and will continue to comply with the provisions of this Law and if the AIFM otherwise complies with the provisions of this Law, the CSSF shall, no later than twenty working days after the date of receipt of the complete notification file referred to in paragraph (2), transmit the notification file to the competent authorities of the Member States where it is intended that the AIF be marketed.

The CSSF shall enclose in the notification file a statement confirming that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

(4) Upon transmission of the notification file, the CSSF shall, without delay, notify the AIFM about the transmission. The AIFM may market the AIF in the host Member State of the AIFM as of the date of that notification.

Where the AIF concerned is an AIF established in a Member State other than Luxembourg, the CSSF shall also inform the competent authorities of the AIF that the AIFM may start marketing the units or shares of the AIF in the host Member State of the AIFM.

(5) Arrangements referred to in point h) of Annex IV are subject to the laws of the host Member State of the AIFM and shall be subject to the supervision of the competent authorities of that Member State.

(6) The notification letter referred to in paragraph (2) and the statement referred to in paragraph (3) are provided in a language customary in the sphere of international finance.

(7) In the event of a material change to any of the particulars communicated in accordance with paragraph (2), the AIFM must give written notice of that change to the CSSF at least one month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with the provisions of this Law or the AIFM would otherwise no longer comply with the provisions of this Law, the CSSF shall inform the AIFM within 15 working days of receiving all the information referred to in the first subparagraph that it is not allowed to implement the change. The CSSF shall notify the competent authorities of the host Member State accordingly.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with the provisions of this Law or the AIFM otherwise would no longer comply with the provisions of this Law, the CSSF shall take all due measures in accordance with Article 50, including, if necessary, the express prohibition of marketing of the AIF, and shall without undue delay inform the competent authorities of the AIFM's host Member State thereof.

If the changes do not affect the compliance of the AIFM's management of the AIF with the provisions of this Law, or the compliance by the AIFM with the provisions of this Law otherwise, the CSSF shall, within one month, inform the competent authorities of the host Member State of the AIFM of those changes.

(8) Without prejudice to the provisions of paragraph (1) of Article 43 of Directive 2011/61/EU, the AIFs managed and marketed by the AIFM referred to in this Article may only be marketed to professional investors.

#### **Art. 30-1. Withdrawal by Luxembourg AIFMs of the notification relating to the marketing in another Member State of units or shares of EU AIFs they manage**

(1) An AIFM established in Luxembourg authorised under this Law may de-notify arrangements made for marketing as regards units or shares of some or all of its AIFs in a Member State in respect of which it has made a notification in accordance with Article 30, where all the following conditions are fulfilled:

- a) except in the case of closed-ended AIFs and funds regulated by Regulation (EU) 2015/760, a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such AIF units or shares held by investors in that Member State, is publicly available for at least 30 working days, and is addressed, to the extent that their identity is known, directly or through financial intermediaries, individually to all investors in that Member State;
- b) the intention to terminate arrangements made for marketing units or shares of some or all of its AIFs in that Member State is made public by means of a publicly available medium which is customary for marketing AIFs and suitable for a typical AIF investor, including by electronic means;

- c) any contractual arrangements with financial intermediaries or delegates are modified or terminated with effect from the date of de-notification in order to prevent any new or further, direct or indirect, offering or placement of the units or shares identified in the notification referred to in paragraph (2).

As of the date referred to in point c) of the first subparagraph, an AIFM shall cease any new or further, direct or indirect, offering or placement of units or shares of the AIF it manages in the Member State in respect of which it has submitted a notification in accordance with paragraph (2).

(2) If the AIFM wishes to withdraw the notification of the arrangements for the marketing of the units or shares of some or all of the AIFs in a Member State in accordance with paragraph (1), it shall submit to the CSSF a notification containing information on compliance with the conditions referred to in paragraph (1), first subparagraph, points a) to c).

(3) The CSSF shall verify whether the notification submitted by the AIFM in accordance with paragraph (2) is complete. The CSSF shall, no later than 15 working days from the receipt of a complete notification, transmit that notification to the competent authorities of the Member State identified in the notification referred to in paragraph (2), and to ESMA. The CSSF shall promptly notify the AIFM of that transmission.

(4) The AIFM shall provide investors who remain invested in the EU AIF as well as the CSSF with the information required under Articles 20 and 21. For this purpose, the use of any electronic or other distance communication means shall be authorised.

(5) The CSSF shall transmit, to the competent authorities of the Member State identified in the notification referred to in paragraph (2), information on any changes to the documentation and information referred to in points b) to f) of Annex IV.

(6) For a period of 36 months from the date referred to in point c) of the first subparagraph of paragraph (1), the AIFM shall not engage in pre-marketing of units or shares of the EU AIFs referred to in the notification referred to in paragraph (2), or in respect of similar investment strategies or investment ideas, in the Member State in that notification.

#### **Art. 31. AIFMs established in another Member State marketing in Luxembourg units or shares of EU AIFs they manage**

(1) If an AIFM established in another Member State intends to market units or shares of an EU AIF that it manages to professional investors in Luxembourg, the competent authorities of the home Member State of the AIFM shall transmit the notification file as well as the statement referred to in paragraph (3) of Article 32 of Directive 2011/61/EU to the CSSF.

Upon notification to the AIFM of the transmission referred to in this paragraph by the competent authorities of the home Member State of the AIFM to the CSSF, the AIFM may as of the date of that notification market the AIF concerned in Luxembourg.

(2) Without prejudice to the provisions of Article 46 of this Law, the AIFs managed and marketed by the AIFMs referred to in this Article may only be marketed to professional investors.

**Art. 31-1. Withdrawal by AIFMs established in another Member State of the notification relating to the marketing in Luxembourg of units or shares of EU AIFs they manage**

(1) An AIFM established in another Member State which has made a notification in accordance with Article 32 of Directive 2011/61/EU may withdraw the notification of the arrangements for the marketing of units or shares of some or all of the AIFs in Luxembourg, when all of the following conditions are met:

- a) except in the case of closed-ended AIFs and funds regulated by Regulation (EU) 2015/760, a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such AIF units or shares held by investors in Luxembourg, is publicly available for at least 30 working days, and is addressed, to the extent that their identity is known, directly or through financial intermediaries, individually to all investors in Luxembourg;
- b) the intention to terminate arrangements made for marketing units or shares of some or all of its AIFs in Luxembourg is made public by means of a publicly available medium which is customary for marketing AIFs and suitable for a typical AIF investor, including by electronic means;
- c) any contractual arrangement with financial intermediaries or delegates are modified or terminated with effect from the date of de-notification in order to prevent any new or further, direct or indirect, offering or placement of the units or shares identified in the notification referred to in paragraph (2).

As of the date referred to in point c) of the first subparagraph, the AIFM shall cease any new or further, direct or indirect, offering or placement of units or shares of the AIF it manages in Luxembourg.

(2) The AIFM shall provide Luxembourg investors who remain invested in the EU AIF with the information required under Articles 22 and 23 of Directive 2011/61/EU. For this purpose, the use of any electronic or other distance communication means shall be authorised.

(3) The CSSF, as the competent authority of the Member State identified in the notification referred to in paragraph (2) of Article 32a of Directive 2011/61/EU, shall have the same rights and obligations as the competent authorities of the host Member State of the AIFM as set out in in Article 45 of Directive 2011/61/EU.

From the date of transmission provided for in paragraph (5) of Article 32a of Directive 2011/61/EU, the CSSF, acting as the competent authority of the Member State identified in the notification referred to in paragraph (2) of Article 32a of Directive 2011/61/EU may not require the AIFM of the AIF concerned to demonstrate compliance with the provisions governing the marketing requirements referred to in Article 5 of Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014.

(4) For a period of 36 months from the date referred to in point c) of the first subparagraph of paragraph (1), the AIFM shall not engage in pre-marketing of units or shares of the EU AIFs referred to in the notification, or in respect of similar investment strategies or investment ideas, in Luxembourg.

## Section 2 - Conditions applicable to the management of EU AIFs

### **Art. 32. AIFMs established in Luxembourg managing EU AIFs established in another Member State and/or providing services in another Member State**

(1) An AIFM established in Luxembourg authorised under this Law which intends to manage EU AIFs established in another Member State either directly or by establishing a branch, must be authorised to manage that type of AIF.

An AIFM established in Luxembourg authorised under this Law may in addition, either directly or by establishing a branch, provide the services referred to in paragraph 4 of Article 5 for which it has been authorised in another Member State.

(2) The AIFM which intends to provide the activities and services referred to in the first paragraph for the first time is required to communicate the following information to the CSSF:

- a) the Member State in whose territory the AIFM intends to manage AIFs directly or establish a branch and/or to provide the services referred to in paragraph 4 of Article 5;
- b) a programme of operations stating in particular the services which the AIFM intends to perform and/or identifying the AIFs it intends to manage.

