



Date: December 2010  
Ref.: CESR/10-1459

**CALL FOR EVIDENCE**

**Implementing measures on the  
Alternative Investment Fund  
Managers Directive**

**Deadline for contributions:** CESR invites responses to this call for evidence by **7 January 2010**. All contributions should be submitted online via CESR's website under the heading 'Consultations' at [www.cesr.eu](http://www.cesr.eu). All contributions received will be published following the close of the call for evidence, unless the respondent requests their submission to be confidential.



### **Executive Summary**

This call for evidence seeks stakeholders' input on the provisional request for assistance from the European Commission regarding CESR's technical advice on the implementing measures on the Alternative Investment Fund Managers Directive. This input will help CESR and its successor, the European Securities and Markets Authority (ESMA), in the development of its draft advice on the content of the implementing measures, which will be published for consultation in 2011.



## Call for evidence on implementing measures on the Alternative Investment Fund Managers Directive

### Background

At the meeting of the Committee of Permanent Representatives (COREPER) of 27 October 2010, the Council indicated its willingness to accept the text of the Alternative Investment Fund Managers Directive (AIFMD) voted by the European Parliament at its Plenary session of 11 November. The Council is expected to adopt the measure formally by January 2011. The AIFMD sets out a wide-ranging set of requirements to be applied to managers of alternative investment funds, which are broadly defined as all funds not covered by the UCITS Directive. The Directive makes provision for a very extensive set of implementing measures covering a wide range of topics. On 2 December 2010 the Commission sent a provisional request for assistance to CESR on the content of these implementing measures. The advice is to be delivered by 16 September 2011, in order to allow the Commission to deliver the full package of implementing legislation at the latest one year before the end of the transition period for the Directive.

### Structure of the mandate

The AIFMD makes provision for an extensive set of implementing measures. To structure the work, the Commission has divided the provisional request for assistance (which is annexed to this call for evidence) into four sections. Numbering of articles is based on the version of the Directive agreed by COREPER on 27 October (Ref. 15053/1/10).

**Part I** covers **general provisions** of the AIFMD, the **authorisation** of and the **operating conditions** for AIFM. It includes the procedures for small managers to 'opt-in' under the Directive (Article 3(5)); procedures for the calculation of de minimis thresholds (Article 3(6)); and the calibration of capital requirements to cover risks related to professional liability (Article 9(9)). The third component includes level 2 measures in relation to general principles of operation (Article 12(3)); conflicts of interest and the avoidance thereof (Article 14(4)); risk management, including the adequacy of systems, frequency of review, hierarchical and functional separation of functions and the avoidance of associated conflicts of interest (Article 15(5)); liquidity management systems and procedures (Article 16(3)); investment in securitisation positions (Article 17(1) and Article 61); general principles of organisation (Article 18(2)); procedures and frequency of valuation, and the professional guarantees to be provided by external valuers (Article 19(11)); and conditions for delegation of functions (Article 20(5)).

**Part II** covers provisions relating to the **depository** requirements. These include level 2 measures (all in Article 21(15)) in relation to the appointment of the depository; the equivalence of prudential regulation and supervision in third countries; the conditions for the performance of depository functions; due diligence obligations in the event of delegation; the segregation of assets; the loss of financial instruments; the definition of certain 'external events'; and reasons for contractual discharge of liability.

**Part III** covers provisions relating to **transparency requirements and leverage**. These include level 2 measures relating to the definition of leverage (Article 4(3)); the content and format of the annual report (Article 22(4)); the content and frequency of disclosure to investors (Article 23(6)); the content of reporting obligations to competent authorities (Article 24(6)); and the circumstances under which competent authorities may take action to limit the use of leverage (Article 25(9)).

**Part IV**, finally, covers provisions relating to the **supervision of AIFM, including third country AIFM**. These include level 2 measures relating to the content of cooperation arrangements with third country authorities (Article 34(2)); the exchange of information between supervisors relating to



the potential systemic consequences of AIFM activity (Article 51(4)); and the procedure for identifying the Member State of reference (Article 37(13)).

The mandate from the Commission describes in more detail the expected content of the advice on each area and identifies a number of specific questions.

The Commission encourages CESR to consider the appropriate prioritisation and sequencing of the development of the advice within each section of the mandate, with a particular focus on those areas of greatest technical complexity and where new sources of data and expertise will be required.

The AIFMD also makes provision for an extensive set of technical standards and guidelines. The Commission considers that these measures constitute an important part of the regulatory framework and will contribute to the clarity, effectiveness and coherence of the overall package. CESR is therefore invited to consider how to co-ordinate work on these standards and guidelines with the development of advice on implementing measures so as to ensure a maximum level of consistency. This does not mean that CESR will work to prepare the technical standards and guidelines to the same timetable as the advice on the other implementing measures; rather, CESR's work on such standards and guidelines should take due account of the advice on the implementing measures and the standards and guidelines themselves should be in place sufficiently in advance of the transposition deadline to allow proper implementation by firms.

The advice will be developed by CESR's Investment Management Standing Committee. All references to CESR should be understood as covering ESMA, which will be established on 1 January 2011.

#### **CALL FOR EVIDENCE**

CESR invites all interested parties to submit their views on what CESR should consider in its advice to the Commission, taking into account the issues identified and the specific questions raised. In addition to this general input on the mandate as a whole, CESR has identified a number of additional questions on which it would appreciate feedback from stakeholders.

#### Differentiation

Given the need for appropriate differentiation between the different entities covered by the Directive, it would be particularly helpful if stakeholders could provide their input on the following question.

#### **Question for the call for evidence**

1. Which categories of investment manager and investment fund will fall within the scope of the Alternative Investment Fund Managers in your jurisdiction? Please provide a brief description of the main characteristics of these entities (investment strategies pursued, underlying assets, use of leverage, redemption policy etc).

#### Choice of legislative instrument

Once CESR/ESMA has submitted its advice on the implementing measures, the Commission will have to decide which type(s) of legislative instrument would be appropriate for the level 2 measures. The choice is likely to be between directives – which require transposition at national level – and regulations, which are directly applicable on market participants without any national transposition. Regulations can be considered as promoting harmonisation across EU Member States (MS), while directives leave a greater amount of discretion to MS in their application. CESR may express an opinion on this in its advice to the Commission.

#### **Question for the call for evidence**



2. Among the topics that will be covered by the implementing measures, which do you consider would be most appropriately adopted in the form of regulations or directives? Please explain your choice.

#### Impact assessment

In line with CESR's existing practices, the Commission mandate asks CESR to carry out an impact assessment (IA) as part of its advice. Ideally this IA work should quantify the compliance costs generated by CESR's proposals; input from stakeholders will be particularly important in facilitating such quantification.

#### **Question for the call for evidence**

3. Can you identify useful sources of data and statistical evidence from which CESR could benefit in the preparation of its advice?

#### **Responses**

All contributions can be submitted online via CESR's website ([www.cesr.eu](http://www.cesr.eu)) under the heading 'Consultations' by **7 January 2010**.

CESR will provide further details in due course in relation to the public consultation(s) it will carry out in light of responses to the call for evidence and its own deliberations.



EUROPEAN COMMISSION  
Directorate General Internal Market and Services

Director General

Brussels, 02 DEC. 2010 -892960  
DG MARKT G4 UE/gc (2010) 976215

**Subject: Provisional request for a technical advice on the Directive for Alternative Investment Fund Managers (AIFM) level 2 measures**

Dear Mr Tavares,

I would like to request the advice of the Committee of European Securities Regulators on the preparation of the level 2 measures foreseen in the AIFM Directive (see attached provisional request for advice).

The provisional nature of this request stems from the fact that the Directive still awaits its final adoption. It is however based on the compromise which has been achieved in the 'trialogue' and endorsed by the Council and voted in the European Parliament on 11 November 2010. The formal adoption by Council should take place in January 2011 after the legal revision. My services will keep you informed of any development in this respect, including any changes in the text introduced at the level of the legal revision.

We are aware that this request represents a significant workload and a many-fold challenge for CESR. We recognize that this is an ambitious and complex mandate covering new issues like a 'passport' for third country fund managers and new types of fund that have so far not been in the scope of CESR's work.

It is up to CESR to organise and prioritise its work with a view to delivering its advice. To help in that process, we have divided our request into four parts. This division of the mandate is function to a natural grouping of the issues based on the structure of the level 1 Directive.

- Part I: General provisions, authorisation and operating conditions:

Carlos Tavares  
Chairman of the Committee  
of European Securities Regulators  
Avenue de Friedland 11-13  
F-75015 Paris

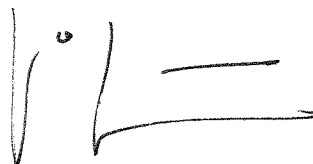
- Part II: Depositary
- Part III: Transparency Requirements and Leverage
- Part IV: Supervision

Although no deadlines have been set for level 2 measures in the Directive, there is a common understanding that level 2 measures should be transposed within the same deadline as the level 1 Directive, i.e. two years after the entering into force of the AIFM Directive which is expected for early 2011. In order to leave enough time for Member States to implement the level 2 measures which take the form of a Directive, these should be adopted by the European Commission one year before the end of the transposition period. This implies, in turn, that we would request to receive CESR's advice by September 16, 2011.

There may be some scope for prioritisation and flexibility in the timing of CESR's advice in respect to some parts of the request; in particular those level 2 measures which refer to supervisory cooperation and the passport regime for third country funds and managers and those which will take the legal form of a regulation and would therefore not need to be transposed into national law. On this question, discussion is still ongoing within the Commission. We will come back to you on this as soon as possible.

The Commission services are looking forward to working closely with CESR on this important project. We are confident in CESR's capacity to deliver this important piece of work within the ambitious deadline we set for it. We will in any case remain at your disposal to provide the assistance you may find necessary during this process.

Yours sincerely,



Jonathan Faull

Contact: Uwe Eiteljoerge, Telephone: +32 2 29 98369, [Uwe.Eiteljoerge@ec.europa.eu](mailto:Uwe.Eiteljoerge@ec.europa.eu)

Enclosure: Provisional request for a technical advice

c.c.: P. Dejmek, B. Dumont, D. Millerot (Cab), C. Hughes (COMM), N. Calviño, E. Paulis, MARKET List G4

**PROVISIONAL REQUEST TO CESR FOR TECHNICAL ADVICE  
ON POSSIBLE LEVEL 2 MEASURES CONCERNING THE  
FUTURE DIRECTIVE ON ALTERNATIVE INVESTMENT FUND MANAGERS**

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## I. Introduction

The European Commission (hereafter, the 'Commission') would like to request the advice of CESR<sup>1</sup> on the content of the level 2 measures to be taken pursuant to the soon-to-be-adopted Directive on Alternative Investment Fund Managers ('AIFMD').<sup>2</sup>

The provisional nature of the present mandate stems from the fact that the AIFMD is yet to be formally adopted. However, the Council (at the meeting of COREPER on 27 October) has signalled its clear intention to accept the text subsequently approved by the European Parliament at its plenary session of 11 November. It is therefore expected that the Council will formally adopt the measure soon.

The present mandate is based on the text agreed by Council and sent to the European Parliament [Council Document 15053/1/10 REV 1 EF 140 ECOFIN 634 CODEC 1069].<sup>3</sup> While we do not anticipate any further changes in substance, the process of legal revision may result in drafting amendments and, as the case may be, the renumbering of articles. The Commission will keep CESR fully informed of any such developments.

The AIFMD makes provision for a very extensive set of implementing measures covering a wide range of topics.<sup>4</sup> Moreover, the AIFMD regulates the alternative investment fund management sector for the first time at European level. The development of these measures therefore constitutes a challenging programme of work and it is vital that their preparation begin immediately.

While the AIFMD does not contain specific deadlines for the delivery of implementing measures, it is the Commission's intention to deliver the entire package of implementing legislation at the latest one year before the end of the transition period, in order to allow sufficient time for transposition and implementation by Member States. To achieve this, the Commission requests that CESR endeavours to deliver its advice by 16 September 2011.

However, some of the level 2 measures might take the form of regulations, which will not require transposition by Member States. In these cases the deadline could be extended accordingly. Furthermore, the deadline for the delivery of the advice might be delayed for a number of the level 2 measures because of the delayed entry into force of the 'third country passport' (expected only two years after the end of the transposition deadline). Accordingly a different timetable for the delivery of CESR's advice could also be envisaged for these measures. The Commission will come back to CESR on these issues as soon as possible. An indicative timetable for the level 2 work is provided in Annex 2.

Should this timeline not be achievable, the Commission invites CESR to consider alternative ways to ensure that all necessary level 2 measures are prepared in time for implementation by Member States within the deadlines imposed by the Level 1 Directive.

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1 Throughout the mandate, references to CESR should also be taken to refer to the European Securities and Markets Authority (ESMA).

2 In this mandate, the term 'level 2 measures' is used when referring to 'delegated acts and implementing acts'. The term 'technical standards' refers to 'regulatory and implementing technical standards'.

3 <http://register.consilium.europa.eu/pdf/en/10/st15/st15053-re01.en10.pdf>

4 Annex 1 provides a complete list of **all implementing measures, technical standards and guidelines**.

In accordance with the principles of Better Regulation, the Commission is required to prepare a detailed **impact assessment** to accompany the level 2 measures. As well as providing advice on the content of the level 2 measures, CESR is therefore requested to justify its advice by identifying, where relevant, a range of policy options and undertaking evidenced assessment of the costs and benefits of each. The results of this assessment should be submitted alongside the advice.

Annex 3 of the mandate provides guidance on areas in which such impact analysis is likely to be particularly important and where CESR's input would be particularly valuable. The Commission may supplement the mandate with additional material on the identification of policy options in these areas at a later stage. This material will be provided for guidance only and is not intended to prejudice the analysis and resulting advice by CESR.

According to its established policy on transparency, the Commission will publish this provisional request for advice and any updated versions on the DG Internal Market and Services website once transmitted to CESR.

### ***1.1. Structure of mandate***

The AIFMD makes provision for an extensive set of level 2 measures. To structure the work, this mandate is divided into four sections.

**Part I** covers **general provisions** of the AIFMD, the **authorisation** of and the **operating conditions** for AIFM. It includes the procedures for small managers to 'opt-in' under the Directive (Article 3(5)); procedures for the calculation of *de minimis* thresholds (Article 3(6)); and the calibration of capital requirements to cover risks related to professional liability (Article 9(9)). The third component includes level 2 measures in relation to general principles of operation (Article 12(3)); conflicts of interest and the avoidance thereof (Article 14(4)); risk management, including the adequacy of systems, frequency of review, hierarchical and functional separation of functions and the avoidance of associated conflicts of interest (Article 15(5)); liquidity management systems and procedures (Article 16(3)); investment in securitisation positions (Article 17(1) and Article 61); general principles of organisation (Article 18(2)); procedures and frequency of valuation, and the professional guarantees to be provided by external valuers (Article 19(11)); and conditions for delegation of functions (Article 20(5)).

**Part II** covers provisions relating to the **depository requirements**. These include level 2 measures (all in Article 21(15)) in relation to the appointment of the depository; the equivalence of prudential regulation and supervision in third countries; the conditions for the performance of depository functions; due diligence obligations in the event of delegation; the segregation of assets; the loss of financial instruments; the definition of certain 'external events'; and reasons for contractual discharge of liability.

**Part III** covers provisions relating to **transparency requirements and leverage**. These include level 2 measures relating to the definition of leverage (Article 4(3)); the content and format of the annual report (Article 22(4)); the content and frequency of disclosure to investors (Article 23(6)); the content of reporting obligations to competent authorities (Article 24(6)); and the circumstances under which competent authorities may take action to limit the use of leverage (Article 25(9)).

**Part IV**, finally, covers provisions relating to the **supervision of AIFM, including third country AIFM**. These include level 2 measures relating to the content of cooperation arrangements with third country authorities (Article 34(2)); the exchange of information between supervisors relating to the potential systemic consequences of AIFM activity (Article 51(4)); and the procedure for identifying the Member State of reference (Article 37(13)).

These sections reflect the structure of the Directive. They do not reflect an attempt to prioritise the measures. Within the framework of the overall timeline, CESR is strongly encouraged to consider how to prioritise and sequence the development of advice within each section of the mandate. Particular attention should be given to those areas of greatest technical complexity; and to areas where new sources of data and expertise will be required.