(3) If the AIFM intends to establish a branch, it must provide the following information in addition to that referred to in paragraph (2):

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

(4) The CSSF, if it considers that the AIFM's management of the AIF complies and will continue to comply with the provisions of this Law and the AIFM otherwise complies with the provisions of this Law, shall, within one month of receiving the complete documentation in accordance with paragraph (2), or within two months of receiving the complete documentation in accordance with paragraph (3), transmit the complete documentation to the competent authorities of the host Member State of the AIFM.

The CSSF shall enclose a statement confirming that the AIFM is authorised in accordance with the provisions of this Law.

After transmission of the file to the competent authorities of the host Member State of the AIFM, the CSSF shall notify the AIFM about this transmission without delay. Upon receipt of the transmission notification the AIFM may start to provide its services in its host Member State.

(5) In the event of a change to any of the information communicated in accordance with paragraph (2), and, where relevant, paragraph (3), an AIFM must give written notice of that change to the CSSF at least one month before implementing planned changes, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with the provisions of this Law or the AIFM would otherwise no longer comply with the provisions of this Law, the CSSF shall inform the AIFM within 15 working days of receipt of all the information referred to in the first subparagraph that it is not authorised to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with the provisions of this Law or the AIFM otherwise would no longer comply with the provisions of this Law, the CSSF shall take all due measures in accordance with Article 50 and shall without undue delay inform the competent authorities of the AIFM's host Member State thereof.

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

### **Art. 33. AIFMs established in another Member State managing AIFs established in Luxembourg and/or providing services in Luxembourg**

If an authorised AIFM established in another Member State intends to manage AIFs established in Luxembourg either directly or by establishing a branch or by providing the services referred to in paragraph 4 of Article 6 of Directive 2011/61/EU, the CSSF shall receive from the competent authorities of the home Member State of the AIFM, in accordance with Article 33 of Directive 2011/61/EU, the information referred to in paragraphs 2 and 3 respectively of Article 33 as well as the statement referred to in paragraph 4 of Article 33 of that Directive.

Upon notification to the AIFM of the transmission referred to in this paragraph by the competent authorities of the home Member State of the AIFM to the CSSF, the AIFM may start providing the activities and services in Luxembourg as of the date of that notification.

## **Chapter 7. - Specific rules in relation to third countries**

### **Art. 34. Conditions for AIFMs established in Luxembourg which manage non-EU AIFs which are not marketed in Member States**

An AIFM established in Luxembourg authorised under this Law is authorised to manage non-EU AIFs which are not marketed in the European Union provided that:

- a) the AIFM complies with all the requirements established in this Law except for Article 19 and 20 in respect of those AIFs; and
- b) appropriate cooperation arrangements are in place between the CSSF and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows the CSSF to carry out its duties in accordance with this Law.

**Art. 35. Conditions for the marketing in Luxembourg or in another Member State with a passport of a non-EU AIF managed by an AIFM established in Luxembourg**

(1) An AIFM established in Luxembourg authorised under this Law which intends to market to professional investors in Luxembourg or in another Member State units or shares of non-EU AIFs it manages and of EU feeder AIFs that do not fulfil the requirements referred to in paragraph (1), second subparagraph of Article 31 of Directive 2011/61/EU is required to comply with the provisions laid down in this Article.

(2) AIFMs referred to in paragraph (1) must comply with all the requirements established in this Law, with the exception of Chapter 6. In addition, the following conditions must be met:

- a) appropriate cooperation arrangements must be in place between the CSSF and the supervisory authorities of the third country where the AIF is established in order to ensure at least an efficient exchange of information, taking into account paragraph (3) of Article 53, that allows the CSSF to carry out its duties in accordance with this Law;
- b) the third country where the AIF is established must not be listed as a Non-Cooperative Country and Territory by FATF;
- c) the third country where the AIF is established must have signed an agreement with Luxembourg and with each other Member State in which the units or shares of the AIF are intended to be marketed, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements.

(3) The AIFM which intends to market units or shares of non-EU AIFs in Luxembourg must submit a notification to the CSSF in respect of each non-EU AIF that it intends to market.

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

(4) No later than twenty working days after receipt of a complete notification pursuant to paragraph (3), the CSSF shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph (3) in the territory of Luxembourg. The CSSF shall prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Law or the AIFM otherwise does not or will not comply with this Law. In the case of a positive decision, the AIFM may start marketing the AIF in Luxembourg as of the date of the notification by the CSSF.

The CSSF shall also inform ESMA that the AIFM may start marketing the units or shares of the AIF in the territory of Luxembourg.

(5) An AIFM which intends to market units or shares of non-EU AIFs in a Member State other than Luxembourg must submit a notification to the CSSF in respect of each non-EU AIF that it intends to market.

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

(6) The CSSF shall, no later than twenty working days after the date of receipt of the complete notification file referred to in paragraph (5), transmit it to the competent authorities of the Member State where the AIF is intended to be marketed. Such transmission will occur only if the AIFM's management

of the AIF complies and will continue to comply with this Law and if the AIFM otherwise complies with this Law.

The CSSF shall enclose in the notification file a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

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

The CSSF shall also inform ESMA that the AIFM may start marketing the units or shares of the AIF in the relevant host Member States.

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

(9) The notification letter referred to in paragraph (5) and the statement referred to in paragraph (6) are provided in a language customary in the sphere of international finance.

(10) In the event of a material change to any of the particulars communicated in accordance with paragraph (3) or (5), the AIFM must give written notice of that change to the CSSF, at least one month before implementing a planned change, or immediately after an unplanned change has occurred.

If pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Law or the AIFM would no longer comply with this Law, the CSSF shall inform the AIFM without delay that it is not authorised to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs, or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with this Law or the AIFM otherwise would no longer comply with this Law, the CSSF shall take all due measures in accordance with Article 50, including, if necessary, the express prohibition of marketing of the AIF.

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

(11) Without prejudice to the provisions of Article 46 of this Law in case of marketing in Luxembourg and of paragraph (1) of Article 43 of Directive 2011/61/EU in case of marketing in a Member State other than Luxembourg, the AIFs managed and marketed by the AIFM referred to in this Article may only be marketed to professional investors.

### **Art. 36. Conditions for the marketing in Luxembourg with a passport of a non-EU AIF managed by an AIFM established in another Member State**

(1) If an AIFM established in another Member State intends to market the shares or units of a non-EU AIF which it manages to professional investors in Luxembourg, the CSSF shall receive from the

competent authorities of the home Member State of the AIFM the notification file as well as the statement referred to in paragraph (6) of Article 35 of Directive 2011/61/EU.

The AIFM may start marketing the AIF concerned in Luxembourg as of the date of the notification to the AIFM of the transmission to the CSSF, referred to in this paragraph, by the competent authorities of the home Member State of the AIFM.

(2) Without prejudice to the provisions of Article 46 of this Law, AIFs managed and marketed by the AIFM referred to in this Article may only be marketed to professional investors.

**Art. 37. Conditions for the marketing in Luxembourg without a passport of non-EU AIFs managed by an authorised AIFM established in Luxembourg or in another Member State**

Without prejudice to Article 35 of Directive 2011/61/EU, an authorised AIFM established in Luxembourg or in another Member State is allowed to market to professional investors, in the territory of Luxembourg only, units or shares of non-EU AIFs it manages and of EU feeder AIFs that do not fulfil the requirements referred to in paragraph (1), second subparagraph of Article 31 of Directive 2011/61/EU, provided that:

- a) the AIFM complies with all the requirements established in Directive 2011/61/EU with the exception of Article 21. That AIFM must however ensure that one or more entities are appointed to carry out the duties referred to in paragraphs (7), (8) and (9) of Article 21. The AIFM shall not perform those functions. The AIFM is required to provide its supervisory authorities with information about the identity of those entities responsible for carrying out the duties referred to in paragraphs (7), (8) and (9) of Article 21; when the marketing is performed by an authorised AIFM established in Luxembourg, the aforementioned information is to be provided to the CSSF;
- b) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the 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 Directive 2011/61/EU; for the purpose of applying this paragraph, the CSSF is the competent authority of the home Member State of the AIFM, when the marketing is performed by an AIFM authorised and established in Luxembourg.
- c) the third country where the AIF is established is not listed as a Non-Cooperative Country and Territory by FATF.

**Art. 38. Authorisation of non-EU AIFMs intending to manage EU AIFs and/or market AIFs managed by them in the European Union in accordance with Articles 39 and 40 of Directive 2011/61/EU, where Luxembourg is defined as the home Member State of reference of the AIFM**

(1) Non-EU AIFMs intending to manage EU AIFs and/or to market AIFs managed by them in the European Union in accordance with Article 39 or Article 40 of Directive 2011/61/EU must acquire prior authorisation by the CSSF in accordance with this Article, in the case where Luxembourg is the Member State of reference of the AIFM as defined in accordance with the rules set out in paragraph (4) hereafter.

(2) A non-EU AIFM which intends to obtain prior authorisation as referred to in paragraph (1) must comply with the provisions of this Law, with the exception of Chapter 6. If and to the extent that

compliance with a provision of this Law is incompatible with compliance with the law to which the non-EU AIFM and/or the non-EU AIF marketed in the European Union is subject, there shall be no obligation on the AIFM to comply with that provision if it can demonstrate that:

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

(3) A non-EU AIFM which intends to obtain prior authorisation as referred to in paragraph (1) must have a legal representative established in Luxembourg. The legal representative shall be the contact point of the AIFM in the European Union. Any official correspondence between the competent authorities and the AIFM and between the investors in the European Union of the relevant AIF and the AIFM as set out in Directive 2011/61/EU must take place through that legal representative. The legal representative must perform the compliance function relating to the management and marketing activities performed by the AIFM under Directive 2011/61/EU together with the AIFM.

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

- a) if the non-EU AIFM intends to manage only one EU AIF, or several EU AIFs established in the same Member State, and does not intend to market any AIF in accordance with Article 39 or Article 40 of Directive 2011/61/EU in the European Union, the home Member State of that or those AIFs is deemed to be the Member State of reference and the competent authorities of this Member State will be competent for the authorisation procedure and for the supervision of the AIFM;
- b) if the non-EU AIFM intends to manage several EU AIFs established in different Member States and does not intend to market any AIF in accordance with Article 39 or Article 40 of Directive 2011/61/EU in the European Union, the Member State of reference is either:
  - i) the Member State where most of the AIFs are established; or
  - ii) the Member State where the largest amount of assets is being managed;
- c) if the non-EU AIFM intends to market only one EU AIF in only one Member State, the Member State of reference is determined as follows:
  - i) if the AIF is authorised or registered in a Member State, the home Member State of the AIF or the Member State where the AIFM intends to market the AIF;
  - ii) if the AIF is not authorised or registered in a Member State, the Member State where the AIFM intends to market the AIF;

- d) if the non-EU AIFM intends to market only one non-EU AIF in only one Member State, the Member State of reference is that Member State;
- e) if the non-EU AIFM intends to market only one EU AIF, but in different Member States, the Member State of reference is determined as follows:
  - i) if the AIF is authorised or registered in a Member State, the home Member State of the AIF or one of the Member States where the AIFM intends to develop effective marketing; or
  - ii) if the AIF is not authorised or registered in a Member State, one of the Member States where the AIFM intends to develop effective marketing;
- f) if the non-EU AIFM intends to market only one non-EU AIF, but in different Member States, the Member State of reference is one of those Member States;
- g) if the non-EU AIFM intends to market several EU AIFs in the European Union, the Member State of reference is determined as follows:
  - i) in so far as those AIFs are all registered or authorised in the same Member State, the home Member State of those AIFs or the Member State where the AIFM intends to develop effective marketing for most of those AIFs;
  - ii) in so far as those AIFs are not all registered or authorised in the same Member State, the Member State where the AIFM intends to develop effective marketing for most of those AIFs;
- h) if the non-EU AIFM intends to market several EU and non-EU AIFs, or several non-EU AIFs in the European Union, the Member State of reference is the Member State where it intends to develop effective marketing for most of those AIFs.

In the cases where, in accordance with the criteria set out in points (b), (c) i), (e), (f) and (g) i) of the first subparagraph, more than one Member State of reference is possible, Member States shall require that the non-EU AIFM intending to manage EU AIFs without marketing them and/or market AIFs managed by it in the European Union in accordance with Article 39 or Article 40 of Directive 2011/61/EU submit a request to the competent authorities of all of the Member States that are possible Member States of reference in accordance with the criteria set out in those points, to determine its Member State of reference from among them. Those competent authorities shall jointly decide the Member State of reference for the non-EU AIFM, within one month of receipt of such request. The competent authorities of the Member State that is appointed as Member State of reference shall, without delay, inform the non-EU AIFM of that appointment. If the non-EU AIFM is not duly informed of the decision made by the relevant competent authorities within seven days of the decision or if the relevant competent authorities have not made a decision within the one-month period, the non-EU AIFM may itself choose its Member State of reference based on the criteria set out in this paragraph.

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

(5) A non-EU AIFM intending to manage EU AIFs without marketing them and/or to market AIFs managed by it in the European Union in accordance with Article 39 or Article 40 of Directive 2011/61/EU

must submit a request for authorisation to the CSSF, in the case where Luxembourg is the Member State of reference of the AIFM as defined in accordance with the rules set out in paragraph (4) of this Article.

After receiving the application for authorisation, the CSSF assesses whether the determination by the AIFM of Luxembourg as Member State of reference complies with the criteria laid down in paragraph (4). If the CSSF considers that this is not the case, it refuses the authorisation request of the AIFM concerned explaining the reasons for its refusal. If the CSSF considers that the criteria of paragraph (4) have been complied with, it notifies ESMA, requesting advice on this assessment. In its notification to ESMA, the CSSF provides ESMA with the justification by the AIFM of its assessment regarding the determination of the Member State of reference and with information on the marketing strategy of the AIFM.

Within one month of having received the notification referred to in the second subparagraph, ESMA shall issue advice to the CSSF about the assessment of the CSSF relating to the determination of the Member State of reference in accordance with the criteria set out in paragraph (4).

The term referred to in paragraph (5) of Article 7 of this Law is suspended during ESMA's deliberation in accordance with this paragraph.

If the CSSF proposes to grant authorisation contrary to ESMA's advice referred to in the third subparagraph it informs ESMA, stating its reasons.

If the CSSF proposes to grant authorisation contrary to ESMA's advice referred to in the third subparagraph and the AIFM intends to market units or shares of AIFs managed by it in Member States other than Luxembourg, determined as being the Member State of reference, the CSSF also informs the competent authorities of those Member States thereof, stating its reasons. Where applicable, the CSSF also informs the competent authorities of the home Member States of the AIFs managed by the AIFM thereof, stating its reasons.

(6) Without prejudice to paragraph (7), the CSSF only grants the authorisation referred to in paragraph (1) where the following additional conditions are met:

- a) Luxembourg is designated as the Member State of reference by the AIFM in accordance with the criteria set out in paragraph (4) of this Article. Such designation must moreover be supported by the disclosure of the marketing strategy, and the procedure set out in paragraph (5) must have been followed;
- b) the AIFM has appointed a legal representative established in Luxembourg;
- c) the legal representative is, together with the AIFM, the contact person of the non-EU AIFM for the investors of the relevant AIFs, for ESMA and for the competent authorities as regards the activities for which the AIFM is authorised in the European Union; the legal representative must be sufficiently equipped to perform the compliance function pursuant to this Law;
- d) appropriate cooperation arrangements are in place between the CSSF, the competent authorities of the home Member State of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established in order to ensure at least an efficient exchange of information that allows the respective competent authorities to carry out their duties in accordance with Directive 2011/61/EU;

- e) the third country where the non-EU AIFM is established is not listed as a Non-Cooperative Country and Territory by FATF;
- f) the third country where the non-EU AIFM is established has signed an agreement with Luxembourg, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements;
- g) the effective exercise by the respective competent authorities of their supervisory functions under Directive 2011/61/EU is neither prevented by the laws, regulations or administrative provisions of a third country governing the AIFM, nor by limitations in the supervisory and investigatory powers of that third country's supervisory authorities.

(7) The authorisation referred to in paragraph (1) is granted by the CSSF in accordance with the provisions of Chapter 2 of this Law which shall apply *mutatis mutandis*, subject to the following provisions:

- a) the information referred to in paragraph (2) of Article 6 shall be supplemented by:
  - i) a justification by the AIFM of its assessment regarding the Member State of reference in accordance with the criteria set out in paragraph (4) with information on the marketing strategy;
  - ii) a list of the provisions of this Law for which compliance by the AIFM is impossible as compliance by the AIFM with those provisions is, in accordance with point b) of paragraph (2), incompatible with compliance with a mandatory provision in the law to which the non-EU AIFM or the non-EU AIF marketed in the European Union is subject;
  - iii) written evidence based on the regulatory technical standards developed by ESMA that the relevant third country law provides for a rule equivalent to the provisions for which compliance is impossible, which has the same regulatory purpose and offers the same level of protection to the investors of the relevant AIFs and that the AIFM complies with that equivalent rule; such written evidence being supported by a legal opinion on the existence of the relevant incompatible mandatory provision in the law of the third country and including a description of the regulatory purpose and the nature of the investor protection pursued by it; and
  - iv) the name of the legal representative of the AIFM and the place where it is established;
- b) the information referred to in paragraph (3) of Article 6 may be limited to the EU AIFs the AIFM intends to manage and to those AIFs managed by the AIFM that it intends to market in the European Union with a passport;
- c) paragraph (1), point a) of Article 7 shall be without prejudice to paragraph (2) of this Article;
- d) paragraph (1), point e) of Article 7 shall not apply;
- e) paragraph (5), second subparagraph of Article 7 shall be read as including a reference to 'the information referred to in paragraph (7), point a) of Article 38'.