The Commission notes that the AIFMD also makes provision for an extensive set of **technical standards and guidelines**. While not covered by this mandate, the Commission considers that these standards and guidelines constitute an important part of the regulatory framework and will contribute to the clarity, effectiveness and coherence of the overall package.

As such, CESR is invited to consider how to coordinate work on these standards and guidelines with the development of advice on level 2 measures so as to ensure a high level of consistency and to exploit synergies between the two processes.

In order to facilitate the smooth and timely adoption of the draft technical standards by the Commission<sup>5</sup> and acceptance by the European Parliament and Council, we would encourage CESR to work closely with stakeholders in this process and to undertake similar efforts with regard to impact assessment work as in the preparation of the advice to the Commission on the level 2 measures.<sup>6</sup>

Without prejudice to the independence of CESR in the development of these technical standards and guidelines, the Commission stands ready to provide guidance and assistance as appropriate in these areas.

## ***1.2. Principles and working methods***

When elaborating its advice, CESR is invited to take due account of the following:

- The AIFMD introduces a fully harmonised single market framework for AIFM, designed to deliver a high level of transparency and investor protection; a level playing field for AIFM; an efficient mechanism for the cross-border provision of marketing and management services, and effective mechanisms for micro- and macro-prudential oversight. These objectives should also guide the design of its implementing provisions. CESR is invited to keep these **overarching objectives** and the 'maximum harmonisation' nature of the AIFMD in mind when elaborating its advice.
- Without prejudice to these objectives, the AIFMD provides for a degree of differentiation in its detailed provisions to reflect the wide and heterogeneous range of entities that fall

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<sup>5</sup> In accordance with Article 10 and 15 of the ESMA Regulation, the Commission should endorse the technical standards proposed by ESMA by means of delegated or implementing acts.

<sup>6</sup> Article 10 and 15 of the ESMA Regulation requires ESMA to conduct open public consultations on draft regulatory and technical standards and analyse the potential related costs and benefits. In addition, ESMA shall consult to the Securities and Markets Stakeholders Group referred to in Article 37.

within its scope. In developing its advice, CESR is requested to take account of **the need for differentiation** within the level 2 measures, so as to ensure that specific rules are appropriately tailored to the structure and circumstances of these entities. Such tailoring should be based on objective and well-defined characteristics of the AIFM in question (e.g. open- or closed-end structure; internal versus external management; investment strategy, liquidity profile and redemption policy; and more broadly the types of risk to which different types of AIFM are exposed) and not generic 'labels' that may prove to be insufficiently precise or stable.<sup>7</sup>

- The **principle of proportionality** which any piece of EU legislation should respect. Solutions proposed by CESR should not go beyond what is necessary to achieve the objectives of the AIFMD. They should be simple, and avoid creating excessive administrative or procedural burdens either on AIFM or on the national competent authorities responsible for their supervision. The assessment of proportionality and administrative burden will be a core element of the impact assessment work.
- While preparing its advice CESR should consider the extensive work that has already been carried out when preparing technical advice pursuant to Directive 2009/65/EC (UCITS), to Directive 2004/39/EC (MiFID), as well as other requirements or advice in the areas of banking and financial services. The forthcoming MiFID review might also provide valuable input. CESR should seek to ensure as much **cross-sectoral consistency** as possible between these legal frameworks but should remain attentive to the need to ensure that the rules are appropriate and proportionate for the specific circumstances of the AIFM sector and the investor base.
- CESR should not feel confined in its reflections to elements that it considers should be addressed by legislative measures at level 2 but, if it finds it appropriate, it may indicate **level 3 work** that it believes should accompany the level 2 measures to better ensure the effectiveness of the level 2 measures.
- CESR will determine its own **working methods**, i.e. by extending the workload of existing expert groups or creating new expert groups depending on the content of the provisions under consideration. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different strands of work being carried out by the various expert groups.
- CESR is invited **consult market participants** (practitioners, consumers and end-users, including stakeholders in third countries) comprehensively in an open and transparent manner. CESR should provide advice which takes account of different opinions expressed by the market participants during these consultations. CESR should provide a feed-back statement on the consultation justifying its choices vis-à-vis the main arguments raised during the consultation. The use of consultation and external expertise is likely to be particularly important in areas that have not been examined in the context of other recent work.
- Level 2 measures will generate administrative burden and more generally **compliance costs** on the side of the industry. In preparing its advice CESR should aim at minimising

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<sup>7</sup> This is in fact an example of a case where work on a regulatory technical standard (determine types of AIFM, Art.4) would be of relevance already for the development of level 2 measures, CESR's advice to the Commission.

these costs subject to the achievement of the respective objectives of the Directive. Where such costs could be significant, CESR should aim at quantifying these costs, possibly with the support of the Commission which intends to tender a study on significant compliance costs the level 2 measures might impose on the industry.

- The **technical advice** provided by CESR to the Commission should not take the form of a legal text. However, CESR should provide the Commission with an “articulated” text which means a clear and structured text, accompanied by sufficient and detailed explanations for the advice given. The advice should be presented in an easily understandable language respecting current legal terminology used in the field of securities markets and company law at European level. As noted above, this advice should be accompanied where relevant with cost-benefit analysis of alternative policy options and a clear justification for the choice of the preferred option.

## **II. Part I: General provisions, authorisation and operating conditions**

The first section of the mandate governs those provisions relating to the de minimis thresholds, the authorisation of AIFM, including own funds requirements, and rules governing the ongoing operation of AIFM. These provisions and their corresponding level 2 measures are central to the efficient and secure functioning of the regulatory framework and to the achievement of a consistently high level of investor protection.

The advice on these issues should aim at helping national competent authorities to implement the AIFMD and ensuring its harmonious application across the EU. The advice should also provide for an appropriate level of differentiation between the wide variety of business models employed in the alternative investment fund management industry.

CESR's work in this area should take due account of the need for consistency with the corresponding provisions of other financial services directives - such as UCITS and MiFID – while reflecting where relevant the differences between the regulated populations.

### **II.1. Issue 1 – Article 3 Exemptions**

#### **Issue 1 a) – Opt-in procedure for AIFM below the threshold**

##### **I. Scope of the Commission's implementing powers**

*5. The Commission shall, in accordance with the regulatory procedure referred to in Article 57(2), adopt implementing measures with a view to specifying the procedures for AIFM which choose to opt-in under this Directive in accordance with paragraph 4.*

##### **II. Level 1 text**

*4. AIFM referred to in paragraph 2 do not benefit from any of the rights granted under this Directive, unless the AIFM chooses to opt-in under this Directive in which case the entire Directive, subject to the exceptions set forth herein, shall be applicable to those AIFM.*

##### **III. Questions**

1. CESR is requested to advise the Commission on the procedures for AIFM which choose to opt-in under this Directive in accordance with Article 3(4). CESR should consider whether there are specific reasons not to use the same procedure that applies to AIFM that do not benefit from this exemption.
2. This advice should include procedures specific to the case of AIFM from third countries seeking to opt in after the phasing-in of the third country regime; in particular the determination of the Member State of reference.

## **Issue 1 b) – Thresholds – calculation, oscillation, obligations below thresholds**

### **I. Scope of the Commission's implementing powers**

6. *The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*
  - (a) *how to calculate the thresholds referred to in paragraph 2 and to treat AIFM whose assets under management, including any assets acquired through use of leverage, in one and the same calendar year occasionally exceed and/or fall below the relevant threshold*
  - (b) *the obligations to register for the entities set forth in paragraph 2 and to provide information in order to effectively monitor systemic risk as set forth in paragraph 3, and*
  - (c) *the obligations to notify competent authorities referred to in paragraph 3.*

### **II. Level 1 text**

2. *Without prejudice to the application of Article 44, for the following AIFM, the application of the Directive shall be limited to the provisions set forth in paragraphs 3 and 4 below:*
  - (a) *AIFM 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 AIF whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million; or*
  - (b) *AIFM 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 AIF whose assets under management, in total do not exceed a threshold of EUR 500 million when the portfolio of AIF consists of AIF that are not leveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.*
3. *Member States shall ensure that AIFM referred to in paragraph 2 shall at least:*
  - (a) *be subject to a registration with the competent authorities of its home Member State;*
  - (b) *at the time of registration identify itself and the AIF managed by it to the competent authorities of its home Member State;*
  - (c) *at the time of registration provide information on the investment strategies of the AIF managed by it to the competent authorities of its home Member State;*
  - (d) *provide regularly the competent authorities of its home Member State with information on the main instruments in which they are trading and on the principal exposures and most important concentrations of AIF they manage in order to enable the competent authorities to effectively monitor systemic risk, and*
  - (e) *notify the competent authorities of its home Member State in the event that they no longer comply with the conditions referred to in paragraph 2.*

*Paragraphs 2 and 3 of this Article shall apply without prejudice to the stricter rules adopted by Member States with respect to AIFM falling under one of the exemptions set forth in paragraph 2.*

*Member States shall take the necessary steps to ensure that where the conditions set out in paragraph 2 are no longer fulfilled, the AIFM concerned seeks authorisation within 30 calendar days in accordance with the relevant procedures laid down in this Directive.*

### **III. Questions**

1. CESR is requested to advise the Commission on how to identify the portfolios of AIF under management by a particular AIFM and the calculation of the value of assets under management by the AIFM on behalf of these AIF.
2. The advice should identify options on how to determine the value of the assets under management by an AIF for a given calendar year. It should indicate the method or methods CESR regards as preferable.
3. CESR is invited to consider how the use of different forms of leverage influences the assets under management by an AIF and how this should best be taken into account in the calculation of assets under management.
4. CESR is requested to advise the Commission on how best to deal with potential cases of cross-holdings among the AIF managed by an AIFM, e.g. funds of AIF with investments in AIF managed by the same AIFM.
5. CESR is requested to advise the Commission on how to treat AIFM whose total assets under management occasionally exceed and/or fall below the relevant threshold in a given calendar year. As part of this work, CESR is requested to specify circumstances under which total assets under management should be considered as having occasionally exceeded and/or fallen below the relevant threshold in a given calendar year.
6. CESR is requested to advise the Commission on the content of the obligation to register with national competent authorities for the entities described in Article 3(2).
7. CESR is requested to advise the Commission on suitable mechanisms for national competent authorities in order to gather information from these entities in order to effectively monitor systemic risk as set forth in Article 3(3). To that end, CESR is requested to specify the content, the format, and modalities of the transmission of the information to be provided to competent authorities. CESR is invited to consider the consistency with its advice regarding the Issue 25 (reporting obligations to competent authorities).
8. CESR is requested to advise the Commission on the obligation of AIFM to notify competent authorities in the event they no longer comply with the exemptions granted in Article 3(2).

## **II.2. Issue 2 – Article 9 Initial capital and own funds**

### **I. Scope of the Commission's implementing powers**

9. *The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*
  - (a) *the risks the additional own funds or the professional indemnity insurance referred to in paragraph 7 must cover;*
  - (b) *the conditions for determining the appropriateness of additional own funds or the coverage of the professional indemnity insurance referred to in paragraph 7;*
  - (c) *the manner of determining ongoing adjustments of the additional own funds or of the coverage of the professional indemnity insurance referred to in paragraph 7.*

### **II. Level 1 text**

7. *To cover potential professional liability risks resulting from activities the AIFM may carry out pursuant to this Directive, both internally managed AIF and externally appointed AIFM shall:*



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

### **III. Questions**

1. CESR is requested to provide the Commission with a description of the potential risks arising from professional negligence to be covered by additional own funds or the professional indemnity insurance referred to in Article 9(7).
2. CESR is requested to advise the Commission on how the appropriateness of additional own funds or the coverage of the professional indemnity insurance to cover appropriately the potential professional liability risks arising from professional negligence referred to in Article 9(7) should be determined, including – to the extent possible and appropriate - the methods to calculate the respective amounts of additional own funds or the coverage of the professional indemnity insurance.
3. CESR is requested to advise the Commission on the best way to determine ongoing adjustments of the additional own funds or of the coverage of the professional indemnity insurance referred to in Article 9(7).
4. CESR is invited to take account of work done in the context of the Capital Requirements Directive and to liaise as appropriate with CEBS and CEIOPS on this issue.

### **II.3. Issue 3 - Article 12 General principles**

#### **I. Scope of the Commission's implementing powers**

3. *The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying the criteria to be used by the relevant competent authorities to assess whether AIFM comply with their obligations under paragraph 1.*

#### **II. Level 1 text**

1. *Member States shall ensure that AIFM comply with the following on an ongoing basis.*

*The AIFM shall:*

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

*No investor in an AIF may obtain a preferential treatment, unless this is disclosed in the relevant AIF's rules or instruments of incorporation.*

### **III. Questions**

1. CESR is requested to advise the Commission on criteria to be used by the relevant competent authorities to assess whether AIFM comply with their obligations under Article 12(1).

The Commission would encourage CESR to target an appropriate level of consistency with the corresponding provisions of other directives, such as UCITS and MiFID, while taking due account of the differences between the regulated populations.

## **II.4. Issue 4 - Article 14 Conflicts of interest**

### **I. Scope of the Commission's implementing powers**

4. *The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*
  - (a) *the types of conflicts of interests as referred to in paragraph 1;*
  - (b) *specifying the reasonable steps AIFM are expected to take in terms of structures and organizational and administrative procedures in order to identify, prevent, manage, monitor and disclose conflicts of interest.*

### **II. Level 1 text**

1. *Member States shall require AIFM to take all reasonable steps to identify conflicts of interest that arise in the course of managing one or more AIF between:*
  - (a) *the AIFM, including their managers, employees or any person directly or indirectly linked to the AIFM by control, and the AIF managed by the AIFM or the investors of this AIF; or*
  - (b) *one AIF or the investors of this AIF and another AIF or the investors of this AIF, or*
  - (c) *the AIF or the investors of the AIF and another client of the AIFM; or*
  - (d) *the AIF or the investors of the AIF and a UCITS managed by the AIFM or the investors of such UCITS; or*
  - (e) *two of the AIFM's clients.*

*AIFM shall maintain and operate 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 AIF and its investors.*

*AIFM shall segregate within its own operating environment, tasks and responsibilities which may be regarded as incompatible with each other or which may potentially generate systematic conflicts of interest. AIFM shall assess whether its operating conditions may involve any other material conflicts of interest and disclose them to the AIF investors.*

### **III. Questions**

1. CESR is requested to provide the Commission with a description of the types of conflicts of interests between the various actors as referred to in Article 14(1).

2. CESR is requested to advise the Commission on the reasonable steps an AIFM should be expected to take in terms of structures and organisational and administrative procedures in order to identify, prevent, manage, monitor and disclose conflicts of interest.

The Commission would encourage CESR to target an appropriate level of consistency with the corresponding provisions of other directives, such as UCITS and MiFID, while taking due account of the differences between the regulated populations.

## **II.5. Issue 5 – Article 15 Risk management**

### **I. Scope of the Commission's implementing powers**

5. *The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*
  - (a) *the risk management systems to be employed by AIFM as a function of the risks which the AIFM incurs on behalf of the AIF that it manages;*
  - (b) *the appropriate frequency of review of the risk management system;*
  - (c) *how the risk management function shall be functionally and hierarchically separated from the operating units, including the portfolio management function;*
  - (d) *specific safeguards against conflicts of interest referred to in subparagraph 2 of paragraph 1;*
  - (e) *the requirements referred to in paragraph 3.*

### **II. Level 1 text**

1. *The AIFM shall functionally and hierarchically separate the functions of risk management from the operating units, including the portfolio management. The functional and hierarchical separation of the functions of risk management in accordance with subparagraph 1 shall be reviewed by the competent authorities of the home Member State of the AIFM in line with the principle of proportionality, in the understanding that the AIFM must 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. *The AIFM shall 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 can be exposed. The AIFM shall review the risk management systems with appropriate frequency, no less than once a year, and adapt it, whenever necessary.*
3. *The AIFM shall at least:*
  - (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 to 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 rules or instruments of incorporation, prospectus and offering documents.*

### **III. Commentary**

The experience of the financial crisis has underscored the vital importance of robust risk management by all financial market actors. Weaknesses in risk management can result not only in investor detriment but also in disruption to the market at large.