(8) In case the CSSF considers that the AIFM may rely on paragraph (2) to be exempted from compliance with certain provisions of this Law, it shall notify ESMA without delay. The CSSF shall support this assessment by the information provided by the AIFM in accordance with points a) ii) and a) iii) of paragraph (7).

Within one month of receipt of the notification referred to in the first subparagraph, ESMA shall issue advice to the CSSF about the application of the exemption for compliance with certain provisions of this Law caused by the incompatibility in accordance with paragraph (2). The term referred to in paragraph (5) of Article 7 shall be suspended during the ESMA review in accordance with this paragraph.

If the CSSF proposes to grant authorisation contrary to ESMA's advice referred to in the second subparagraph it shall inform ESMA, stating its reasons.

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

(9) The CSSF, as the competent authority of the Member State of reference, shall, without delay, inform ESMA of the outcome of the initial authorisation process, about any changes in the authorisation of the AIFM and any withdrawal of authorisation.

The CSSF shall moreover inform ESMA about the applications for authorisation that it has rejected, providing data about the AIFM having asked for authorisation and the reasons for the rejection.

(10) If an AIFM authorised by the CSSF by reason of this Article changes its marketing strategy within two years of its initial authorisation, and under the hypothesis that such change would have affected the determination of the Member State of reference if the modified marketing strategy had been the initial marketing strategy, the AIFM is required to inform the CSSF, as the competent authority of the original Member State of reference, of the change before implementing it. The AIFM concerned indicates its Member State of reference in accordance with the criteria set out in paragraph (4) and based on the new marketing strategy. The AIFM shall justify its assessment by disclosing its new marketing strategy to the CSSF as the competent authority of the original Member State of reference. At the same time, the AIFM shall provide information on its legal representative, including its name and the place where it is established. The legal representative shall be established in the new Member State of reference.

The CSSF shall assess whether the determination of the Member State of reference by the AIFM in accordance with the first subparagraph, is correct and shall notify ESMA thereof. In the notification to ESMA, the CSSF discloses the AIFM's justification of its assessment regarding the determination of the Member State of reference and information on the AIFM's new marketing strategy.

Within one month of receipt of the notification referred to in the second subparagraph, ESMA shall issue advice to the CSSF about its assessment.

After receipt of ESMA's advice in accordance with the third subparagraph, the CSSF shall inform the non-EU AIFM, its original legal representative and ESMA of its decision.

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

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

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

- a) the CSSF informs ESMA thereof, stating its reasons;
- b) where the AIFM markets units or shares of AIFs managed by it in Member States other than Luxembourg, as the original Member State of reference, the CSSF shall inform the competent authorities of those other Member States thereof, stating its reasons. Where applicable, the CSSF also informs the competent authorities of the home Member States of the AIFs managed by the AIFM thereof, stating its reasons.

(11) Where it appears from the actual course of the business development of the AIFM in the European Union within two years after its authorisation by reason of this Article that the marketing strategy as presented by the AIFM at the time of its authorisation was not followed, the AIFM made false statements in relation thereto or the AIFM has failed to comply with paragraph (10) when changing its marketing strategy, the CSSF, as the competent authority of the original Member State of reference, shall request the AIFM to indicate the Member State of reference based on its actual marketing strategy. The procedure set out in paragraph (10) shall apply *mutatis mutandis*. If the AIFM does not comply with the CSSF's request, the latter shall proceed to the withdrawal of its authorisation.

Where the AIFM changes its marketing strategy after the period referred to in paragraph (10) and intends to change its Member State of reference on the basis of its new marketing strategy, it may submit a request to change its Member State of reference to the CSSF as the competent authority of the original Member State of reference. The procedure referred to in paragraph (10) shall apply *mutatis mutandis*.

(12) Any disputes arising between the CSSF, as the competent authority of the Member State of reference of the AIFM, and the AIFM shall be settled in accordance with Luxembourg law and subject to the Luxembourg courts.

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

**Art. 39. Conditions for the marketing in the European Union with a passport of EU AIFs managed by a non-EU AIFM, where Luxembourg is defined as the Member State of reference of the AIFM**

(1) A duly authorised non-EU AIFM which intends to market the units or shares of an EU AIF it manages to professional investors in the European Union with a passport, is required to comply with the provisions of this Article, where Luxembourg is defined as the Member State of reference of the AIFM in accordance with the rules set out in paragraph (4) of Article 38.

(2) In case the AIFM intends to market units or shares of the EU AIF in Luxembourg, defined as the Member State of reference of the AIFM, the AIFM must submit to the CSSF a notification in respect of each EU AIF that it intends to market.

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

(3) No later than twenty working days after receipt of a complete notification pursuant to paragraph (2), the CSSF shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph (2) in the territory of Luxembourg. The CSSF may oppose the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Law or if the AIFM otherwise does not or will not comply with this Law. In the case of a positive decision, the AIFM may start marketing the AIF in Luxembourg as of the date of the notification by the CSSF to that effect.

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

(4) In case the AIFM intends to market units or shares of the EU AIF in Member States other than Luxembourg, defined as the Member State of reference of the AIFM, the AIFM must submit a notification to the CSSF in respect of each EU AIF that it intends to market.

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

(5) No later than twenty working days after the date of receipt of the complete notification file referred to in paragraph (4), the CSSF shall transmit the complete notification file to the competent authorities of the Member States where the units or shares of the AIF are intended to be marketed. Such transmission shall be effected only if the AIFM's management of the AIF complies and will continue to comply with this Law and if the AIFM otherwise complies with this Law.

The CSSF shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

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

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

(7) The arrangements referred to in point h) of Annex IV are subject to the laws of the host Member States of the AIFM and are subject to supervision by the competent authorities of this Member State.

(8) The notification letter by the AIFM referred to in paragraph (4) and the statement referred to in paragraph (5) are provided in a language customary in the sphere of international finance.

(9) In the event of a material change to any of the particulars communicated in accordance with paragraph (2) and/or (4), the AIFM must give written notice of that change to the CSSF at least one month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Law or the AIFM would otherwise no longer comply with this Law, the CSSF shall inform the AIFM, without delay, that it is not authorised to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with this Law or the AIFM otherwise no longer complies with this Law, the CSSF shall take all

due measures in accordance with Article 50, including, if necessary, the express prohibition of marketing of the AIF.

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

(10) Without prejudice to the provisions of Article 46 of this Law in case of marketing in Luxembourg and of paragraph (1) of Article 43 of Directive 2011/61/EU in case of marketing in a Member State other than Luxembourg, the AIFs managed and marketed by the AIFMs referred to in this Article may only be marketed to professional investors.

**Art. 40. Conditions for the marketing in Luxembourg with a passport of EU AIFs managed by a non-EU AIFM, where Luxembourg is not the Member State of reference of the AIFM**

(1) If a duly authorised non-EU AIFM intends to market with a passport to professional investors, in Luxembourg, units or shares of an EU AIF that it manages, the competent authorities of the Member State of reference of the AIFM shall transmit to the CSSF the notification file as well as the statement referred to in paragraph (5) of Article 39 of Directive 2011/61/EU.

Upon notification to the AIFM of the transmission to the CSSF, referred to in this paragraph, by the competent authorities of the AIFM's Member State of reference, the AIFM may market the AIF concerned in Luxembourg from the date of this notification.

(2) Without prejudice to the provisions of Article 46 of this Law, AIFs managed and marketed by the AIFMs referred to in this Article may be marketed only to professional investors.

**Art. 41. Conditions for the marketing in the European Union with a passport of non-EU AIFs managed by a non-EU AIFM, where Luxembourg is defined as the Member State of reference of the AIFM**

(1) A duly authorised non-EU AIFM which intends to market units or shares of a non-EU AIF it manages to professional investors in the European Union with a passport is required to comply with the provisions of this Article, where Luxembourg is defined as the Member State of reference of the AIFM pursuant to the rules set out in paragraph (4) of Article 38 of this Law.

(2) AIFMs referred to in paragraph (1) shall satisfy all requirements contained in this Law relating to AIFMs established in the European Union. In addition, the following conditions must be fulfilled:

- a) appropriate cooperation arrangements are in place between the CSSF and the supervisory authority of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows the CSSF to carry out its duties in accordance with this Law;
- b) the third country where the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF;

- c) the third country where the non-EU AIF is established has signed an agreement with Luxembourg and with each other Member State in which the units or shares of the non-EU AIF are intended to be marketed which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements.

(3) If the AIFM intends to market the units or shares of non-EU AIFs in Luxembourg, defined as the Member State of reference of the AIFM, the AIFM must submit a notification to the CSSF in respect of each non-EU AIF that it intends to market.

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

(4) No later than twenty working days after receipt of a complete notification pursuant to paragraph (3), the CSSF shall inform the AIFM whether it may start marketing the AIF identified in the notification referred to in paragraph (3) in the territory of Luxembourg. The CSSF may prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with this Law or the AIFM otherwise does not or will not comply with this Law. In the case of a positive decision, the AIFM may start marketing the AIF in Luxembourg from the date of the notification by the CSSF to that effect.

The CSSF shall also inform ESMA that the AIFM may start marketing units or shares of the AIF in Luxembourg defined as the Member State of reference of the AIFM.

(5) If the AIFM intends to market the units or shares of a non-EU AIF also in Member States other than Luxembourg, defined as the Member State of reference of the AIFM, the AIFM shall submit a notification to the CSSF in respect of each non-EU AIF that it intends to market.

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

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

The CSSF shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

(7) Upon transmission of the notification file, the CSSF shall, without delay, notify the AIFM of the transmission. The AIFM may start marketing the AIF in the relevant host Member States of the AIFM as of the date of that notification.

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

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

(9) The notification letter by the AIFM referred to in paragraph (5) and the statement referred to in paragraph (6) are provided in a language customary in the sphere of international finance.

(10) In the event of a material change to any of the particulars communicated in accordance with paragraph (3) or (5), the AIFM must give written notice of that change to the CSSF at least one month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with this Law, or the AIFM would otherwise no longer comply with this Law, the CSSF shall inform the AIFM, without delay, that it is not authorised to implement the change.

If the planned change is implemented notwithstanding the first and second subparagraphs, or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with this Law or the AIFM otherwise no longer complies with this Law, the CSSF shall take all due measures in accordance with Article 50, including, if necessary, the express prohibition of marketing of the AIF.

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

(11) Without prejudice to the provisions of Article 46 of this Law in case of marketing in Luxembourg and of paragraph (1) of Article 43 of Directive 2011/61/EU in case of marketing in a Member State other than Luxembourg, the AIFs managed and marketed by the AIFMs referred to in this Article may only be marketed to professional investors.

**Art. 42. Conditions for the marketing in Luxembourg with a passport of non-EU AIFs managed by a non-EU AIFM, where Luxembourg is not the Member State of reference of the AIFM**

(1) If a duly authorised non-EU AIFM intends to market with a passport to professional investors in Luxembourg, units or shares of a non-EU AIF that it manages, the competent authorities of the Member State of reference of the AIFM shall transmit to the CSSF the notification file as well as the statement referred to in paragraph (4) of Article 40 of Directive 2011/61/EU.

Upon notification to the AIFM of the transmission to the CSSF, referred to in this paragraph, by the competent authorities of the AIFM's Member State of reference, the AIFM may market the AIF concerned in Luxembourg from the date of this notification.

(2) Without prejudice to the provisions of Article 46 of this Law, AIFs managed and marketed by the AIFMs referred to in this Article may be marketed only to professional investors.

**Art. 43. Conditions for managing AIFs established in Member States other than the Member State of reference by non-EU AIFMs, where Luxembourg is defined as the Member State of reference of the AIFM**

(1) An authorised non-EU AIFM which intends to manage EU AIFs established in a Member State other than Luxembourg, defined as the Member State of reference of the AIFM, either directly or via the establishment of a branch, must be authorised to manage that type of AIF.

(2) Any AIFM referred to in paragraph (1) which intends to manage EU AIFs established in another Member State than Luxembourg, defined as the Member State of reference of the AIFM, for the first time, is required to communicate the following information to the CSSF:

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

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

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

(4) The CSSF, if it considers that the AIFM's management of the AIF complies and will continue to comply with the provisions of this Law and the AIFM otherwise complies with the provisions of this Law, shall transmit, within one month of receiving the complete documentation in accordance with paragraph (2) or within two months of receiving the complete documentation in accordance with paragraph (3), that documentation to the competent authorities of the host Member States of the AIFM.

The CSSF shall enclose with the file a statement confirming having authorised the AIFM in accordance with the provisions of this Law.

After transmission of the file to the competent authorities of the host Member State of the AIFM, this transmission shall be notified without delay by the CSSF to the AIFM. Upon receipt of the transmission notification the AIFM may start to provide its services in the host Member States.

The CSSF shall also inform ESMA that the AIFM may start managing the AIF in the host Member States of the AIFM.

(5) In the event of a change to any of the information communicated in accordance with paragraph (2) and, if relevant, paragraph (3), the AIFM must give written notice of that change to the CSSF at least one month before implementing a planned change, or immediately after an unplanned change has occurred.

If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with the provisions of this Law or the AIFM would otherwise no longer comply with the provisions of this Law, the CSSF shall inform the AIFM without delay that it is not authorised to implement the change.

If a planned change is implemented notwithstanding the first and second subparagraphs or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with the provisions of this Law or the AIFM otherwise no longer complies with the provisions of this Law, the CSSF shall take all due measures in accordance with Article 50, including the express prohibition of marketing of the AIF.

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

**Art. 44. Conditions for managing AIFs established in Luxembourg by non-EU AIFMs, where Luxembourg is not the Member State of reference of the AIFM**

If an authorised non-EU AIFM intends to manage AIFs established in Luxembourg, either directly or via the establishment of a branch, the competent authorities of the Member State of reference of the AIFM shall transmit to the CSSF the information referred to in paragraphs (2) and (3), respectively, of Article 41 of Directive 2011/61/EU.

Upon notification to the AIFM of the transmission to the CSSF, as referred in this Article, by the competent authorities of the Member State of reference of the AIFM, the latter may start providing its services in Luxembourg from the date of this notification.

**Art. 45. Conditions for the marketing in Luxembourg without a passport of AIFs managed by a non-EU AIFM**

Without prejudice to Articles 37, 39 and 40 of Directive 2011/61/EU, non-EU AIFMs are authorised to market to professional investors, in the territory of Luxembourg, units or shares of AIFs they manage, subject at least to complying with the following conditions:

- a) the non-EU AIFM complies with Articles 22, 23 and 24 of Directive 2011/61/EU in respect of each AIF marketed by it pursuant to this Article and with Articles 26 to 30 of Directive 2011/61/EU where an AIF marketed by it pursuant to this Article falls within the scope of paragraph (1) of Article 26 of that Directive;
- b) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the Member States where the AIFs are marketed, in so far as applicable, the competent authorities of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows competent authorities of the relevant Member States to carry out their duties in accordance with Directive 2011/61/EU;
- c) the third country where the non-EU AIFM or the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF.

**Chapter 8. - Marketing to retail investors**

**Art 46. Marketing of AIFs by AIFMs to retail investors**

(1) Authorised AIFMs established in Luxembourg, in another Member State or in a third country are authorised to market to retail investors in the territory of Luxembourg units or shares of AIFs they manage in accordance with Directive 2011/61/EU, irrespective of whether such AIFs are marketed on a cross-border basis or not, or whether they are EU or non-EU AIFs. In such case, the following preliminary conditions must be fulfilled:

- a) the AIFs must be subject in their home State to a permanent supervision performed by a supervisory authority set up by law in order to ensure the protection of investors. For AIFs established in Luxembourg, this condition shall be deemed fulfilled by AIFs subject to part II of the amended Law of 17 December 2010 on undertakings for collective investment, the amended Law of 15 June 2004 on the investment company in risk capital (“SICAR”) and the amended Law of 13 February 2007 on specialised investment funds.

This paragraph is without prejudice to conditions of eligibility applicable to investors in AIFs which are subject to regulation by a law of the financial sector in Luxembourg.

- b) AIFs established in a Member State other than Luxembourg or in a third country must be subject in their home State to regulation providing investors guarantees of protection at least equivalent to those provided by Luxembourg laws governing AIFs authorised to be marketed to retail investors in Luxembourg. These AIFs must also be subject in their home State to supervision considered by the CSSF to be equivalent to that provided in Luxembourg laws governing AIFs authorised to be marketed to retail investors in Luxembourg.

In such case, cooperation between the CSSF and the supervisory authority of the AIF must also be ensured.

(2) The means of implementation of this Article are laid down by way of a CSSF regulation.

(3) This Article is without prejudice to the provisions applicable to marketing to investors in AIFs regulated by EU Regulation 2015/760, EU Regulation No. 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds or EU Regulation No. 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds.

#### **Art. 46-1. Arrangements to be made by AIFMs with retail investors**

(1) Without prejudice to Article 26 of Regulation (EU) 2015/760, authorised AIFMs established in Luxembourg, in another EU Member State or in a third country that market or intend to market in Luxembourg units or shares of an AIF to retail investors, shall make arrangements in Luxembourg to perform the following tasks:

- a) process investors' subscription, payment, repurchase and redemption orders relating to the units or shares of the AIF, in accordance with the conditions set out in the AIF's documents;
- b) provide investors with information on how orders referred to in point a) can be made and how repurchase and redemption proceeds are paid;
- c) facilitate the handling of information relating to the exercise of investors' rights arising from their investment in the AIF;
- d) make the information and documents required pursuant to Articles 22 and 23 of Directive 2011/61/EU available to investors for the purposes of inspection and obtaining copies thereof;
- e) provide investors with information relevant to the arrangements to perform the tasks provided for in points a) to f) of this paragraph, in a durable medium as defined in point (m) of Article 2(1) of Directive 2009/65/EC; and

f) act as a contact point for communicating with the CSSF.