Against this backdrop, the purpose of the risk management provisions in the AIFM Directive is to ensure that AIFM employ adequate risk management systems, which allow them to identify, measure, manage and monitor on a continuous basis all risks relevant to the funds they manage, and which are regularly reviewed. The Directive also seeks to ensure that the risk management function is appropriately separated from other business units, including from portfolio management.

The Commission requests CESR's advice on the development of a structured and appropriately differentiated approach to ensuring that adequate risk management processes are in place for all AIFM. This approach shall ensure a harmonised, comprehensive and robust approach to risk management across the sector. It should take full account of the diversity of the regulated population. In particular, the nature and intensity of risks borne by AIFM will vary according to the type of AIF they manage.

When preparing its advice, CESR is encouraged to take account of its extensive prior work in the area of risk management, to the extent that the results of this work are compatible with the provisions of the AIFM Directive and the powers delegated to the Commission in Article 15(5).

AIFM may also be subject to risk management requirements imposed by MiFID and/or UCITS. CESR is invited to consider the need for coherence with these requirements, again taking account of the differences between the regulated sectors.

For the definition of the various risks and their appropriate categorisation, as well as the means for their assessment, CESR should take account of any relevant provisions of European law as well as similar work conducted in the field of financial services in other European and international fora, in particular work carried out in light of the experience of the financial crisis.

### **IV. Questions**

1. CESR is requested to advise the Commission on the risk management systems to be employed by AIFM as a function of the risks that the AIFM incurs on behalf of the AIF that it manages and on the criteria that competent authorities should take into account when assessing for the AIF managed by the AIFM whether the risk management process employed by the AIFM is adequate in order to identify measure, manage and monitor appropriately all risks relevant to each AIF investment strategy and to which each AIF is or can be exposed.

In particular, CESR is requested:

- a) to advise on the categories of risk relevant to each AIF investment strategy and to which each AIF is or can be exposed and the methods for identifying the risks that are

- relevant for the particular AIF investment strategy or strategies so that all risks are adequately identified.
- b) to advise, to the extent possible, on methods for quantifying and measuring risks including the conditions for the use of different risk measurement methodologies in relation to the identified types of risk so that overall risk exposures as well as contributions to overall risk from each risk factor are properly measured.
  - c) to advise on adequate methods for managing and monitoring all such risks so that the AIF risk exposures respect at all times the risk objectives of the AIF.
2. CESR is requested to advise the Commission on the appropriate frequency of review of the risk management system. CESR is invited to consider whether the appropriate frequency of review varies according to the type of AIFM or the investment strategy of the AIF.
  3. CESR is requested to advise the Commission on the conditions for the appropriate risk governance structure, infrastructure, reporting and methodology, in particular, on how the risk management function shall be functionally and hierarchically separated from the operating units, including the portfolio management function.
  4. CESR is requested:
    - a) to advise how the principle of proportionality is to be applied by competent authorities in reviewing the functional and hierarchical separation of the functions of risk management in accordance with Article 15(1).
    - b) to advise on criteria to be used in assessing whether 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 Article 15 and is consistently effective. This advice will be particularly relevant in cases where full separation of functions is not considered proportionate. CESR is encouraged to provide the Commission with a non-exhaustive list of specific safeguards AIFM could employ against conflicts of interest referred to in the second subparagraph of Article 15(1).
  5. CESR is requested to advise the Commission on the content of the requirements referred to in Article 15(3).
  6. This advice should at least address the following issues:
    - a) the content of 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) the criteria to be used by competent authorities when assessing whether 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 stress testing;
    - c) appropriate stress testing procedures and their frequency pursuant to Article 15(3)(b);
    - d) the criteria to be used in assessing whether the risk profile of the AIF corresponds to the size, portfolio structure and investment strategies and objectives of the AIF as laid down in the AIF rules or instruments of incorporation, prospectus and offering documents.

## **II.6. Issue 6 - Article 16 Liquidity management**

### **I. Scope of the Commission's implementing powers**

3. *The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying*
  - (a) *the liquidity management systems and procedures,*
  - (b) *the alignment of the investment strategy, liquidity profile and redemption policy set out in paragraph 2.*

### **II. Level 1 text**

1. *The AIFM shall for each AIF it manages, that is not an unleveraged closed-ended AIF, employ an appropriate liquidity management system and adopt procedures which enable it 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.*

*The AIFM shall regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable it to assess the liquidity risk of the AIF and monitor the liquidity risk of the AIF accordingly.*
2. *The AIFM shall ensure that for each AIF it manages the investment strategy, the liquidity profile and the redemption policy are consistent.*

### **III. Commentary**

The illiquidity of major financial markets during the financial crisis placed considerable strain on the liquidity of many types of alternative investment fund and therefore on their ability to meet investor redemption requests.

The purpose of the liquidity management provisions is to ensure that all AIFM implement appropriate liquidity management systems and procedures, so as to ensure that the liquidity profile of the fund's investments is consistent with the underlying obligations towards investors.

CESR is invited to advise both on the content of appropriate liquidity management systems and procedures; and on the steps to be taken to ensure consistency between investment strategies, liquidity profiles and redemption policy.

CESR's advice in this area should take full account of the differences between different types of AIFM, and of the diversity of AIF investment strategies and of the content of the corresponding provisions of other directives, such as UCITS, while taking due account of the differences between the regulated populations.

### **IV. Questions**

1. CESR is invited to advise the Commission on the content of rules that are proportionate and necessary for specifying the general obligations placed on AIFM by Article 16(1) and (2).
2. In particular, CESR is invited to advise on:

- a) the systems and procedures to be implemented by the AIFM in order to comply with its obligations under Article 16(1), having regard for the appropriateness of these systems and procedures for different types of AIFM and the AIF they manage.
- b) the content of the obligation for AIFM to regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable it to assess the liquidity risk of the AIF and monitor the liquidity risk of the AIF accordingly.
- c) the circumstances under which the investment strategy, liquidity profile and redemption policy for each AIF managed by an AIFM can be considered to be consistent. In this context, CESR is invited to consider all relevant aspects of the redemption policy, including mechanisms that can be invoked in exceptional circumstances, and assess their consistency with the investment strategy and liquidity profile.

## **II.7. Issue 7 - Article 17 and Article 61 (new Article 50a in UCITS) Investment in securitisation positions**

### **I. Scope of the Commission's implementing powers**

*[...] the Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures laying down the requirements in the following areas:*

- (a) the requirements that need to be met by the originator, the sponsor or the original lender, in order for an AIFM to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011 on behalf of one or more AIF, including requirements that ensure that the originator, the sponsor or the original lender, retains a net economic interest of not less than 5 per cent.*
- (b) qualitative requirements that must be met by AIFM which invest in these securities or other financial instruments on behalf of one or more AIF.*

### **II. Level 1 text**

- 1. In order to ensure cross-sectoral consistency and to remove misalignment between the interest of firms that repackage loans into tradable securities and originators within the meaning of Article 4(41) of 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 (recast), and AIFM that invest in these securities or other financial instruments on behalf of one or more AIF,*

### **III. Commentary**

The provision on investment in securitisation positions is intended to address the potential misalignment between the interests of firms that repackage loans into tradable securities and originators, on the one hand, and the AIFM that invest in those securities, on the other.

These provisions are to be applied on a horizontal basis across all regulated financial services sectors. In developing this advice, CESR is invited to take full account of the need for cross-sectoral consistency in the content of these provisions. The advice should therefore be based on the relevant provisions of the Capital Requirements Directive and should take full account of the advice previously drafted by CEIOPS in relation to the corresponding articles of the Solvency II Directive.

Moreover, the advice developed pursuant to the delegation to the Commission under Article 17 will also be of direct relevance to the delegated acts foreseen by Article 61, which modifies the

UCITS Directive to include the provisions on investment in securitisation positions. CESR is invited to develop advice that is applicable both to the AIFM and UCITS Directives, indicating clearly the reasons for any divergence between the two.

#### **IV. Questions**

1. CESR is invited to advise the Commission on the content of rules that are necessary and proportionate for an AIFM to fulfil its obligations under Article 17.
2. In particular, CESR is invited to advise on:
  - a) the requirements to be met by the originator, the sponsor or the original lender, in order for an AIFM to be allowed to invest in securities as defined in Article 17.
  - b) the qualitative requirements to be met by an AIFM in order to comply with their obligations under Article 17.

In developing this advice, CESR is invited to take full account of the content of the relevant articles of the Capital Requirements Directive and of measures developed for the same purpose in the context of other legislation, notably Solvency II.

### **II.8. Issue 8 – Section 2 Organisational requirements, Article 18 General principles**

#### **I. Scope of the Commission's implementing powers**

2. *The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying the procedures and arrangements as referred to under paragraph 1.*

#### **II. Level 1 text**

1. *Member States shall require that AIFM shall, at all times, use adequate and appropriate human and technical resources that are necessary for the proper management of AIF.*  
*In particular, the competent authorities of the home Member State of the AIFM, having regard also to the nature of the AIF managed by the AIFM, shall require 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 AIF 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 AIF managed by the AIFM are invested according to the fund rules or the instruments of incorporation and the legal provisions in force.*

#### **III. Commentary**

The provisions on general principles of organisation are identical to those of the UCITS Directive.

While the Commission expects CESR to target an appropriate level of consistency with the corresponding provisions UCITS and other directives, due consideration should be given to the differences between AIFM and the entities regulated by those directives.



#### **IV. Questions**

1. CESR is invited to advise the Commission on the content of rules that are proportionate and necessary for specifying the general obligations placed on an AIFM by Article 18(1).
2. In particular, CESR is requested to advise on the procedures and arrangements to be implemented by the AIFM, having regard to the nature of the AIF managed by the AIFM, in order to comply with its obligations under Article 18(1).

#### **II.9. Issue 9 - Article 19 Valuation**

##### **I. Scope of the Commission's implementing powers**

11. *The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*
  - (a) *the criteria concerning the procedures for the proper valuation of the assets and the calculation of the net asset value per share or unit;*
  - (b) *the professional guarantees the external valuer must be able to furnish to effectively perform the valuation function;*
  - (c) *the frequency of valuation carried out by open-ended funds which is both appropriate to the assets held by the fund and its issuance and redemption policy.*

##### **II. Level 1 text**

1. *The AIFM shall ensure that, for each AIF that it manages, 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 and the applicable national and AIF rules.*
2. *The rules applicable to the valuation of assets and the calculation of the net asset value per share or unit of the AIF shall be laid down in the law of the country where the AIF has its registered office and/or in the AIF rules or instruments of incorporation.*
3. *The AIFM shall also ensure that the net asset value per share or unit of AIF is calculated and disclosed to the investors in accordance with this Article, the applicable national law and the AIF rules or instruments of incorporation.*

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

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

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

*The investors are informed of the valuations and calculations in the way set forth in the relevant AIF's rules or instruments of incorporation.*

[...]
5. *When an external valuer is performing the valuation function, the AIFM shall be able to demonstrate that:*
  - (a) *the external valuer is subject to mandatory professional registration recognized by law or to legal or regulatory provisions or rules of professional conduct; and*

*(b) the external valuer can furnish sufficient professional guarantees to be able to effectively perform 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 Article 20 (1) and their implementing measures by means of delegated acts.*

### **III. Commentary**

The accurate and independent valuation of the assets held by an AIF is of critical importance for investor decision-making and hence for the protection of investors.

The fundamental principle of the relevant provisions of the AIFM Directive is that processes should be in place to ensure the proper and independent valuation of the assets of the AIF. Subject to certain conditions, valuation may be performed internally or externally, with the AIFM remaining ultimately responsible for the valuation in either case.

The purpose of the delegated acts in this area is to develop criteria for the proper valuation of the assets and the calculation of the net asset value per share or unit; to specify the professional guarantees that must be provided by an external valuer; and to determine the appropriate frequency of valuation for open-ended funds, which must reflect the characteristics of the assets held by that fund as well as its issuance and redemption policy.

In developing advice in this area, CESR is invited to take full account of the diverse range of assets in which an AIF, or an AIFM on its behalf, may invest. The criteria developed for the proper valuation of assets should be appropriately differentiated to reflect this diversity. They should be sufficiently precise to ensure consistently high standards of valuation, while offering sufficient flexibility to avoid limiting the range of assets in which an AIF may invest.

CESR is also invited to take account of principles developed in other European and international fora, particularly those in relation to 'hard-to-value' assets.

### **IV. Questions**

CESR is invited to advise the Commission on:

1. The criteria concerning the procedures for the proper valuation of the assets and the calculation of the net asset value per share or unit to be used by competent authorities in assessing whether an AIFM complies with its obligations under Article 19(1) and Article 19(3).

CESR is invited to consider how these procedures should be differentiated to reflect the diverse characteristics of the assets in which an AIF may invest.

2. The type of specific professional guarantees an external valuer should be required to provide so as to allow the AIFM to fulfil its obligations under Article 19(5).

CESR is asked to consider the impact of the required guarantees on the availability of external valuers to the AIFM industry.

3. The frequency of valuation carried out by open-ended funds that can be considered appropriate to the assets held by the fund and its issuance and redemption frequency.

In particular, CESR is invited to consider how the appropriate frequency of valuation should be assessed for funds investing in different types of assets and with different issuance and redemption frequencies, taking into account different (and varying) degrees of market liquidity. CESR is invited to take account of the fact that such valuations shall in any case be performed at least once a year.

## **II.10. Issue 10 – Article 20 Delegation of AIFM functions**

### **I. Scope of the Commission's implementing powers**

5. *The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*
  - (a) *the conditions for fulfilling the requirements set out in paragraphs 1 and 3;*
  - (b) *the conditions under which the manager has delegated its functions to the extent that it becomes a letter-box entity and could no longer be considered to be the manager of the AIF as set out in paragraph 2.*

### **II. Level 1 text**

1. *AIFM which intend to delegate to third parties the task of carrying out on their behalf one or more of their functions shall notify the competent authorities of their home Member State before the delegation arrangements become effective. The following conditions have to be complied with:*
  - (a) *the AIFM must be able to justify its entire delegation structure with objective reasons;*
  - (b) *the delegate must dispose of sufficient resources to perform the respective tasks and the persons who effectively conduct the business must be of sufficiently good repute and sufficiently experienced;*
  - (c) *where the delegation concerns the portfolio management or the risk management, the mandate must be given only to undertakings which are authorised or registered for the purpose of asset management and subject to supervision. Where this condition cannot be satisfied, delegation may only be given on the condition of prior approval by the competent authorities of the home Member State of the AIFM;*
  - (d) *where the delegation concerns the portfolio management or the risk management and is given to a third-country undertaking, in addition to the requirements in point (c), co-operation between the competent authorities of the home Member State of the AIFM and the supervisory authority of the undertaking shall be ensured;*
  - (e) *the delegation shall not prevent the effectiveness of supervision of the AIFM, and in particular, it 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.*

*No delegation of portfolio management or risk management shall be given to*

  - (i) *the depositary or to a delegate of the depositary, or*

(ii) 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 AIFM shall review the services provided by each delegate on an ongoing basis.*

2. *In no case shall the AIFM's liability towards the AIF and its investors be affected by the fact that the AIFM has delegated functions to a third party, or by any further sub-delegation, nor shall the AIFM 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 becomes a letter-box entity.*

3. *The third party may sub-delegate any of the functions delegated to it as long as the following conditions are fulfilled:*

*(a) the AIFM consented prior to the sub-delegation;*

*(b) the AIFM notified the competent authorities of its home Member State before the sub-delegation arrangements become effective;*

*(c) the conditions set forth in paragraph 1 points (a) to (f), in the understanding that all references to the 'delegate' shall be read as references to the 'sub-delegate'.*

*No sub-delegation of portfolio management or risk management shall be given to*

*(i) the depositary or to a delegate of the depositary, or*

*(ii) any other undertaking 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 shall review the services provided by each sub-delegate on an ongoing basis.*

### **III. Commentary**

The delegation provisions are intended to create a secure framework for the delegation of the performance of specific functions to third parties, including to entities in third countries. The provisions specify the conditions to be fulfilled prior to any such delegation or sub-delegation. Delegation of functions does not affect the liability of the AIFM for the performance of these functions; nor should delegation result in the AIFM becoming a 'letter box entity'.