(2) For the purposes of paragraph (1), no physical presence in Luxembourg or appointment of a third party is required.

(3) The AIFM shall ensure that the arrangements to perform the tasks referred to in paragraph (1) can be provided, including electronically:

a) in Luxembourgish, French, German or English;

b) by the AIFM itself, by a third party which is subject to regulation and supervision governing the above-mentioned tasks, or by both.

For the purposes of point b), where the tasks are to be performed by a third party, the appointment of that third party shall be evidenced by a written contract, which specifies which of the tasks referred to in paragraph (1) are not to be performed by the AIFM and that the third party will receive all the relevant information and documents from the AIFM.

## **Chapter 9. - Organisation of supervision**

### **Section 1 - Competent authority, supervisory and sanctioning powers**

#### **Art. 47. Competent authority**

(1) The CSSF is the authority in charge of carrying out the duties provided for in this Law.

(2) The CSSF carries out these duties exclusively in the interest of the public.

(3) Any person who works or who has worked for the CSSF, as well as the independent auditors or experts mandated by the CSSF, shall be bound by the obligation of professional secrecy provided for by Article 16 of the amended Law of 23 December 1998 creating a commission for the supervision of the financial sector. This secrecy implies that confidential information which they may receive in the course of their duties may not be divulged to any person or authority whatsoever, save in summary or abridged form so that no person subject to this Law can be individually identified, without prejudice to cases covered by criminal law.

This paragraph shall not prevent the CSSF from exchanging confidential information with the supervisory authorities of other Member States, ESMA, EBA and ESRB within the limits, under the conditions and in accordance with the provisions of this Law, Directive 2011/61/EU and other legal provisions governing the CSSF's professional secrecy.

#### **Art. 48. Responsibility of the CSSF as competent authority of the home Member State of the AIFM**

(1) The CSSF is in charge of prudential supervision of AIFMs established in Luxembourg, authorised under this Law, irrespective of whether such AIFM manages and/or markets AIFs in another Member State or not, without prejudice to those provisions of this Law which confer the responsibility for supervision on the competent authorities of the host Member State of the AIFM.

(2) Where an AIFM established in Luxembourg and authorised pursuant to this Law, which manages or markets AIFs in the territory of another Member State, by operating or not through a branch, refuses to

provide the competent authorities of the host Member State with the information falling under their responsibility, or fails to take the necessary steps to put an end to the breach of the rules falling under their responsibility, the CSSF is informed thereof. The CSSF shall, at the earliest opportunity, take all appropriate measures to ensure that the AIFM concerned provides the information requested by the competent authorities of its host Member State or puts an end to the breach. The CSSF shall request, where applicable, the necessary information from the competent supervisory authorities of third countries. The nature of the measures referred to in this paragraph shall be communicated by the CSSF to the competent authorities of the AIFM's host Member State.

(3) The CSSF shall take appropriate measures, including requesting, if necessary, additional information from the relevant supervisory authorities of third countries, if the competent authorities of the AIFM's host Member State inform the CSSF that they have clear and demonstrable grounds for believing that the AIFM is in breach of the obligations arising from rules in relation to which they have no responsibility.

#### **Art. 49. Responsibility of the CSSF as competent authority of the host Member State of the AIFM**

(1) Where an AIFM established in another Member State manages and/or markets AIFs through a branch in Luxembourg, the CSSF, as competent authority of the AIFM's host Member State, shall be responsible for supervising compliance with the provisions of Articles 11 and 13 of this Law.

(2) The AIFM managing or marketing AIFs in Luxembourg, whether or not through a branch, is required to provide the CSSF with the information necessary for the monitoring of the AIFM's compliance with the rules which are applicable to it and which are under the responsibility of the CSSF.

(3) Where the CSSF ascertains that an AIFM managing and/or marketing AIFs in Luxembourg, whether or not through a branch, is in breach of one of the rules falling under its responsibility, it shall require the AIFM concerned to put an end to that breach and informs the competent authorities of the home Member State thereof.

(4) If the AIFM concerned refuses to provide the CSSF with information falling under its responsibility, or fails to take the necessary steps to put an end to the breach referred to in paragraph (3), the CSSF shall inform the competent authorities of the home Member State of the AIFM thereof. The nature of the measures taken by the competent authorities of the home Member State of the AIFM shall be communicated to the CSSF so that the AIFM provides the information requested by the CSSF or puts an end to the breach.

(5) If, despite the measures taken by the competent authorities of the home Member State of the AIFM pursuant to paragraph (4) or because such measures prove to be inadequate or are not available in the Member State in question, the AIFM continues to refuse to provide the information requested by the CSSF pursuant to paragraph (2), or persists in breaching the legal or regulatory provisions, referred to in paragraph (3), in force in Luxembourg, the CSSF shall, after informing the competent authorities of the home Member State of the AIFM, take the appropriate measures, including those laid down in Articles 50 and 51, to prevent or penalise further irregularities and, in so far as necessary, to prevent that AIFM from initiating any further transactions in Luxembourg. Where the function carried out in Luxembourg is the management of AIFs, the CSSF may require the AIFM to cease managing those AIFs.

(6) Where the CSSF has clear and demonstrable grounds for believing that the AIFM is in breach of the obligations arising from rules which do not fall under its responsibility, it shall inform the competent

authorities of the home Member State of the AIFM which shall take appropriate measures, including, if necessary, request additional information from the relevant supervisory authorities in third countries.

(7) If despite the measures taken by the competent authorities of the home Member State of the AIFM or because such measures prove to be inadequate, or because the home Member State of the AIFM fails to act within a reasonable timeframe, the AIFM persists in acting in a manner that is clearly prejudicial to the interests of the investors of the relevant AIF, the financial stability or the integrity of the Luxembourg market, the CSSF shall, after informing the competent authorities of the home Member State of the AIFM, take all appropriate measures needed in order to protect the investors of the relevant AIF, the financial stability and the integrity of the Luxembourg market, including preventing the AIFM concerned from further marketing the units or shares of the relevant AIF in Luxembourg.

(8) The procedure laid down in paragraphs (6) and (7) shall also apply in the event that the CSSF has clear and demonstrable grounds for disagreement with the authorisation of a non-EU AIFM by the Member State of reference.

#### **Art. 50. Supervisory and investigatory powers**

(1) For the purpose of applying this Law, the CSSF is given all supervisory and investigatory powers that are necessary for the exercise of its functions.

(2) The CSSF's powers include the right:

- a) to have access to any document in any form and to receive a copy of it;
- b) to require information from any person related to the activities of the AIFM or the AIF and if necessary to summon and question a person with a view to obtaining information;
- c) to carry out on-site inspections with or without prior announcements of persons subject to its prudential supervision under this Law;
- d) to require the communication of existing telephone and existing data traffic records;
- e) to require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Law;
- f) to request the freezing or the sequestration of assets by the President of the District Court of and in Luxembourg acting on request;
- g) to pronounce the temporary prohibition of professional activities of persons subject to its prudential supervision, as well as of the members of administrative, governing and management bodies, employees and agents linked to these persons;
- h) to require authorised AIFMs, depositaries or approved statutory auditors to provide information;
- i) to adopt, in accordance with national law, any type of measure to ensure that AIFMs or depositaries continue to comply with the requirements of this Law applicable to them;

- j) to require the suspension of the issue, repurchase or redemption of units of AIFs in the interest of the unitholders or of the public;
- k) to withdraw the authorisation granted to an AIFM or a depositary;
- l) to transmit information to the Public Prosecutor for criminal proceedings;
- m) to instruct approved statutory auditors or experts to carry out verifications or investigations of persons subject to this Law.

(3) The CSSF shall in particular make use of the powers referred to in paragraph (2) in order to ensure the orderly functioning of markets in those cases where the activity of one or more AIFs in the market for a financial instrument might jeopardise the orderly functioning of that market.

#### **Art. 51. Administrative penalties**

(1) Legal persons subject to the supervision of the CSSF under this Law and natural persons in charge of the administration or management of these legal persons as well as natural persons subject to the same supervision may be sanctioned by the CSSF in the case that:

- they fail to comply with the obligations provided for by Articles 3 (3), 4 (2), 5 (2) (3) (5) (7), 8, 9 (1), 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 32, 34, 35, 37 and 46 of this Law or by the implementing measures relating to these Articles,
- they refuse to provide accounting documents or other requested information,
- they have provided documents or other information that proves to be incomplete, inaccurate or false,
- they prevent the CSSF from exercising its powers of supervision, inspection and investigation,
- they contravene the rules governing the publication of balance sheets and accounts,
- they fail to act in response to injunctions of the CSSF,
- they risk, with their behaviour, to jeopardise the sound and prudent management of the institution concerned,<sup>23</sup>
- they fail to comply with the obligations provided for by Articles 13 and 14 of Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012.

(2) The CSSF may impose the following sanctions, classed in order of severity:

- a warning,

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<sup>23</sup> Correction of a material mistake by the legislator.

- a reprimand,
- a fine of between EUR 250 and EUR 250,000,
- and, in the cases referred to in the 4th, 6th and 7th indents of paragraph (1), one or several of the following measures:
  - a) a temporary or definitive prohibition on carrying out operations or activities, as well as any other restrictions on the activity of the person or entity,
  - b) a temporary or definitive prohibition on acting as directors, managers or conducting persons, whether *de jure* or *de facto*, of persons or entities subject to the supervision of the CSSF.

The CSSF may disclose to the public the penalties imposed under this Article, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

When imposing a penalty, the CSSF takes into account the nature, duration and the severity of the infringement, the conduct and past record of the natural or legal person to be sanctioned, the damage caused to third parties and the potential benefits or gain and/or those effectively deriving from the infringement.

#### **Art. 52. Right of appeal**

(1) The decisions to be adopted by the CSSF in implementation of this Law shall state in writing the reasons on which they are based and, unless the delay entails risks, they shall be adopted after preparatory proceedings at which all parties are able to state their case. They shall be notified by registered letter or delivered by bailiff.

(2) The decisions by the CSSF concerning the granting, refusal or withdrawal of the authorisations provided for in this Law as well as the decisions by the CSSF concerning the administrative penalties pursuant to Article 51, may be referred to the administrative court which will deal with the substance of the case. The appeal must be filed within one month from the date of notification of the contested decision, or else shall be time-barred.

### **Section 2 - Cooperation between different competent authorities**

#### **Art. 53. Obligation to cooperate**

(1) The CSSF shall cooperate with the competent authorities of the other Member States as well as with ESMA and the ESRB in view of the accomplishment of their duties under Directive 2011/61/EU or the exercise of their powers under the aforementioned directive or under national law.

(2) The CSSF shall cooperate with the competent authorities, even in cases where the conduct under investigation does not constitute an infringement of any regulation in force in Luxembourg.

(3) The CSSF shall supply the competent authorities of the other Member States and shall supply immediately ESMA with the information required for the purposes of carrying out their duties under Directive 2011/61/EU.

The CSSF, as the competent authority of the home Member State of the AIFM, shall forward a copy of the relevant cooperation arrangements entered into by it in accordance with Articles 35, 37 and/or 40 of Directive 2011/61/EU to the competent authorities of the host Member States of the AIFM concerned. The CSSF shall, in accordance with procedures relating to the applicable regulatory technical standards referred to in paragraph (14) of Article 35, paragraph (17) of Article 37 or paragraph (14) of Article 40 of Directive 2011/61/EU, forward the information received from third-country supervisory authorities in accordance with cooperation arrangements with such supervisory authorities in respect of an AIFM, or, where relevant, pursuant to paragraphs (6) or (7) of Article 45 of that Directive, to the competent authorities of the host Member State of the AIFM concerned.

Where the CSSF, as the competent authority of the host Member State of the AIFM, considers that the contents of the cooperation arrangement entered into by the home Member State of the AIFM concerned in accordance with Article 35, 37 and/or 40 of Directive 2011/61/EU does not comply with what is required pursuant to the applicable regulatory technical standards, the CSSF may refer the matter to ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

(4) Where the CSSF has clear and demonstrable grounds to suspect that acts contrary to Directive 2011/61/EU are being or have been carried out by an AIFM not subject to its supervision, it shall notify ESMA and the competent authorities of the home and host Member States of the AIFM concerned thereof in as specific a manner as possible.

(5) If the competent authorities of another Member State have clear and demonstrable grounds to suspect that acts contrary to Directive 2011/61/EU are being or have been carried out by an AIFM authorised under this Law, the authorities concerned shall notify the CSSF thereof. The CSSF shall take appropriate measures, shall inform ESMA and the notifying competent authorities of the outcome of that action and, to the extent possible, of significant interim developments.

#### **Art. 54. Transfer and retention of personal data**

(1) The provisions of Directive 95/46/EC are applicable to personal data transferred between the CSSF and the competent authorities concerned under Directive 2011/61/EU.

(2) The CSSF shall retain the personal data referred to in paragraph (1) for a maximum period of five years.

#### **Art. 55. Disclosure of information to the competent authorities of third countries**

(1) The CSSF is authorised to transfer to the competent authorities of third countries data and the analysis of data on a case-by-case basis where the conditions laid down in Article 25 or Article 26 of Directive 95/46/EC are met and where the CSSF is satisfied that this transfer is necessary for the purpose of the application of Directive 2011/61/EU. The competent authorities of the third country which receive information from the CSSF are only authorised to transfer the data to the competent authorities of another third country with the express written authorisation of the CSSF.

(2) Information received by the CSSF under Directive 2011/61/EU may not be disclosed to a supervisory authority of a third country without the express agreement of the competent authorities which transmitted the information to the CSSF and solely for the purposes for which such authorities gave their agreement.

#### **Art. 56. Exchange of information relating to the potential systemic consequences of AIFM activity**

(1) The CSSF shall communicate to the competent authorities of the other Member States concerned the information which is relevant for them for monitoring and responding to the potential implications of the activities of individual AIFMs or AIFMs collectively for the stability of systemically relevant financial institutions as well as the orderly functioning of markets on which AIFMs are active and to enable them to take appropriate measures. The CSSF also informs ESMA and the ESRB thereof which shall forward this information to the competent authorities of the other Member States.

(2) Subject to the conditions laid down in Article 35 of Regulation (EU) No 1095/2010, aggregated information relating to the activities of AIFMs subject to the supervision of the CSSF under this Law shall be communicated by the CSSF to ESMA and the ESRB.

#### **Art. 57. Cooperation in the accomplishment of supervisory missions**

(1) The competent authorities of one Member State may request the cooperation of the CSSF in the conduct of their supervisory mission or for an on-the-spot verification or in an investigation in Luxembourg within the framework of their powers pursuant to Directive 2011/61/EU.

Where the CSSF receives a request with respect to an on-the-spot verification or an investigation, it shall perform one of the following:

- a) carry out the verification or investigation itself;
- b) allow the requesting authority to carry out the verification or investigation;
- c) allow auditors or experts to carry out the verification or investigation.

(2) If the verification or investigation is performed by the CSSF, the competent authority of the Member State which has requested cooperation may ask that members of its own personnel assist the CSSF carrying out the verification or investigation. The verification or investigation shall, however, be subject to the overall control of the CSSF.

If the verification or investigation is carried out by the authority which made the request, the CSSF may request that its own personnel assist the personnel in carrying out the verification or investigation.

(3) The CSSF may refuse to exchange information or to act on a request to cooperate in an investigation or on-the-spot verification under Directive 2011/61/EU only where:

- a) the investigation, on-the-spot verification or exchange of information might adversely affect the sovereignty, security or public order of Luxembourg;
- b) judicial proceedings have already been initiated in respect of the same actions and the same persons in Luxembourg;
- c) final judgment has already been delivered in Luxembourg in respect of the same persons and the same actions.

The CSSF shall notify the requesting competent authorities of any decision taken under this paragraph. Such notification shall contain information about the reasons of the decision.

## Chapter 10. - Transitional provisions

### Art. 58. Transitional provisions

(1) The persons performing activities of AIFM within the meaning of this Law before 22 July 2013 shall take all necessary measures to comply with the provisions of this Law and shall have until 22 July 2014 to submit an application for authorisation to the CSSF.

(2) Articles 29, 30 and 32 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 this date may continue to manage such AIFs without being authorised under this Law.

(4) AIFMs in so far as they manage AIFs of the closed-ended type whose subscription period for investors has closed prior to 22 July 2011 and are constituted for a period of time which expires at the latest three years after 22 July 2013, may continue to manage such AIFs without needing to comply with the provisions of this Law except Article 20 and, where relevant, Articles 24 to 28, or to submit an application for authorisation under this Law.

(5) Articles 35 to 36 and 38 to 44 of this Law will be applicable once the European Commission has adopted the delegated act referred to under paragraph (6) of Article 67 of Directive 2011/61/EU, and from the date disclosed therein. Articles 37 and 45 of this Law will cease to be applicable once the European Commission has adopted the delegated act referred to under paragraph (6) of Article 68 of Directive 2011/61/EU, and from the date disclosed therein.