The purpose of the Level 2 provisions is to further specify the conditions for delegation and sub-delegation; and to define the conditions under which an AIFM would be considered to have delegated functions to the extent that it becomes a letter-box entity.

The Commission would encourage CESR to target an appropriate level of consistency appropriate level of consistency with the corresponding provisions of other directives, such as MiFID and UCITS, while taking due account of the differences between the regulated populations.

### **IV. Questions**

1. CESR is invited to advise the Commission on the content of rules that are necessary and proportionate to ensure that an AIFM fulfils the conditions under Article 20(1) and Article 20(2).

2. In particular, CESR is invited to advise the Commission on the following, which are applicable both to cases of delegation and sub-delegation:
  - a) the criteria that competent authorities should use to assess whether the reasons supplied to justify the entire delegation structure of an AIFM are objective.
  - b) the circumstances under which a delegate should be considered to have sufficient resources to perform the tasks delegated to it by an AIFM; and to be of sufficiently good repute and sufficiently experienced to perform these tasks.
  - c) the types of institutions that should be considered to be authorised or registered for the purpose of asset management and subject to supervision. CESR is invited to consider whether to employ general criteria or to specify categories of eligible institution in this context.
  - d) in the event of a delegation of portfolio or risk management to an undertaking in a third country, how cooperation between the home Member State of the AIFM and the supervisory authority of the undertaking should be ensured.
  - e) the circumstances under which a delegation would prevent the effective supervision of the AIFM, or the AIFM from acting, or the AIF from being managed, in the best interest of its investors.
3. CESR is invited to advise the Commission on the content of rules that are necessary and proportionate to ensure that an AIFM fulfils the conditions under Article 20(3).
4. In particular, CESR is invited to advise on:
  - a) the type of evidence necessary for an AIFM to demonstrate that it has consented to a sub-delegation
  - b) the criteria to be taken into account when considering whether a sub-delegation would result in a material conflict of interest with the AIFM or the investors of the AIFM; and for ensuring that portfolio and risk management functions have been appropriately segregated from any conflicting tasks; and that potential conflicts are properly identified, managed, monitored and disclosed to the investors of the AIF.
  - c) the form and content the notification under Article 20(3) (b) should take in order to ensure that the supervisory authorities have been properly notified.
5. CESR is also invited to advise the Commission, in relation to Article 20(2), on the conditions under which the AIFM would be considered to have delegated its functions to the extent that it had become a letter-box entity and could no longer be considered to be the manager of the AIF.

### **III. Part II: Depositary (Article 21)**

In developing its advice, CESR should take into account that one of the legislative objectives of the AIFMD is to foster a common understanding and harmonised interpretation among the Member States of the functions and duties of the depositary. To that end, the provisions in the AIFMD clarify the general principles applicable to the depositary functions and liability regime while providing for an extensive set of level 2 measures to further specify the depositary duties and conditions for performing its tasks.

To achieve this objective, CESR should consider the appropriate level of detail of its advice. It should also be noted that during a period of four years certain EU entities could be permitted to provide depositary services on a cross-border basis. To ensure the smooth functioning of such an 'AIF depositary passport', the level 2 provisions should further clarify and specify what has been introduced in the AIFMD as 'principles' set forth in the relevant provisions of Commission Directive 2006/73/EC.

In its advice, CESR should also take into account: the legal structure of the AIF and in particular whether the AIF is of the closed-ended or open-ended type with respect to depositary functions pursuant to Article 21(6); and specificities of various types of assets to be safe-kept by the depositary pursuant to Article 21(7). In addressing the issue of the scope of financial instruments that can be held in custody, CESR should take into account the upcoming Securities Law Directive with a view to ensuring consistency between the two directives.

#### **III.1. Issue 11 – Contract evidencing appointment of the depositary**

##### **I. Scope of the Commission's implementing powers**

*"15. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*

*(a) the particulars that need to be included in the standard agreement as referred to in paragraph 2;..."*

##### **II. Level 1 text**

*2. The appointment of the depositary shall be evidenced by a contract in writing. The contract shall, among others, 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 Directive and in other relevant laws, regulations or administrative provisions.*

##### **III. Questions**

1. CESR is requested to advise the Commission on the necessary particulars to be found in the standard agreement evidencing the appointment of the depositary. In its advice, CESR should take into account the consistency with the respective requirements in the UCITS Directive.
2. CESR is encouraged to provide the Commission, if possible, with a draft model agreement.

### **III.2. Issue 12 - General criteria for assessing equivalence of the effective prudential regulation and supervision of third countries**

#### **I. Scope of the Commission's implementing powers**

5. (...)

*The Commission shall adopt, by means of delegated acts in accordance with Article 54 and subject to the conditions laid down in Articles 55 and 56, measures specifying the criteria for assessing that the prudential regulation and supervision of third countries are to the same effect as the provisions laid down in European law and are effectively enforced, as referred to in point (ii) of this paragraph 5.*

*On the basis of the criteria referred to in third subparagraph, the Commission shall adopt, in accordance with the procedure referred to in Article 57(2), implementing measures, stating that prudential regulation and supervision of a third country are to the same effect as the provisions laid down in European Union law and are effectively enforced.*

#### **II. Level 1 text**

*"5.The depositary shall be located as follows:*

*[...]*

*(b)For non-EU AIF, the depositary shall be established in the third country where the AIF is established, or in the home Member State of the AIFM managing the AIF, or, as the case may be, in the Member State of reference of the AIFM managing the AIF.*

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

*[...]*

*(ii)in the third country where the depositary is established depositaries are subject to effective prudential regulation (including minimum capital requirements) and supervision which are to the same effect as the provisions laid down in European Union law and which are effectively enforced;"*

#### **III. Questions**

1. CESR is requested to advise the Commission on the criteria for assessing whether the prudential regulation and supervision applicable to a depositary established in a third country with respect to its depositary duties are to the same effect as the provisions laid down in European law.

In this regard, CESR is invited to take into account at least whether the depositary:

- is subject to specific capital requirements for the safe-keeping of assets.
- is subject to supervision on an ongoing basis.
- provides sufficient financial and professional guarantees to be able to effectively pursue its business as a depositary and meet the commitments inherent to that function.
- is subject to rules as stringent as those laid down in Article 21 AIFMD

2. CESR is requested to advise the Commission specifying the criteria for assessing that prudential regulation and supervision of a third country applicable to the AIF depositary with respect to its depositary duties established in a third country is to be considered as effectively enforced. Inter alia, CESR should take into account whether the depositary is subject to the oversight of a public authority, meaning that, at least:

- the authority has the power to request information from the depositary
- the authority has the power to intervene with respect to, and sanction, the depositary

### **III.3. Issue 13 – Depositary functions**

#### **I. Scope of the Commission's implementing powers**

*15. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*

*[...]*

- (c) the conditions for performing the depositary functions pursuant to paragraphs 6, 7 and 8, including:*
- the type of financial instruments that shall be included in the scope of the depositary's custody duties according to point (a) of paragraph 7;*
  - the conditions upon which the depositary may exercise its custody duties over financial instruments registered with a central depositary; and*
  - the conditions upon which the depositary shall safe keep according to point (b) of paragraph 7 the financial instruments issued in a nominative form and registered with an issuer or a registrar;*

#### **ISSUE 13.1 – DEPOSITARY FUNCTIONS PURSUANT TO PARAGRAPH 6**

##### **II. Level 1 text**

*"6. The depositary shall 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 shares or units of an AIF have been received and that all cash of the AIF has been booked in one or more 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 Article 18 (1) (a) to (c) of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, or an other entity of the same nature as the entity referred to in Article 18 (1) (a) to (c) of that Commission Directive 2006/73/EC in the relevant market where cash accounts are required as long as such entity is subject to effective prudential regulation and supervision of the same effect as the provisions laid down in European Union law and which are effectively being enforced, and in accordance with the principles set forth in Article 16 of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.*

*In case 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."*

##### **III. Questions**



1. CESR is requested to advise the Commission on the conditions for performing the depositary functions pursuant to Article 21(6). CESR is requested to specify conditions for the depositary to ensure that:
  - the AIF's cash flows are properly monitored;
  - all payments made by or on behalf of investors upon the subscription of shares or units of - an AIF have been received and booked in one or more 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 Article 18 (1) (a) to (c) of Commission Directive 2006/73/EC in accordance with the principles set forth in Article 16 of Commission Directive 2006/73/EC.
  - where cash accounts are opened in the name of the depositary acting on behalf of the AIF, none of the depositary's own cash is kept in the same accounts.

In its advice, CESR should take into account the legal structure of the AIF and in particular whether the AIF is of the closed-ended or open-ended type.

2. CESR is requested to advise the Commission on the conditions applicable in order to assess whether:
  - an entity can be considered to be of the same nature as the entity referred to in Article 18 (1) (a) to (c) of Commission Directive 2006/73/EC, in the relevant non-EU market where opening cash accounts on behalf of the AIF are required;
  - such an entity is subject to effective prudential regulation and supervision to the same effect as the provisions laid down in European Union law and which is effectively enforced.
3. CESR is requested to advise the Commission on the conditions applicable in order to determine what shall be considered as the relevant market where cash accounts are required.

## **ISSUE 13.2 – DEPOSITARY FUNCTIONS PURSUANT TO PARAGRAPH 7**

### **II. Level 1 text**

7. *"The assets of the AIF, or, as the case may be, the AIFM acting on behalf of the AIF, shall be entrusted to the depositary for safe-keeping, as follows:*
  - (a) *Financial instruments that can be held in custody*
    - (i) *The depositary shall 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 this purpose, the depositary shall 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 forth in Article 16 of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, opened in the name of the AIF or, as the case may be, the AIFM acting on behalf of the AIF, so that they*

*can at all times be clearly identified as belonging to the AIF in accordance with the applicable law.*

*(b) Other assets*

- (i) For all other assets of the AIF, the depositary shall verify the ownership of the AIF, or, as the case may be, 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, as the case may be, the AIFM acting on behalf of the AIF, holds the ownership of such assets;*
- (ii) The assessment whether the AIF, or, as the case may be, 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 shall keep this record up to date."*

### **III. Questions**

1. CESR is requested to advise the Commission on:

- the type of financial instruments that shall be included in the scope of the depositary's custody duties as referred to in point (a) of Article 21(7), namely (i) the financial instruments<sup>8</sup> that can be registered in a financial instruments account opened in the name of the AIF in the depositary's books, and (ii) the financial instruments that can be "physically" delivered to the depositary;
- the conditions applicable to the depositary when exercising its safekeeping custody duties for such financial instruments, taking into account the specificities of the various types of financial instruments and where applicable their registration with a central depositary, including but not limited to:
  - o the conditions upon which such financial instruments shall be registered in a financial instruments accounts opened in the depositary's books opened in the name of the AIF or, as the case may be, the AIFM acting on behalf of the AIF,;
  - o the conditions upon which such financial instruments shall be deemed (i) to be appropriately segregated in accordance with the principles set forth in Article 16 of Commission Directive 2006/73/EC<sup>9</sup>), and (ii) to be clearly identified at all times as belonging to the AIF, in accordance with the applicable law; and what shall be considered as the applicable law.

2. CESR is requested to advise the Commission on:

- the type of "other assets" with respect to which the depositary shall exercise its safekeeping duties pursuant to paragraph 7(b), namely all assets that cannot or are not to be kept in custody by the depositary pursuant paragraph to Article 7(a);
- the conditions applicable to the depositary when exercising its safekeeping duties over such "other assets", taking into account the specificities of the various types of asset, including but not limited to financial instruments issued in a 'nominative' form, financial instruments registered with an issuer or a registrar, other financial instruments and other types of assets.

3. To that end, CESR is requested to advise the Commission on:

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<sup>8</sup> As specified in annex I section C of Directive 2004/39/EC

<sup>9</sup> 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

- the conditions upon which the depositary shall verify the ownership of the AIF or the AIFM on behalf of the AIF of such assets;
  - the information, documents and evidence upon which a depositary may rely in order to be satisfied that the AIF or the AIFM on behalf of the AIF holds the ownership of such assets, and the means by which such information shall be made available to the depositary;
  - the conditions upon which the depositary shall maintain a record of these assets, including but not limited to the type of information to be recorded according to the various specificities of these assets; and the conditions upon which such records shall be kept updated.
4. In its advice, CESR should also consider the circumstances where assets belonging to the AIF, are subject to temporary lending or repurchase arrangements or any type of arrangements under which financial instruments may be re-used or provided as collateral by the AIF or AIFM on behalf of the AIF, whether or not such arrangements involve transfer of legal title to the financial instruments, and advise on the conditions applicable to the depositary to perform its safekeeping duties accordingly.

### **ISSUE 13.3 – DEPOSITARY FUNCTIONS PURSUANT TO PARAGRAPH 8**

#### **II. Level 1 text**

8. *In addition to the tasks referred to in paragraph 6 and 7, the depositary shall:*
- (a) ensure that the sale, issue, re-purchase, redemption and cancellation of shares or units of the AIF are carried out in accordance with the applicable national law and the AIF rules or instruments of incorporation;*
  - (b) ensure that the value of the shares or units of the AIF is calculated in accordance with the applicable national law and the AIF rules or instruments of incorporation and procedures laid down in Article 19;*
  - (c) carry out the instructions of the AIFM, unless they conflict with the applicable national law or the AIF rules or instruments of incorporation;*
  - (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 rules.*

#### **III. Questions**

1. CESR is requested to advise the Commission on the conditions the depositary must comply with in order to fulfil its duties pursuant to Article 21(8). The advice shall include all necessary elements specifying the depositary control duties when inter alia verifying the compliance of instructions of the AIFM with the applicable national law or the AIF rules or instruments of incorporation, or when ensuring that the value of the shares or units of the AIF is calculated in accordance with the applicable national law and the AIF rules or instruments of incorporation and procedures laid down in Article 19.

### **III.4. Issue 14 – Due diligence**

#### **I. Scope of the Commission's implementing powers**

*15. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*

*[...]*

*(d) the due diligence duties of depositaries pursuant to paragraph 10 (c);*

#### **II. Level 1 text**

*10. The depositary may not delegate to third parties any of its functions as described in this Article, other than those referred to in paragraph 7.*

*The depositary may only delegate to third party the functions referred to in paragraph 7, provided that:*

*[...]*

*(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 shall keep 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;*

### **III. Questions**

1. CESR is requested to advise the Commission on the duties the depositary has to carry out in exercising its due diligence duties pursuant to Article 21(10), namely:
  - procedures for the selection and the appointment of any third party to whom it wants to delegate parts of its tasks; and
  - procedures for the periodic review and ongoing monitoring of that third party and of the arrangements of that third party in respect of the matters delegated to it.
2. CESR is encouraged to develop a comprehensive template of evaluation, selection, review and monitoring criteria to be considered by the depositary while exercising its due diligence duties under Article 21(10).

### **III.5. Issue 15 – The segregation obligation**

#### **I. Scope of the Commission's implementing powers**

*15. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*

*[...]*

*(e) the segregation obligation set forth in paragraph 10 (d) (iv)*

#### **II. Level 1 text**

*10. The depositary may not delegate to third parties any of its functions as described in this Article, other than those referred to in paragraph 7.*

*The depositary may only delegate to third parties the functions referred to in paragraph 7, provided that:*

[...]

*(d) the depositary has ensured that the third party fulfils the following conditions and on an ongoing basis ensures that it will remain to fulfil such conditions during the performance of the tasks delegated to it:*

[...]

*(iv) it 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 given depositary;*

### **III. Questions**

1. CESR is requested to advise the Commission on criteria to be satisfied to comply with the segregation obligation whereby the depositary shall ensure on an ongoing basis that the third party fulfils the conditions referred to in Article 21(10)(d)(iv).

## **III.6. Issue 16 – Loss of financial instruments**

### **I. Scope of the Commission's implementing powers**

*15. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*

[...]

*(f) the conditions and circumstances under which financial instruments held in custody shall be considered as lost;*

### **II. Level 1 text**

*11. The depositary shall be liable to the AIF, or, as the case may be, to the investors of the AIF, for the loss by the depositary, or as the case may be, a third party to whom the custody has been delegated, of financial instruments held in custody according to point (a) of paragraph 7.*

*In the case of such a loss of a financial instrument held in custody, the depositary shall return a financial instrument of the identical type or the corresponding amount to the AIF or, as the case may be, the AIFM acting on behalf of the AIF without undue delay. The depositary shall not be liable if it can 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.*

### **III. Questions**

1. CESR is requested to advise the Commission on the conditions and circumstances under which financial instruments held in custody pursuant paragraph 7(a) shall be considered as "lost" according to Article 21(11). In its advice, CESR should take into account the various legal rights attached to the financial instruments depending, for example, on the legal concepts ('ius ad rem' vs. 'ius in personam') used in the jurisdiction where they have been issued and any legal restrictions applicable to the place where they are kept in (sub-) custody.
2. In its advice, CESR should specify circumstances when such financial instrument should be considered permanently "lost", to be distinguished from circumstances when such

financial instruments should be considered temporarily “unavailable” (held up or frozen). To that end, CESR shall consider inter alia the following circumstances:

- Insolvency of, and other administrative proceedings against, a sub-custodian;
- Legal or political changes in the country where financial instruments are held in sub custody;
- Actions of authorities imposing restrictions on securities markets;
- Risks involved through the use of settlement systems; and
- Any other circumstances which may prevent the AIF from using or disposing of its assets that are kept in custody by a depositary or a sub custodian.

### **III.7. Issue 17 - External events beyond reasonable control**

#### **I. Scope of the Commission's implementing powers**

*15. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*

*[...]*

*(g) what is to be understood by external events beyond reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary pursuant to paragraph 11;*

#### **II. Level 1 text**

*11. The depositary shall be liable to the AIF, or, as the case may be, to the investors of the AIF, for the loss by the depositary, or as the case may be, a third party to whom the custody has been delegated, of financial instruments held in custody according to point (a) of paragraph 7.*

*In the case of such a loss of a financial instrument held in custody, the depositary shall return a financial instrument of the identical type or the corresponding amount to the AIF or, as the case may be, the AIFM acting on behalf of the AIF without undue delay. The depositary shall not be liable if it can 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.*

#### **III. Questions**

1. CESR is requested to advise the Commission on conditions and circumstances for events to be considered as:
  - external,
  - going beyond reasonable control, and
  - having consequences which would have been unavoidable despite all reasonable efforts to the contrary.
2. If possible, CESR is requested to advise the Commission on a non-exhaustive list of events where the loss of assets can be considered to be 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. CESR is encouraged to consider the appropriate form (e.g. guidelines) of such a list.

### **III.8. Issue 18 – Objective reason to contract a discharge**

#### **I. Scope of the Commission's implementing powers**

*15. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*

*[...]*

*(h) the conditions and circumstances under which there is an objective reason to contract a discharge pursuant to paragraph 12.*

#### **II. Level 1 text**

*12. The depositary's liability shall not be affected by any delegation referred to in paragraph 10.*

*However, in case of a loss of financial instruments held in custody by a third party pursuant to paragraph 10, provided that there is a written contract between the depositary and the AIF, or, as the case may be, the AIFM acting on behalf of the AIF, which expressly allows such a discharge under the explicit condition precedent of the existence of a written contract in accordance with point (i) below and which establishes the objective reason to contract such a discharge, the depositary can discharge itself of its liability if it can prove:*

*(i) that all requirements for the delegation of its custody tasks, as set forth in paragraph 10 (a) to (d), are met, and*

*(ii) that there is a written contract between the depositary and the third party that explicitly transfers the liability of the depositary to that third party and makes it possible for the AIF, or as the case may be, 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.*

#### **III. Questions**

1. CESR is requested to advise the Commission on the conditions and circumstances under which there is an objective reason for the depositary to contract a discharge pursuant to Article 21(12).
2. In its advice, CESR is encouraged to provide an indicative list of scenarios that are to be considered as being objective reasons for the contractual discharge referred to in Article 21 (12).

## **IV. Part III: Transparency Requirements and Leverage**

One of the main objectives of the AIFMD is to increase the transparency of AIFM vis-à-vis investors and competent authorities. To that end, the AIFMD lays down requirements regarding:

- the annual report of the AIF;
- disclosure vis-à-vis investors before they invest into the AIF as well as on a periodic basis thereafter; and
- reporting to competent authorities.

The AIFMD envisages several level 2 measures to further specify these transparency requirements.

In its advice, CESR should address the appropriate level of detail and harmonisation for the transparency requirements taking into account:

1. the transparency objectives of the Level 1 Directive including the importance of consistent reporting to achieve the objective of effective supervision and information exchange among the competent authorities and ESMA;
2. the principle of proportionality and the need to minimise for any given transparency requirement the administrative burden for AIF, AIFM, competent authorities and other stakeholders concerned; and
3. the need to ensure a level playing field across the industry and the need for sufficiently harmonized requirements given the 'passport' for AIFM/AIF.

In addition, CESR should take into account the need for the requirements to be sufficiently adjusted or tailored to the different business models and legal forms of AIFM. With respect to level 2 measures for the provisions on the annual report of the AIF, CESR's advice should be consistent with the IFRS/IAS principles and standards. In developing its advice with respect to level 2 measures for reporting obligations to competent authorities, CESR should liaise with ESRB and consider consistency with existing reporting requirements for statistical purposes. CESR is also encouraged to liaise with the central banking community on this issue.

### **IV.1. Issue 19 - Article 4 Definition of leverage**

#### **I. Scope of the Commission's implementing powers**

3. *The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*
  - (a) the methods of leverage, including any financial and/or legal structures involving third parties controlled by the relevant AIF, as defined in point (w) of paragraph 1; and*
  - (b) how leverage shall be calculated.*

#### **II. Level 1 text**

1. *For the purpose of this Directive, the following definitions shall apply, unless specifically provided otherwise in this Directive:*  
[...]



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

### **III. Questions**

1. CESR is requested to provide the Commission with a description of relevant methods by which AIFM increase the exposure of AIF whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means, including any financial and/or legal structures involving third parties controlled by the AIF. This description or mapping should distinguish between the various business models and approaches to leverage in the AIFM industry. In its advice, CESR should take into account the guidance provided in recital 14.
2. CESR is requested to advise the Commission on the appropriate method or methods for the calculation of leverage for the purpose of this Directive. The analysis should, inter alia, take into account the appropriateness, accuracy, cost, comparability and practicability of the different methods.

## **IV.2. Issue 20 - Article 22 Annual report**

### **I. Scope of the Commission's implementing powers**

4. *The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying the content and format of the annual report. These measures shall be adapted to the type of AIF to which they apply.*

### **II. Level 1 text**

2. *The annual report shall 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 23 during the financial year covered by the report;*
  - (e) *the total amount of remuneration for the financial year, split into fixed and variable remuneration paid by the AIFM to its staff members, and number of beneficiaries, and, where relevant, carried interests 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.*

### **III. Questions**

1. CESR is requested to advise the Commission on the content and format of the annual report. In its advice, CESR should consider whether all or any of the information referred to in Article 23 should be included in the annual report and the need for appropriate explanatory notes.
2. CESR is requested to advise the Commission on the content and the format of a balance-sheet or a statement of assets and liabilities. In its advice, CESR should specify in particular:

- the appropriate presentation, elements and level of detail of the AIF's assets;
  - the appropriate presentation, elements and level of detail of the AIF's liabilities;
  - the appropriate presentation, the elements and level of detail of net assets (shareholders' or unitholders' equity); and
  - the statement of cash inflows to and outflows from the AIF.
3. CESR is requested to advise the Commission on the content and format of an income and expenditure account for the financial year. In its advice, CESR should specify in particular the elements and the level of detail of AIF's income and expenditure accounts.
  4. CESR is requested to advise the Commission on the content and format of the report on the activities of the financial year. In its advice, CESR should consider specifying inter alia:
    - statement explaining how the fund has invested its assets during the relevant period in accordance with its published investment policy;
    - overview of the AIF's portfolio and, where appropriate, the AIF's major investments;
    - financial results; and
    - directors' and corporate governance report depending on the legal structure of the AIF.
  5. CESR is requested to advise the Commission on how material changes in the information listed in Article 23 during the financial year covered by the report should be best presented in the annual report.
  6. CESR is requested to advise the Commission on the content and the format of the remuneration disclosure required under points (e) and (f) of Article 22(2) including the details on the form of remuneration.

### **IV.3. Issue 21 - Article 23 Disclosure to investors**

#### **I. Scope of the Commission's implementing powers**

*6. The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying the disclosure obligations of AIFM referred to in paragraphs 4 and 5, including the frequency of the disclosure set forth in paragraph 5. These measures shall be adapted to the type of AIFM to which they apply.*

#### **II. Level 1 text**

4. *AIFM shall for each of the EU AIF it manages and for each of the AIF it markets 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 these risks.*
5. *AIFM managing one or more EU AIF employing leverage or marketing in the European Union one or more AIF employing leverage, shall 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 re-use of collateral or any guarantee granted under the leveraging arrangement;*
- (b) the total amount of leverage employed by that AIF.*

### **III. Questions**

1. With respect to the disclosure obligations in Article 23(4), CESR is requested to advise the Commission on:
  - the appropriate frequency of such disclosures;
  - the criteria for assessing the liquidity of assets and procedure for calculating the percentage referred to in Article 23(4)(a) and the format of such disclosures; the information and the essential elements to be included in the description of the arrangements referred in points a) and b) of Article 23(4) including the use of gates, suspensions and side pockets; the essential information, and the format thereof, of the risk factors, including relevant risk measures and metrics used to assess the sensitivity of the AIF portfolio to movements in interest rates, credit spreads, equity markets, etc, counterparty risks the extent of rehypothecation and information on indebtedness of entities controlled by the AIF to be disclosed by the AIFM to enable appropriate description of the current risk profile of the AIF; and
  - the information and the essential elements to be disclosed by the AIFM to enable appropriate description of the risk management systems employed by the AIFM to manage these risks including results of recent stress tests.

CESR is requested to adapt its advice to the types of AIFM.

2. With respect to the disclosure obligations in Article 23(5), CESR is requested to advise the Commission on:
  - the appropriate frequency of such disclosures;
  - the essential information, and the format thereof, to ensure an appropriate description of changes to the maximum level of leverage which the AIFM may employ on behalf of the AIF as well as any right of re-use of collateral or any guarantee granted under the leveraging arrangement; and the leverage measures or ratios, and the format thereof, to be used by the AIFM when disclosing the total amount of leverage employed by the AIF during the reporting period and at the end of the reporting period including those specified according to Article 4.

CESR is invited to take the variation in the types of AIFM into account in its advice.

## **IV.4. Issue 22 - Article 24 Reporting obligations to competent authorities**

### **I. Scope of the Commission's implementing powers**

6. *The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying:*
  - (a) for the purposes of paragraph 4, when leverage is considered to be employed on a substantial basis;*

*(b) the obligations to report and provide information referred to in paragraphs 1 through 5.*

*Those measures shall take into account the need to avoid excessive administrative burden for competent authorities.*

## **II. Level 1 text**

*1. AIFM shall regularly report to the competent authorities of its home Member State on the principal markets and instruments in which it trades on behalf of the AIF it manages.*

*It shall provide information on the main instruments in which it is trading, markets of which it is a member or where it actively trades, and on the principal exposures and most important concentrations of each of the AIF it manages.*

*2. An AIFM shall provide for each of the EU AIF it manages and for each of the AIF it markets in the European Union the following to the competent authorities of its home Member State:*

*(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 actual risk profile of the AIF and the risk management tools employed by the AIFM to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk;*

*(d) the main categories of assets in which the AIF invested;*

*(e) the results of the stress tests performed according to Article 15(3)(b) and Article 16(1) second subparagraph.*

*3. The AIFM shall provide on request the following documents to the competent authorities of its home Member State:*

*(a) an annual report of each EU AIF managed by the AIFM and, as the case may be, for each AIF marketed in the European Union, for each financial year, according to Article 22(1);*

*(b) a detailed list of all AIF which the AIFM manages for the end of each quarter.*

*4. AIFM managing one or more AIF employing leverage on a substantial basis shall make available 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 their assets have been reused under leveraging arrangements to the competent authorities of its home Member State.*

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

*For the non-EU AIFM, the reporting obligations set forth in this paragraph are limited to the EU AIF managed by them and the non-EU AIF marketed by them in the European Union.*

*5. Where necessary for the effective monitoring of systemic risk, the competent authorities of the home Member State may require information in addition to that described in this Article, on a periodic as well as on an ad-hoc basis. The competent authorities shall inform ESMA about the additional information requirements.*

*In exceptional circumstances and where required in order to ensure the stability and integrity of the financial system, or to promote long term sustainable growth, ESMA may request the competent authorities of the home Member State to impose additional reporting requirements.*

### **III. Questions**

1. CESR is requested to advise the Commission for the purposes of paragraph 4 on the criteria to be used to determine under which conditions leverage is to be considered as being 'employed on a substantial basis'.
2. CESR is requested to advise the Commission on the content of the obligations to report and provide information referred to in paragraphs 1 through 5. In its advice, CESR should
3. consider developing a comprehensive template to be used by AIFM for reporting to competent authorities the information required under Article 24. In developing such a template, CESR should take into account the reporting template issued by IOSCO on 25 February 2010 for reporting from hedge funds and templates used by national competent authorities. CESR should address inter alia the following elements:
  - Assets under management
  - Performance and investor information
  - Market and product exposure (long and short positions)
  - Regional focus
  - Turnover and number of transactions, indication of markets in which trading can represent a significant proportion of overall volume, trading and clearing mechanisms
  - Leverage and risk
  - Asset and liability information
  - Counterparty risk

The template should be sufficiently flexible to accommodate the different types, sizes and investment strategies of AIFM, without compromising the objective of effective supervision.

4. CESR is requested to advise the Commission on:
  - a. the appropriate frequency of such reporting as a function of the potential risks posed by specific types of AIFM; the modalities and forms for data transmission; and whether the same conditions should apply to the additional information requirements referred to in Article 24(5).

### **IV.5. Issue 23 - Article 25 Use of information by competent authorities, supervisory cooperation and limits to leverage**

#### **I. Scope of the Commission's implementing powers**

9. *The Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures setting out principles specifying the circumstances in which competent authorities exercise the provisions in paragraph 3, taking into account different strategies of AIF, different market conditions in which AIF operate and possible pro-cyclical effects following from exercising the provisions.*

## **II. Level 1 text**

*3. The AIFM must demonstrate that the leverage limits for each AIF it manages are reasonable and that it complies at all times with the leverage limits set by it. Competent authorities shall assess the risks that the use of leverage by an AIFM with respect to the AIF it manages could entail, and when it is deemed necessary in order to ensure the stability and integrity of the financial system, the competent authorities of the home Member State of the AIFM, after having notified ESMA, the ESRB and, as the case may be, the competent authorities of the relevant AIF, shall impose limits to the level of leverage that an AIFM may employ or other restrictions on the management of the AIF with respect to the AIF 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 competent authorities of the home Member State of the AIFM shall duly inform ESMA and the ESRB and, as the case may be, the competent authorities of the AIF, of actions taken in this respect, through the procedures set out in Article 48 on supervisory co-operation.*

## **III. Questions**

1. CESR is requested to advise the Commission on the principles specifying the circumstances in which competent authorities shall exercise the powers granted pursuant to Article 25(3), taking into account different strategies of AIF, different market conditions in which AIF operate and possible pro-cyclical effects following from exercising the provisions. Such principles should guide competent authorities in identifying situations and circumstances in which competent authorities shall exercise the powers referred to in paragraph 3.
2. In its advice, CESR should consider inter alia to what extent the following aspects might endanger the stability and integrity of the financial system:
  - leverage used in different strategies and the size of an AIF's "footprints";
  - the concentration of risks in particular markets and risks of spill-over effects; liquidity issues in particular markets; counterparty risks to credit institutions or other systemically relevant institutions; the scale of any asset/liability mismatch; and
  - the evolution of prices of assets with respect to their fundamentals.
3. CESR is also requested to advise on the the appropriate timing of potential measures referred to in Article 25(3).

## **V. Part IV: Supervision**

This part of the mandate covers level 2 measures on: a) cooperation arrangements with third country authorities; b) exchange of information relating to the potential systemic consequences of AIFM activities between EU competent authorities; and c) the determination of the Member State of reference for non-EU AIFM.