(6) AIFMs which have been authorised under Chapter 2 before the entry into force of the Law of 10 May 2016 implementing Directive 2014/91/EU will have until 15 September 2016 to appoint an independent auditor in accordance with Article 7*bis*.

The provisions of Articles 7*bis* have to be complied with in their entirety with respect to the annual accounts concerning the accounting years ending on or after 31 December 2016.

## Chapter 11. - Criminal law provisions

### Art. 59. Criminal law provisions

(1) A penalty of imprisonment of eight days to five years and a fine of EUR 5,000 to EUR 125,000 or either of these penalties, shall be imposed upon any persons who carry out or attempt to carry out the activity of AIFM within the meaning of paragraph (1), points a) or b) of Article 4 of this Law without being in possession of an authorisation from the CSSF under this Law.

(2) A penalty of imprisonment of eight days to five years and a fine of EUR 5,000 to EUR 125,000 or either of these penalties, shall be imposed upon any persons who, in violation of paragraph (6) of Article 7, have used a designation or description giving the impression that they relate to the activities subject to this Law if they have not obtained the authorisation provided for in Article 7.

## Chapter 12. - Amending and various provisions

[...]

## Chapter 13. - Repealing and final provisions

**Art. 215.** (...)

**Art. 216.** Reference to this Law may be made under abbreviated form using the following title: "Law of 12 July 2013 on alternative investment fund managers".

**Art. 217.** This Law enters into force upon its publication in the *Mémorial*. The amendments of Article 208, 1° and of Article 209 do not apply to common limited partnerships incorporated prior to this Law entering into force.

## Annexes

### ANNEX I

1. Investment management functions which an AIFM must at least perform when managing an AIF:

- a) portfolio management;
- b) risk management.

2. Other functions that an AIFM may additionally perform in the course of the collective management of an AIF:

- a) administration:
  - i) legal and fund management accounting services;
  - ii) customer inquiries;
  - iii) valuation and pricing, including tax returns;
  - iv) regulatory compliance monitoring;
  - v) maintenance of unit-/shareholder register;
  - vi) distribution of income;
  - vii) unit/shares issues and redemptions;
  - viii) contract settlements, including certificate dispatch;
  - ix) record keeping;
- b) marketing;
- c) activities related to the assets of AIFs, namely services necessary to meet the fiduciary duties of the AIFM, facilities management, real estate administration activities, advice to undertakings on capital structure, industrial strategy and related matters, advice and services relating to mergers and the purchase of undertakings and other services connected to the management of the AIF and the companies and other assets in which it has invested.

## ANNEX II

### Remuneration policy

1. When establishing and applying the total remuneration policies, inclusive of salaries and discretionary pension benefits, for those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the AIFMs or of AIFs they manage, AIFMs must comply with the following principles in a way and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities:

- a) the remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk-taking which is inconsistent with the risk profiles, management regulations<sup>24</sup> or instruments of incorporation of the AIFs they manage;
- b) the remuneration policy is in line with the business strategy, objectives, values and interests of the AIFM and the AIFs it manages or the investors of such AIFs, and includes measures to avoid conflicts of interest;
- c) the management body of the AIFM, in its supervisory function, adopts and periodically reviews the general principles of the remuneration policy and is responsible for its implementation;
- d) the implementation of the remuneration policy is, at least annually, subject to central and independent internal review for compliance with policies and procedures for remuneration adopted by the management body in its supervisory function;
- e) staff engaged in control functions are compensated in accordance with the achievement of the objectives linked to their functions, independent of the performance of the business areas they control;
- f) the remuneration of the senior officers in the risk management and compliance functions is directly overseen by the remuneration committee;
- g) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit or AIF concerned and of the overall results of the AIFM, and when assessing individual performance, financial as well as non-financial criteria are taken into account;
- h) the assessment of performance is set in a multi-year framework appropriate to the life-cycle of the AIFs managed by the AIFM in order to ensure that the assessment process is based on longer term performance and that the actual payment of performance-based components of remuneration is spread over a period which takes account of the redemption policy of the AIFs it manages and their investment risks;
- i) guaranteed variable remuneration is exceptional, occurs only in the context of hiring new staff and is limited to the first year;

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<sup>24</sup> règlement

- j) fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy, on variable remuneration components, including the possibility to pay no variable remuneration component;
- k) payments related to the early termination of a contract reflect performance achieved over time and are designed in a way that does not reward failure;
- l) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes a comprehensive adjustment mechanism to integrate all relevant types of current and future risks;
- m) subject to the legal structure of the AIF and its management regulations<sup>25</sup> or instruments of incorporation, a substantial portion, and in any event at least 50 % of any variable remuneration consists of units or shares of the AIF concerned, or equivalent ownership interests, or share-linked instruments or equivalent non-cash instruments, unless the management of AIFs accounts for less than 50 % of the total portfolio managed by the AIFM, in which case the minimum of 50 % does not apply.

The instruments referred to in this point shall be subject to an appropriate retention policy designed to align incentives with the interests of the AIFM and the AIFs it manages and the investors of such AIFs. This point shall be applied to both the portion of the variable remuneration component deferred in line with point n) and the portion of the variable remuneration component not deferred;

- n) a substantial portion, and in any event at least 40 %, of the variable remuneration component, is deferred over a period which is appropriate in view of the life cycle and redemption policy of the AIF concerned and is correctly aligned with the nature of the risks of the AIF in question.

The period referred to in this point shall be at least three to five years unless the life cycle of the AIF concerned is shorter; remuneration payable under deferral arrangements vests no faster than on a pro-rata basis; in the case of a variable remuneration component of a particularly high amount, at least 60 % of the amount is deferred;

- o) the variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the AIFM as a whole, and justified according to the performance of the business unit, the AIF and the individual concerned.

The total variable remuneration shall generally be considerably contracted where subdued or negative financial performance of the AIFM or of the AIF concerned occurs, taking into account both current compensation and reductions in payouts of amounts previously earned, including through malus or clawback arrangements;

- p) the pension policy is in line with the business strategy, objectives, values and long-term interests of the AIFM and the AIFs it manages.

If the employee leaves the AIFM before retirement, discretionary pension benefits shall be held by the AIFM for a period of five years in the form of instruments defined in point m). In the case of an employee reaching retirement, discretionary pension benefits shall be paid to

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<sup>25</sup> règlement

the employee in the form of instruments defined in point m), subject to a five year retention period;

- q) staff are required to undertake not to use personal hedging strategies or remuneration- and liability-related insurance to undermine the risk alignment effects embedded in their remuneration arrangements;
- r) variable remuneration is not paid through vehicles or methods that facilitate the avoidance of the requirements of this Directive.

2. The principles set out in point 1. shall apply to remuneration of any type paid by the AIFM, to any amount paid directly by the AIF itself, including carried interest, and to any transfer of units or shares of the AIF, made to the benefits of those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile or the risk profiles of the AIF that they manage.

3. AIFMs that are significant in terms of their size or the size of the AIFs they manage, their internal organisation and the nature, the scope and the complexity of their activities must establish a remuneration committee. The remuneration committee shall be constituted in a way that enables it to exercise competent and independent judgment on remuneration policies and practices and the incentives created for managing risk.

The remuneration committee shall be responsible for the preparation of decisions regarding remuneration, including those which have implications for the risk and risk management of the AIFM or the AIF concerned and which are to be taken by the management body in its supervisory function. The remuneration committee shall be chaired by a member of the management body who does not perform any executive functions in the AIFM concerned. The members of the remuneration committee shall be members of the management body who do not perform any executive functions in the AIFM concerned.

### ANNEX III

#### **Documentation and information to be provided in case of marketing in Luxembourg**

- a) a notification letter, including a programme of operations identifying the AIFs the AIFM intends to market and information on where the AIFs are established;
- b) the AIF management regulations or instruments of incorporation;
- c) identification of the depositary of the AIF;
- d) a description of, or any information on, the AIF available to investors;
- e) information on where the master AIF is established if the AIF is a feeder AIF;
- f) any additional information referred to in paragraph (1) of Article 21 for each AIF the AIFM intends to market;
- g) where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF.

## ANNEX IV

### Documentation and information to be provided in case of marketing in a Member State other than Luxembourg

- a) a notification letter, including a programme of operations identifying the AIFs the AIFM intends to market and information on where the AIFs are established;
- b) the AIF management regulations or instruments of incorporation;
- c) identification of the depositary of the AIF;
- d) a description of, or any information on, the AIF available to investors;
- e) information on where the master AIF is established if the AIF is a feeder AIF;
- f) any additional information referred to in paragraph (1) of Article 21 for each AIF the AIFM intends to market;
- g) the indication of the Member State in which it intends to market the units or shares of the AIF to professional investors;
- h) information about arrangements made for the marketing of AIFs and, where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF;
- i) the information, including the address, necessary for the invoicing or for the communication of any applicable regulatory fees or charges by the competent authorities of the host Member State;
- j) information on the arrangements to perform the tasks referred to in Article 46-1.