CESR should take into account that, as mentioned in the introduction, the deadline for the delivery of the advice might be delayed for a number of the level 2 measures because of the delayed entry into force of the 'third country passport' (expected only two years after the end of the transposition deadline).

It should be noted, however, that the cooperation arrangements referred to in Articles 34(1) 36(1) and 40 (1) (b) should be in place between the EU and the non-EU competent authorities as from the first day the national laws transposing the AIFMD take effect in 2013. It would, therefore, be preferable to have the relevant level 2 measure regarding the design of a common framework in place at an early stage. CESR should take into account the need to give sufficient time to competent authorities to conclude the cooperation arrangements with the non-EU authorities.

CESR is encouraged to explore the possible assistance that ESMA could render to the European competent authorities in the negotiation of the cooperation arrangements with non-EU supervisory authorities. This assistance could include the negotiation of the arrangements on behalf of the competent authorities, since in accordance with Article 13 of the ESMA Regulation, competent authorities may delegate tasks and responsibilities to ESMA.

Measures on exchange of information relating to potential systemic consequences of AIFM activities between EU competent authorities (Article 51(3)) should be in place and operating by 2013, as for the measures covered by the previous chapters of this mandate.

### ***V.1. Issue 24 - Cooperation arrangements between European competent authorities and the authorities of third countries***

There are a number of provisions in the AIFMD that require the existence of cooperation arrangements between European competent authorities and supervisory authorities from the country of origin of the non-EU AIFM or non-EU AIF. The aim of these arrangements is to ensure, in certain circumstances not limited to, an efficient exchange of information that allows the competent authorities to carry out their duties in accordance with the Directive.

The different situations where cooperation arrangements are needed can be divided into two groups: a first group would be composed by the cooperation arrangements required for the management and the marketing of non-EU AIF under the 'national regimes' (Articles 34(1), 36(1) and 40(1) AIFMD). In this case level 2 measures should be adopted as soon as possible, taking into account that the authorities will have to conclude the cooperation arrangements before the end of the AIFMD transposition period (beginning 2013). The second group would include the cooperation arrangements that form part of the third country AIFM passport regime (Articles 35(2), 37(7)(d) and 39(2)(a)). Since in this case the passporting regime will only be

operational by 2015, the level 2 measures could be adopted at a later stage, allowing for the timely conclusion of the arrangements before 2015.

#### **Issue 24a - Cooperation arrangements between European competent authorities and the authorities of third countries required by Articles 34(1), 36(1) and 40(1) AIFMD**

Articles 34(1), 36(1) and 40(1) require cooperation arrangements between EU and non-EU competent authorities in three situations:

a) EU AIFM managing non-EU AIF which are not marketed in Member States: the arrangements should be put in place between the competent authority of the home Member State of the AIFM and the supervisory authority of the country where the non-EU AIF is established. This obligation is laid down in Article 34 (1) AIFMD:

*"Member States shall ensure that an authorised EU AIFM may manage non-EU AIF which are not marketed in the European Union provided that: (...) (b) Appropriate cooperation arrangements are in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows competent authorities of the home Member State of the AIFM to carry out their duties according to this Directive."*

The scope of the Commission's implementing powers is laid down in Article 34(2):

*"The Commission shall adopt by means of delegated acts, in accordance with Article 54 and subject to the conditions set forth in Articles 55 and 56, measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries."*

b) EU AIFM marketing non-EU AIF in Member States without a passport: the arrangements should be put in place between the competent authority of the home Member State of the AIFM and the supervisory authority of the country where the non-EU AIF is established. The exchange of information between authorities in this case should be focused on systemic risk oversight. This obligation is laid down in Article 36 (1) AIFMD:

*"Without prejudice to Article 35, Member States may allow an authorised EU AIFM to market to professional investors, on their territory only, shares or units of non-EU AIF they manage and of EU feeder AIF that do not fulfil the requirements referred to in the second subparagraph of paragraph 1 of Article 31, provided that: (...) (b) Appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows competent authorities of the home Member State of the AIFM to carry out their duties according to this Directive."*

The scope of the Commission's implementing powers is laid down in Article 36(3) and is similar to that of Article 34(2).



c) Non-EU AIFM marketing EU or non-EU AIF in Member States without a passport: depending on the particular situation, the arrangements might involve the competent authority of the Member State where the AIF is marketed, the competent authority of the EU AIF concerned, the supervisory authorities of the third country where the non-EU AIFM is established and/or the supervisory authorities of the third country where the non-EU AIF is established. As in the previous case, the exchange of information between authorities in this case should be focused on systemic risk oversight. This obligation is laid down in Article 40 (1)(b) AIFMD:

*"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 State where the AIF are marketed, insofar applicable, the competent authorities of the EU AIF concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, insofar 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 according to this Directive."*

The scope of the Commission's implementing powers is laid down in paragraph 3 of Article 40, and it is similar to that of Article 34(2).

#### **Questions to CESR:**

1. CESR is requested to advise the Commission on a common framework to facilitate the establishment of the cooperation arrangements with supervisory authorities from third countries in the different situations described above. CESR is requested to advise on the objectives, the parties and the scope of the cooperation arrangements. In relation to the arrangements for the purpose of systemic risk oversight referred to in Articles 36(1) and 40(1), they should cover, at least, the minimum information related to the potential systemic consequences of non-EU AIFM activity that competent authorities should exchange with their non-European counterparts, the procedure for the exchange of that information and the frequency of the exchange. CESR is encouraged to consider as a framework the reporting obligations laid down in Article 24 AIFMD.
2. CESR should take into account that, due to the non-binding nature of the administrative arrangements, they should have a limited scope (i.e. cannot create legal obligations), since they cannot be considered as international treaties.
3. CESR is encouraged to take into account the relevant international standards in this regard, in particular, the principles and standards related to the control of the potential systemic risk posed by AIFM of the International Organisation of Securities Commissions (IOSCO).

#### **Issue 24b - Cooperation arrangements between European competent authorities and the authorities of third countries required by Articles 35(2), 37(7)(d) and 39(2)(a) of AIFMD**

In accordance with Articles 35(2), 37(7)(d) and 39(2)(a) there should be cooperation arrangements between EU and non-EU competent authorities in place in three situations:

a) EU AIFM marketing non-EU AIF with passport in the EU: the arrangements should be put in place between the competent authority of the home Member State of the AIFM and the supervisory authority of the country where the non-EU AIF is established. The obligation is laid down in Article 35(2) AIFMD:

*"The AIFM must comply with all the requirements established in this Directive, with the exception of Chapter VI. In addition the following conditions apply: (a) Appropriate cooperation arrangements are in place between the competent authorities of the home Member State of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information, taking into account Article 48(4), that allows the competent authorities to carry out their duties according to this Directive."*

The scope of the Commission's implementing powers is laid down in Article 35(11) and is similar to Article 34(2).

b) Non-EU AIFM authorised to manage EU AIF and or market AIF in the EU with a passport: the arrangements should be put in place between the competent authority of the Member State of reference, the supervisory authority of the non-EU AIFM and the competent authority of the non-EU AIF. The obligation is laid down in Article 37 (7)(d) AIFMD:

*"Without prejudice to what is set forth in paragraph 8, no authorisation shall be given unless the following additional conditions are met: (...) (d) Appropriate cooperation arrangements are in place between the competent authorities of the Member State of reference, the competent authorities of the EU AIF concerned and the supervisory authorities of the third country where the non-EU AIFM is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties according to this Directive."*

The scope of the Commission's implementing powers is laid down in Article 37(14) and is in line with Article 34(2).

c) Non-EU AIFM marketing in the EU non-EU AIF with passport (Article 39) – the arrangements should be put in place between the competent authority of the Member State of reference and the competent authority of the non-EU AIF. The obligation is laid down in Article 39 (2)(a) AIFMD:

*"The AIFM must comply with all the requirements established in this Directive. In addition the following conditions apply: (a) Appropriate cooperation arrangements are in place between the competent authorities of the Member State of reference and the supervisory authority of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties according to this Directive."*

The scope of the Commission's implementing powers is laid down in Article 39(11), in line with Article 34(2).

**Questions to CESR:**

1. CESR is requested to advise the Commission on a common framework to facilitate the establishment of cooperation arrangements with supervisory authorities from third countries in the different situations described above. CESR is requested to advise on the objectives, the parties and the scope of the cooperation arrangements. These arrangements should cover:
  - a) the modalities and conditions for the supervision of non-EU AIFM and funds and
  - b) the procedures for the exchange of information between the authorities involved.

The aim of these cooperation arrangements should be to ensure the efficient cooperation between supervisors and the effective supervision of the third country AIFM and/or AIF.

2. CESR should take into account that due to the non-binding nature of the administrative arrangements they should have a limited scope (i.e. cannot create legal obligations), since they cannot be considered as international treaties.
3. CESR is encouraged to take into account the international standards in this regard, in particular, the principles regarding cross-border supervisory cooperation of the International Organisation of Securities Commissions (IOSCO).

## **V.2. Issue 25: Cooperation and exchange of information between competent authorities**

A consequence of the passport for AIFM is that close cooperation between competent authorities in the supervision of AIFM that operate on a cross-border basis in the EU is essential. Indeed, in accordance with Article 48(1) competent authorities have a general obligation to cooperate:

*"the competent authorities of the Member States shall co-operate with each other and with the ESMA and the ESRB whenever necessary for the purpose of carrying out their duties under this Directive or of exercising their powers under this Directive or under national law".*

Since the exchange of information is an essential element of this cooperation, Article 48(4) establishes that

*"the competent authorities of the Member States shall immediately supply one another and ESMA with the information required for the purposes of carrying out their duties under this Directive".*

In the context of interconnected financial markets it is essential to have an adequate flow of information between competent authorities about the potential systemic consequences of the AIFM activity under their surveillance. This information should also be shared with ESMA and the European Systemic Risk Board. This is why, in accordance with Article 51(3),

*"the competent authorities of the Member States responsible for the authorisation and/or supervision of AIFM under this Directive shall communicate information to the competent authorities of other Member States where this is relevant for monitoring and responding to the potential implications of the activities of individual AIFM or AIFM collectively for the stability of systemically relevant*

*financial institutions and the orderly functioning of markets on which AIFM are active. The ESRB and the ESMA shall also be informed and shall forward this information to the competent authorities of the other Member States."*

The Commission is requested to specify by level 2 measures the type of information to be exchanged and how the flow of information will work. In accordance with paragraph 3, the content of the information will be defined in a delegated act

*"the Commission shall adopt by means of delegated acts, in accordance with Article 54, and subject to the conditions laid down in Articles 55 and 56, measures specifying the content of the information to be exchanged pursuant to paragraph 1."*

Whereas the modalities and frequency of the exchange of information will be specified in an implementing act, in accordance with paragraph 4

*"the Commission shall, in accordance with the regulatory procedure referred to in Article 57(2) adopt implementing measures specifying the modalities and frequency of the information to be exchanged pursuant to paragraph 1".*

### **Questions to CESR:**

1. CESR is requested to advise the Commission on the content of the level 2 measures on the exchange of information on the potential systemic consequences of AIFM activity. In particular CESR is requested to advise on what type of information could be exchanged among supervisors in order to facilitate supervisory cooperation in identifying potential systemic risks and risks to the orderly functioning of markets posed by AIFM individually or collectively, taking into account the reporting requirements on AIFM pursuant to Article 24.
2. CESR is requested to advise the Commission on a template, a data format, and the conditions of secured data transmission for the exchange of data among competent authorities. CESR is also requested to advise on the periodicity of the exchange of the information.

### **V.3. Issue 26: Authorisation of non-EU AIFM**

Non-EU AIFM will be entitled to operate in the EU in the same way as EU AIFM, provided they comply with the rules of the AIFMD and receive an authorisation from the competent authority of a Member State. The fact that these entities are established in a third country implies that the authorisation procedure has to be adapted to accommodate this reality. The AIFMD lays down criteria to determine the Member State that will act as the home Member State for each non-EU AIFM ("Member State of reference"). In accordance with the last subparagraph of Article 37(4) there could be situations where several Member States could qualify at the same time for that responsibility. In accordance with Article 37(13),

*"The Commission shall, in accordance with the regulatory procedure referred to in Article 57(2), adopt implementing measures with a view to specifying the procedure to be followed by the possible Member States of reference when determining the Member State of reference among each other in accordance with the second subparagraph of paragraph 4."*

**Questions to CESR:**

1. CESR is requested to advise the Commission on the procedure to be followed by Member States when determining the Member State of reference in cases where there are several possible Member States of reference. This advice should discuss a number of alternatives. It should take the following aspects into account: legal certainty, risk of regulatory arbitrage and potential impact/costs on the AIFM, the investors in the AIF it manages, and the competent authorities involved.

## Annex I: List of all level 2 implementing measures, technical standards and guidelines

No	Article	Area	Type of measure	Type	Description
1	Article 3	Exemptions	implementing	shall	specifying the procedures for AIFM which choose to opt-in under this Directive in accordance with paragraph 4
2	Article 3	Exemptions	delegated	shall	specifying how to calculate the thresholds referred to in paragraph 2 and to treat AIFM whose assets under management, including any assets acquired through use of leverage, in one and the same calendar year occasionally exceed and/or fall below the relevant threshold
3	Article 3	Exemptions	delegated	shall	specifying the obligations to register for the entities set forth in paragraph 2 and to provide information in order to effectively monitor systemic risk as set forth in paragraph 3
4	Article 3	Exemptions	delegated	shall	specifying the obligations to notify competent authorities referred to in paragraph 3
5	Article 4	Definitions	delegated	shall	specifying the methods of leverage, including any financial and/or legal structures involving third parties, as defined in point (v) of paragraph 1 [leverage].
6	Article 4	Definitions	delegated	shall	specifying how leverage shall be calculated
7	Article 4	Definitions	regulatory technical standards	shall	determine, where relevant in the application of this Directive, the types of AIFM
8	Article 7	Application for authorisation	regulatory technical standards	may	specify the information to be provided to the competent authorities in the application for the authorisation of the AIFM, including the programme of activity
9	Article 7	Application for authorisation	implementing technical standards	may	determine standard forms, templates and procedures for the provision of information provided in the first subparagraph of paragraph 6
10	Article 8	Conditions for granting authorisation	regulatory technical standards	may	specify the requirements applicable to the AIFM under paragraph 3
11	Article 8	Conditions for granting authorisation	regulatory technical standards	may	specify the requirements applicable to shareholders and members with qualifying holdings referred to in paragraph 1(d), as well as to specify obstacles which may prevent effective exercise of the supervisory functions of the competent authorities.
12	Article 9	Initial capital and own funds	delegated	shall	specifying the risks the additional own funds or the professional indemnity insurance referred to in paragraph 7 must cover
13	Article 9	Initial capital and own funds	delegated	shall	specifying the conditions for determining the appropriateness of additional own funds or the coverage of the professional indemnity insurance referred to in paragraph 7
14	Article 9	Initial capital and own funds	delegated	shall	specifying the manner of determining ongoing adjustments of the additional own funds or of the coverage of the professional indemnity insurance referred to in paragraph 7
15	Article 12	General principles (operating conditions)	delegated	shall	specifying the criteria to be used by the relevant competent authorities to assess whether AIFM comply with their obligations under paragraph 1
16	Article 13	Remuneration	guidelines	shall	ensure the existence of guidelines on sound remuneration policies which comply with the principles set out in Annex II.
17	Article 14	Conflicts of interest	delegated	shall	specifying the types of conflicts of interests as referred to in paragraph 1
18	Article 14	Conflicts of interest	delegated	shall	specifying the reasonable steps AIFM are expected to take in terms of internal and organizational procedures in order to identify, prevent, manage, monitor and disclose conflicts of interest.
19	Article 15	Risk management	delegated	shall	specifying the risk management systems to be employed by AIFM as a function of the risks which the AIFM incurs on behalf of the AIF that it manages
20	Article 15	Risk management	delegated	shall	specifying the appropriate frequency of review of the risk management system
21	Article 15	Risk management	delegated	shall	specifying how the risk management function shall be functionally and hierarchically separated from the operating units, including the portfolio management function

22	Article 15	Risk management	delegated	shall	specifying specific safeguards against conflicts of interest referred to in subparagraph 2 of paragraph 1
23	Article 15	Risk management	delegated	shall	specifying the requirements referred to in paragraph 3
24	Article 16	Liquidity management	delegated	shall	specifying the liquidity management systems and procedures
25	Article 16	Liquidity management	delegated	shall	specifying the alignment of the investment strategy, liquidity profile and redemption policy set out in paragraph 2
26	Article 17	Investment in securitisation positions	delegated	shall	specifying the requirements that need to be met by the originator in order for an AIFM to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011 on behalf of one or more AIF, including requirements that ensure that the originator retains a net economic interest of not less than 5 per cent.
27	Article 17	Investment in securitisation positions	delegated	shall	specifying qualitative requirements that must be met by AIFM which invest in these securities or other financial instruments on behalf of one or more AIF
28	Article 18	General principles (organizational requirements)	delegated	shall	specifying the procedures and arrangements as referred to under point (a) of the paragraph 1
29	Article 19	Valuation	delegated	shall	specifying the criteria concerning the procedures for the proper valuation of the assets and the calculation of the net asset value per share or unit
30	Article 19	Valuation	delegated	shall	specifying the professional guarantees the external valuer must be able to furnish to effectively perform the valuation function
31	Article 19	Valuation	delegated	shall	specifying the frequency of valuation carried out by open-ended funds which is both appropriate to the assets held by the fund and its issuance and redemption policy
32	Article 20	Delegation	delegated	shall	specifying the conditions for fulfilling the requirements set out in paragraphs 1 and 3
33	Article 20	Delegation	delegated	shall	specifying the conditions under which the manager has delegated its functions to the extent that it becomes a letter-box entity and could no longer be considered to be the manager of the AIF as set out in paragraph 2
*	Article 21	Depositary			Paragraph 5 contains a delegated act with the same content as Paragraph 15 (b), no. 36
34	Article 21	Depositary	implementing	shall	stating that prudential regulation and supervision of a third country are to the same effect as the provisions laid down in European Union law and are effectively enforced
35	Article 21	Depositary	delegated	shall	specifying the particulars that need to be included in the standard agreement as referred to in paragraph 2
36	Article 21	Depositary	delegated	shall	specifying general criteria for assessing whether the prudential regulation and supervision of third countries as referred to in the second subparagraph of paragraph 2 and in paragraph 5 (b) (ii) are to the same effect as the provisions laid down in European Union law and are effectively enforced
37	Article 21	Depositary	delegated	shall	specifying the conditions for performing the depositary functions pursuant to paragraphs 6, 7 and 8, including: - the type of financial instruments that shall be included in the scope of the depositary's custody duties according to point (a) of paragraph 7; - the conditions upon which the depositary may exercise its custody duties over financial instruments registered with a central depositary; and - the conditions upon which the depositary shall safe keep according to point (b) of paragraph 7 the financial instruments issued in a nominative form and registered with an issuer or a registrar
38	Article 21	Depositary	delegated	shall	specifying the due diligence duties of depositaries pursuant to paragraph 10 (c)
39	Article 21	Depositary	delegated	shall	specifying the segregation obligation set forth in paragraph 10 (d) (iv)
40	Article 21	Depositary	delegated	shall	specifying the conditions and circumstances under which financial instruments held in custody shall be considered as lost
41	Article 21	Depositary	delegated	shall	specifying what is to be understood by external events beyond reasonable control, the consequences of which would have been unavoidable despite all efforts to the contrary pursuant to paragraph 11
42	Article 21	Depositary	delegated	shall	specifying the conditions and circumstances under which there is an objective reason to contract a discharge pursuant to paragraph 12
43	Article 22	Annual report	delegated	shall	specifying the content and format of the annual report. These measures shall be adapted to the type of AIF to which they apply.

44	Article 23	Disclosure to investors	delegated	shall	specifying the disclosure obligations of AIFM referred to in paragraphs 4 and 5. These measures shall be adapted to the type of AIFM to which they apply.
45	Article 24	Reporting obligations to competent authorities	delegated	shall	specifying for the purposes of paragraph 4, when leverage is considered to be employed on a substantial basis
46	Article 24	Reporting obligations to competent authorities	delegated	shall	specifying the obligations to report and provide information referred to in paragraphs 1 through 5. Those measures shall take into account the need to avoid excessive administrative burden for competent authorities.
47	Article 25	Use of information by competent authorities, supervisory cooperation and limits to leverage	delegated	shall	setting out principles specifying the circumstances in which competent authorities exercise the provisions in paragraph 3, taking into account different strategies of AIF, different market conditions in which AIF operate and possible pro-cyclical effects following from exercising the provisions.
48	Article 31	Marketing of shares or units of EU AIF in the home Member State of the AIFM	implementing technical standards	may	determine the form and content of a standard model of the notification letter referred to in paragraph 2
49	Article 31	Marketing of shares or units of EU AIF in the home Member State of the AIFM	implementing technical standards	may	determine the form of the written notice referred to in paragraph 4
50	Article 32	Marketing of shares or units of EU AIF in other Member States than in the home Member State of the AIFM	implementing technical standards	may	determine the form and content of a standard model of the notification letter referred to in paragraph 2
51	Article 32	Marketing of shares or units of EU AIF in other Member States than in the home Member State of the AIFM	implementing technical standards	may	determine the form and content of a standard model of attestation referred to in paragraph 3
52	Article 32	Marketing of shares or units of EU AIF in other Member States than in the home Member State of the AIFM	implementing technical standards	may	determine the form of the transmission referred to in paragraph 3
53	Article 32	Marketing of shares or units of EU AIF in other Member States than in the home Member State of the AIFM	implementing technical standards	may	determine the form of the written notice referred to in paragraph 7
54	Article 33	Conditions for managing AIF established in other Member States	regulatory technical standards	may	specify the information to be notified in accordance with paragraphs 2 and 3
55	Article 33	Conditions for managing AIF established in other Member States	implementing technical standards	may	establish standard forms, templates and procedures for the transmission of information in accordance with paragraphs 2 and 3
56	Article 34	Conditions for EU AIFM which manage non-EU AIF which are not marketed in Member States	delegated	shall	regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries
57	Article 34	Conditions for EU AIFM which manage non-EU AIF which are not marketed in Member States	guidelines	shall	determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1
58	Article 35	Conditions for the marketing in the European Union with a passport of a non-EU AIF managed by an EU AIFM	delegated	shall	cooperation arrangements referred to in paragraph 2(a) in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries
59	Article 35	Conditions for the marketing in the European Union with a passport of a non-EU AIF managed by an EU AIFM	guidelines	may	determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 2(a)
60	Article 35	Conditions for the marketing in the European Union with a passport of a non-EU AIF managed by an EU AIFM	regulatory technical standards	shall	determine the minimum content of the cooperation arrangements referred to in paragraph 2(a) so as to ensure that both the competent authorities of the home and the host Member States receive sufficient information in order to be able to exercise their supervisory and investigatory powers under this Directive



61	Article 35	Conditions for the marketing in the European Union with a passport of a non-EU AIF managed by an EU AIFM	regulatory technical standards	shall	specify the procedures for coordination and exchange of information between the competent authority of the home Member State and the competent authorities of the host Member States of the AIFM
62	Article 35	Conditions for the marketing in the European Union with a passport of a non-EU AIF managed by an EU AIFM	implementing technical standards	may	the form and content of a standard model of the notification letter referred to in paragraph 3
63	Article 35	Conditions for the marketing in the European Union with a passport of a non-EU AIF managed by an EU AIFM	implementing technical standards	may	the form and content of a standard model of the notification letter referred to in paragraph 5
64	Article 35	Conditions for the marketing in the European Union with a passport of a non-EU AIF managed by an EU AIFM	implementing technical standards	may	the form and content of a standard model of attestation referred to in paragraph 6
65	Article 35	Conditions for the marketing in the European Union with a passport of a non-EU AIF managed by an EU AIFM	implementing technical standards	may	the form of the transmission referred to in paragraph 6
66	Article 35	Conditions for the marketing in the European Union with a passport of a non-EU AIF managed by an EU AIFM	implementing technical standards	may	the form of the written notice referred to in paragraph 10
67	Article 36	Conditions for the marketing in Member States without a passport of non-EU AIF managed by an EU AIFM	delegated	shall	measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries
68	Article 36	Conditions for the marketing in Member States without a passport of non-EU AIF managed by an EU AIFM	guidelines	shall	determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1
69	Article 37	Authorisation of non-EU AIFM intending to manage EU AIF and/or market AIF managed by it in the European Union in accordance with Article 38 or 39	implementing	shall	specifying the procedure to be followed by the possible Member States of reference when determining the Member State of reference among each other in accordance with the second subparagraph of paragraph 4
70	Article 37	Authorisation of non-EU AIFM intending to manage EU AIF and/or market AIF managed by it in the European Union in accordance with Article 38 or 39	delegated	shall	cooperation arrangements referred to in paragraph 7(d) in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries
71	Article 37	Authorisation of non-EU AIFM intending to manage EU AIF and/or market AIF managed by it in the European Union in accordance with Article 38 or 39	guidelines	may	determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 7(d)
72	Article 37	Authorisation of non-EU AIFM intending to manage EU AIF and/or market AIF managed by it in the European Union in accordance with Article 38 or 39	regulatory technical standards	shall	determine the minimum content of the cooperation arrangements referred to in paragraph 7(d) so as to ensure that the competent authorities of the Member State of reference and the competent authorities of the host Member States receive sufficient information in order to be able to exercise their supervisory and investigatory powers under this Directive
73	Article 37	Authorisation of non-EU AIFM intending to manage EU AIF and/or market AIF managed by it in the European Union in accordance with Article 38 or 39	regulatory technical standards	shall	specify the procedures for coordination and exchange of information between the competent authority of the Member State of reference and the competent authorities of the host Member States of the AIFM

74	Article 37	Authorisation of non-EU AIFM intending to manage EU AIF and/or market AIF managed by it in the European Union in accordance with Article 38 or 39	implementing technical standards	may	determine the form and content of the request referred to in paragraph 11 (c)
75	Article 37	Authorisation of non-EU AIFM intending to manage EU AIF and/or market AIF managed by it in the European Union in accordance with Article 38 or 39	regulatory technical standards	shall	The manner in which the AIFM should comply with the requirements laid down in this Directive, taking into account that the AIFM is established in a third country. In particular, the presentation of the information required in Articles 22 to 24
76	Article 37	Authorisation of non-EU AIFM intending to manage EU AIF and/or market AIF managed by it in the European Union in accordance with Article 38 or 39	regulatory technical standards	shall	Under which conditions the law to which a non-EU AIFM or a non-EU AIF is submitted is considered to provide for an equivalent rule having the same regulatory purpose and offering the same level of protection to the relevant investors.
77	Article 37a	Peer review of authorisation and supervision of non-EU AIFM	guidelines	may	establishing consistent, efficient and effective supervisory practices of non-EU AIFM
78	Article 38	Conditions for the marketing in the European Union with a passport of EU AIF managed by a non-EU AIFM	implementing technical standards	may	determine the form and content of a standard model of the notification letter referred to in paragraph 2 and 4
79	Article 38	Conditions for the marketing in the European Union with a passport of EU AIF managed by a non-EU AIFM	implementing technical standards	may	determine the form and content of a standard model of attestation referred to in paragraph 5
80	Article 38	Conditions for the marketing in the European Union with a passport of EU AIF managed by a non-EU AIFM	implementing technical standards	may	determine the form of the transmission referred to in paragraph 5
81	Article 38	Conditions for the marketing in the European Union with a passport of EU AIF managed by a non-EU AIFM	implementing technical standards	may	determine the form of the written notice referred to in paragraph 9
82	Article 39	Conditions for the marketing in the European Union with a passport of non-EU AIF managed by a non-EU AIFM	delegated	shall	measures regarding the cooperation arrangements referred to in paragraph 2(a) in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries
83	Article 39	Conditions for the marketing in the European Union with a passport of non-EU AIF managed by a non-EU AIFM	guidelines	may	determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 2(a)
84	Article 39	Conditions for the marketing in the European Union with a passport of non-EU AIF managed by a non-EU AIFM	regulatory technical standards	shall	determine the minimum content of the cooperation arrangements referred to in paragraph 2(a) so as to ensure that the competent authorities of the Member State of reference and the competent authorities of the host Member States receive sufficient information in order to be able to exercise their supervisory and investigatory powers under this Directive
85	Article 39	Conditions for the marketing in the European Union with a passport of non-EU AIF managed by a non-EU AIFM	regulatory technical standards	shall	specify the procedures for coordination and exchange of information between the competent authority of the Member State of reference and the competent authorities of the host Member States of the AIFM
86	Article 39	Conditions for the marketing in the European Union with a passport of non-EU AIF managed by a non-EU AIFM	implementing technical standards	may	determine the form and content of a standard model of the notification letter referred to in paragraph 3 and 5
87	Article 39	Conditions for the marketing in the European Union with a passport of non-EU AIF managed by a non-EU AIFM	implementing technical standards	may	determine the form and content of a standard model of attestation referred to in paragraph 6

88	Article 39	Conditions for the marketing in the European Union with a passport of non-EU AIF managed by a non-EU AIFM	implementing technical standards	may	determine the form of the transmission referred to in paragraph 6
89	Article 39	Conditions for the marketing in the European Union with a passport of non-EU AIF managed by a non-EU AIFM	implementing technical standards	may	determine the form of the written notice referred to in paragraph 10
90	Article 39bis	Conditions for managing AIF established in Member States other than the Member State of reference by non-EU AIFM	regulatory technical standards	may	specify the information to be notified in accordance with paragraphs 2 and 3
91	Article 39 bis	Conditions for managing AIF established in Member States other than the Member State of reference by non-EU AIFM	implementing technical standards	may	establish standard forms, templates and procedures for the transmission of information in accordance with paragraphs 2 and 3
92	Article 40	Conditions for the marketing in Member States without a passport of AIF managed by a non-EU AIFM	delegated	shall	measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries
93	Article 40	Conditions for the marketing in Member States without a passport of AIF managed by a non-EU AIFM	guidelines	shall	determine the conditions of application of the measures adopted by the Commission regarding the cooperation arrangements referred to in paragraph 1
94	Article 48	Obligation to co-operate	technical standards	may	determine the conditions of application with regard to the procedures for exchange of information between competent authorities and between the competent authorities and ESMA.
95	Article 51	Exchange of information relating to the potential systemic consequences of AIFM activity	delegated	shall	specifying the content of the information to be exchanged pursuant to paragraph 1
96	Article 51	Exchange of information relating to the potential systemic consequences of AIFM activity	implementing	shall	specifying the modalities and frequency of the information to be exchanged pursuant to paragraph 1.
97	Article 52	Co-operation in supervisory activities	implementing technical standards	may	develop draft implementing technical standards to establish common procedures for competent authorities to cooperate in on-the-spot verifications and investigations
98	Article 61	Investment in securitisation positions	delegated	shall	specifying the requirements that need to be met by the originator in order for an UCITS to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011, including requirements that ensure that the originator retains a net economic interest of not less than 5 per cent.
99	Article 61	Investment in securitisation positions	delegated	shall	specifying qualitative requirements that must be met by UCITS which invest in these securities or other financial instruments

Delegated acts in Articles 63 bis and 63 ter are not included in this list.

## Annex II: Indicative timetable for AIFMD transposition and Level 2 work

**Indicative timetable for AIFMD transposition and Level 2 work**

<b>Date</b>	<b>Milestones</b>
Nov 2010	Request for advice
Dec 2010	
Jan 2011	
Feb 2011	
Mar 2011	
Apr 2011	AIFMD enters into force (20 days after expected publ. in OJ)
May 2011	MS start implementing Level 1 Directive
Jun 2011	
Jul 2011	
Aug 2011	
Sep 2011	CESR advice
Oct 2011	
Nov 2011	COM working documents Draft L2 + IA
Dec 2011	ISC
Jan 2012	Translation
Feb 2012	Consultation with ESC
Mar 2012	Adoption of L2 measures
Jun 2012	End of period for EP and Council to object to Level 2 measures, MS start applying Level 1 and Level 2
...	
Apr 2013	AIFMD taking effect

## Annex III: Input for Commission Impact Assessment

In order to support and justify its proposals on the level 2 measures covered by this mandate, the Commission is required to prepare and present an Impact Assessment at the same time as the level 2 measures.

In its impact assessment the Commission has to cover the following topics:

*1. Procedural issues and consultation of interested parties*

A description of the process of preparation of the impact assessment

*2. Policy context, problem definition, and subsidiarity*

A description of the context in which the proposal has been developed and of the problems the Commission intends to address with the proposal and a discussion of subsidiarity issues

*3. Objectives*

A description of the objectives the Commission intends to achieve with the various elements of the proposal.

*4. Identification of policy options*

A description of policy options that had been taken into account in the preparation

*5. Analysis of impacts*

A proportionate analysis of the likely impacts of the various options identified for the individual measures

*6. Comparing the options*

A comparison of the options in order to determine the most appropriate one in the assessment of the Commission services

*7. Monitoring and evaluation*

An outline of how the Commission intends to monitor and evaluate the impacts of the proposals

### ***Contribution by CESR to the Commission impact assessment***

In order to be able to meet the deadlines and in particular to benefit from CESR's expertise, the Commission invites CESR to structure its advice in a way that would facilitate the preparation of the Commission's impact assessment.

Concretely, it would be useful if CESR could briefly elaborate on the objectives and the underlying problems along the lines of those identified in the Impact Assessment for the level 1 proposal (see tables 7 and 8 below). In some cases it should be possible to rely on what has been developed in the level 1 impact assessment; in other cases it might be necessary to define problems and objectives more precisely. This could be done in close cooperation with the Commission services. This part would not need to be very detailed but should allow a clear link to be established with the following section on options and the assessment of expected impacts.

The sections on options, impacts and comparison would be the core of CESR's contribution to the impact assessment. CESR is invited to derive, for each of the measures in question, a number of relevant options from the respective problem description and objectives. Commission services could support CESR in this. The crucial part of the impact assessment work is the assessment of expected social, economic and environmental impacts of the relevant options on stakeholders or the economy and society in general. The required level of scrutiny would depend on the significance of the expected impacts and the variation of these impacts between the different options. In this specific impact assessment the focus would in most cases

probably be on the costs the provisions would impose on AIFM, AIF or investors, the functioning of the markets, level playing field issues, and systemic risks.

Impacts should be quantified to the extent possible. Where this is not possible, they should be described and discussed in qualitative terms. On the basis of the expected impacts CESR should select its 'preferred option', i.e. the approach CESR will present to the Commission in its advice.

#### **Template for CESR contribution to impact assessment work**

*1. Problem definition*

A description of the problems the measure should address; in most cases it might be sufficient to refer to one or more of the problems identified in the level 1 impact assessment; in some cases, however, it might be necessary to be more specific.

*2. Objectives*

A description of the objectives that should be achieved with the specific measure; as a rule these objectives should be derived from the objectives identified in the level 1 impact assessment, in some cases they might be identical

*3. Identification of policy options*

A description of policy options that had been taken into account in the preparation

Here it will be possible to start with a larger set of options some of which could be already disregarded after a first screening. The more detailed impact analysis in the next section would then only be performed for a narrow set of options

*4. Analysis of impacts*

A proportionate analysis of the likely impacts of the various options identified for the individual measures

*5. Comparing the options*

A comparison of the options in order to determine the most appropriate one

#### ***Cost study to be launched by the Commission***

The Commission intends to launch a study to quantify the costs (compliance costs, in particular administrative burden) of some of the level 2 measures. This would cover (quantitative) parts of the impact assessment work. In order to maximise synergies it might be necessary for CESR to provide the Commission with a list of relevant options which it has identified for some of the level 2 measures by early January 2011 at the latest so that the consultant can start its analysis in January 2011. For some measures this has already been indicated in Table 1 below. These should be understood as preliminary views which are open to amendment by CESR.

#### ***Indicative list of impact assessment requirements***

The Commission has indicated its assessment of the impact assessment requirements in the last column of the table below. Where cells are empty, the Commission did not regard impact assessment work on the specific measure as a priority in its initial screening. This should, however, not be understood as a final assessment but might be subject to change in the course of the overall IA work. Nor should it discourage CESR from undertaking IA work or cost-benefit-analysis on its own initiative. The Commission would invite CESR to provide reasoning justifying its advice in these cases as well. Like the mandate itself this annex should be understood as a living document and should be developed further in cooperation by CESR and the Commission. In particular, the Commission services are ready to provide further input to CESR on the identification of relevant options to be considered in the impact assessment.

**Table 1: Indicative assessment of Impact Assessment requirements**

<b>No</b>	<b>Article</b>	<b>Description</b>	<b>Role for CESR/ESMA</b>
1	3 Exemptions	specifying the procedures for AIFM which choose to opt-in under this Directive in accordance with paragraph 4	
2	3 Exemptions	specifying how to calculate the thresholds referred to in paragraph 2 and to treat AIFM whose assets under management, including any assets acquired through use of leverage, in one and the same calendar year occasionally exceed and/or fall below the relevant threshold	Different approaches to calculate the threshold could be discussed as options; impacts would be on AIFM (costs) and achievement of the objectives of the Directive
3	3 Exemptions	specifying the obligations to register for the entities set forth in paragraph 2 and to provide information in order to effectively monitor systemic risk as set forth in paragraph 3	Options could be the in-/exclusion of certain information and the resulting costs for AIFM and the effectiveness of the systemic risk monitoring STUDY
4	3 Exemptions	specifying the obligations to notify competent authorities referred to in paragraph 3	
5	9 Initial capital and own funds	specifying the risks the additional own funds or the professional indemnity insurance referred to in paragraph 7 must cover	
6	9 Initial capital and own funds	specifying the conditions for determining the appropriateness of additional own funds or the coverage of the professional indemnity insurance referred to in paragraph 7	Options of different degrees of coverage and their respective impact on costs and risks to investor protection STUDY
7	9 Initial capital and own funds	specifying the manner of determining ongoing adjustments of the additional own funds or of the coverage of the professional indemnity insurance referred to in paragraph 7	
8	12 General principles (operating conditions)	specifying the criteria to be used by the relevant competent authorities to assess whether AIFM comply with their obligations under paragraph 1	
9	14 Conflicts of interest	specifying the types of conflicts of interests as referred to in paragraph 1	
10	14 Conflicts of interest	specifying the reasonable steps AIFM are expected to take in terms of internal and organizational procedures in order to identify, prevent, manage, monitor and disclose conflicts of interest.	Discussion of potential impacts of different levels of strictness on costs, competitiveness and investor protection
11	15 Risk management	specifying the risk management systems to be employed by AIFM as a function of the risks which the AIFM incurs on behalf of the AIF that it manages	Discussion of potential impacts of different levels of strictness on costs, competitiveness and investor protection
12	15 Risk management	specifying the appropriate frequency of review of the risk management system	Discussion of potential impacts of different levels of strictness on costs, competitiveness and investor protection
13	15 Risk management	specifying how the risk management function shall be functionally and hierarchically separated from the operating units, including the portfolio management function	Discussion of potential impacts of different levels of strictness on costs, competitiveness and investor protection
14	15 Risk management	specifying specific safeguards against conflicts of interest referred to in subparagraph 2 of paragraph 1	Discussion of potential impacts of different levels of strictness on costs, competitiveness and investor protection
15	15 Risk management	specifying the requirements referred to in paragraph 3	

<b>No</b>	<b>Article</b>	<b>Description</b>	<b>Role for CESR/ESMA</b>
16	16 Liquidity management	specifying the liquidity management systems and procedures	Discussion of potential impacts of different levels of strictness on costs, competitiveness and investor protection
17	16 Liquidity management	specifying the alignment of the investment strategy, liquidity profile and redemption policy set out in paragraph 2	
18	17 Investment in securitisation positions	specifying the requirements that need to be met by the originator in order for an AIFM to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011 on behalf of one or more AIF, including requirements that ensure that the originator retains a net economic interest of not less than 5 per cent.	Discussion of potential impacts of different requirements to be met by the originator and AIFM on costs and risks to investor protection
19	17 Investment in securitisation positions	specifying qualitative requirements that must be met by AIFM which invest in these securities or other financial instruments on behalf of one or more AIF	Discussion of potential impacts of different requirements to be met by the originator and AIFM on costs and risks to investor protection
20	18 General principles (organizational requirements)	specifying the procedures and arrangements as referred to under point (a) of the paragraph 1	Reasoning justifying the advice is being provided
21	19 Valuation	specifying the criteria concerning the procedures for the proper valuation of the assets and the calculation of the net asset value per share or unit	Reasoning justifying the advice is being provided
22	19 Valuation	specifying the professional guarantees the external valuer must be able to furnish to effectively perform the valuation function	
23	19 Valuation	specifying the frequency of valuation carried out by open-ended funds which is both appropriate to the assets held by the fund and its issuance and redemption policy	
24	20 Delegation	specifying the conditions for fulfilling the requirements set out in paragraphs 1 and 3	Discussion of potential impacts of different levels of strictness of the requirements on costs and risks to investor protection, in particular, different arrangements could be analysed with respect to functional and hierarchical separation of portfolio management or risk management from other potentially conflicting tasks.
25	20 Delegation	specifying the conditions under which the manager has delegated its functions to the extent that it becomes a letter-box entity and could no longer be considered to be the manager of the AIF as set out in paragraph 2	Different definitions of 'letter box' could be discussed and assessed as options; discussing the risks that might arise if an AIFM becomes a letter box.
26	21 Depositary	specifying the particulars that need to be included in the standard agreement as referred to in paragraph 2	
27	21 Depositary	specifying general criteria for assessing whether the prudential regulation and supervision of third countries as referred to in the second subparagraph of paragraph 2 and in paragraph 5 (b) (ii) are to the same effect as the provisions laid down in European Union law and are effectively enforced	Reasoning justifying the advice is being provided



<b>No</b>	<b>Article</b>	<b>Description</b>	<b>Role for CESR/ESMA</b>
28	21 Depositary	specifying the conditions for performing the depositary functions pursuant to paragraphs 6, 7 and 8, including: - the type of financial instruments that shall be included in the scope of the depositary's custody duties according to point (a) of paragraph 7; - the conditions upon which the depositary may exercise its custody duties over financial instruments registered with a central depositary; and - the conditions upon which the depositary shall safe keep according to point (b) of paragraph 7 the financial instruments issued in a nominative form and registered with an issuer or a registrar	Discussion of potential impacts of different options for types of financial instruments to be within the scope of custody duties on costs and investor protection
29	21 Depositary	specifying the due diligence duties of depositaries pursuant to paragraph 10 c)	Developing options in terms of content of due diligence activities and discuss potential impacts on costs and risks to investor protection in a qualitative form
30	21 Depositary	specifying the segregation obligation set forth in paragraph 10 (d) (iv)	Discussion of potential impacts of different options for segregating assets in sub-custody pursuant paragraph 10(d)(iv) on costs and risks to investor protection.
31	21 Depositary	specifying the conditions and circumstances under which financial instruments held in custody shall be considered as lost	
32	21 Depositary	specifying what is to be understood by unforeseeable external events beyond reasonable control, the consequences of which would have been unavoidable despite all efforts to the contrary pursuant to paragraph 11	
33	21 Depositary	specifying the conditions and circumstances under which there is an objective reason to contract a discharge pursuant to paragraph 12	
34	4 Definitions	specifying the methods of leverage, including any financial and/or legal structures involving third parties, as defined in point (v) of paragraph 1 [leverage].	
35	4 Definitions	specifying how leverage shall be calculated	Based on the methods of employing leverage specified, discussion of potential impacts of different methods to calculate leverage on the scope of (the provisions of) the Directive and on AIFM (costs), on the objective monitoring of systemic risk
36	22 Annual report	specifying the content and format of the annual report. These measures shall be adapted to the type of AIF to which they apply.	CESR provides options/information on potential content and format; STUDY
37	23 Disclosure to investors	specifying the disclosure obligations of AIFM referred to in paragraphs 4 and 5. These measures shall be adapted to the type of AIFM to which they apply.	CESR provides options/details on the disclosure obligations STUDY
38	24 Reporting obligations to competent authorities	specifying for the purposes of paragraph 4, when leverage is considered to be employed on a substantial basis	Probably most efficient to combine this with IA work on item 35 (Art.4)
39	24 Reporting obligations to competent authorities	specifying the obligations to report and provide information referred to in paragraphs 1 through 5. Those measures shall take into account the need to avoid excessive administrative burden for competent authorities.	Could be part of the study on costs if CESR provides information on potential content and format; CESR might discuss wider implications of inadequate information collection

<b>No</b>	<b>Article</b>	<b>Description</b>	<b>Role for CESR/ESMA</b>
40	25	Use of information by competent authorities, supervisory cooperation and limits to leverage	setting out principles specifying the circumstances in which competent authorities exercise the provisions in paragraph 3, taking into account different strategies of AIF, different market conditions in which AIF operate and possible pro-cyclical effects following from exercising the provisions.
41	34	Conditions for EU AIFM which manage non-EU AIF which are not marketed in MS	regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries
42	35	Conditions for the marketing in the EU with a passport of a non-EU AIF managed by an EU AIFM	regarding the cooperation arrangements referred to in paragraph 2(a) in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries
43	36	Conditions for the marketing in MS without a passport of non-EU AIF managed by an EU AIFM	measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries
44	37	<i>Authorisation of non-EU AIFM intending to manage EU AIF and/or market AIF managed by it in the EU in accordance with Article 38 or 39 *</i>	specifying the procedure to be followed by the possible Member States of reference when determining the Member State of reference among each other in accordance with the second subparagraph of paragraph 4
45	37	Authorisation of non-EU AIFM intending to manage EU AIF and/or market AIF managed by it in the EU in accordance with Article 38 or 39	measures regarding the cooperation arrangements referred to in paragraph 7(d) in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries
46	39	Conditions for the marketing in the EU with a passport of non-EU AIF managed by a non-EU AIFM	measures regarding the cooperation arrangements referred to in paragraph 2(a) in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries
47	40	Conditions for the marketing in MS without a passport of AIF managed by a non-EU AIFM	measures regarding the cooperation arrangements referred to in paragraph 1 in order to design a common framework to facilitate the establishment of those cooperation arrangements with third countries

<b>No</b>	<b>Article</b>	<b>Description</b>	<b>Role for CESR/ESMA</b>
48	51	Exchange of information relating to the potential systemic consequences of AIFM activity	specifying the content of the information to be exchanged pursuant to paragraph 1
49	51	Exchange of information relating to the potential systemic consequences of AIFM activity	specifying the modalities and frequency of the information to be exchanged pursuant to paragraph 1.

## Impact assessment for AIFMD level 1 proposal: Problems and objectives

**Table 7: Evaluation of key risks posed by activities of AIFM**

Source of risk	Summary of analysis
<b>Macro-prudential (systemic) risks, the use of leverage</b>	The absence of a consistent approach to the collection of macro-prudential data (on leverage, risk concentrations etc) and of effective mechanisms for the sharing of this information between prudential authorities at the European or global level is a significant barrier to robust macro-prudential oversight. Existing arrangements do not take sufficient account of the cross-border nature of risks arising in the AIFM sector.
<b>Micro-prudential risks</b>	AIFM in the EU are not currently subject to consistent requirements as regards their risk management procedures and processes. Weaknesses in risk management practice present risks for investors, counterparties and the market at large. Greater consistency in regulatory standards in this area would provide greater assurance for domestic and cross-border investors and counterparties and would reduce opportunities for regulatory arbitrage.
<b>Investor Protection</b>	Although the majority of investors in AIF are professional and qualified, the financial crisis has demonstrated that even this category of investors requires reliable and comprehensive information from AIFM on an initial and ongoing basis. National regulatory approaches to disclosure practice and governance vary and do not appear to provide a consistent regulatory underpinning for AIFM practice in this area.
<b>Market efficiency and integrity</b>	AIFM activity may impact not only on financial stability but also on the efficiency and integrity of the markets in which they operate, irrespective of the location of those markets. One area of particular recent concern has been the impact of short-selling on financial markets and institutions. Some AIFM engage heavily in such activity for both risk management and speculative purposes. However, the activity of short-selling is a legitimate trading technique and is not the exclusive preserve of the AIFM sector.
<b>Impact on market for corporate control</b>	Concerns raised in relation to AIFM activities as minority 'activist' shareholders in companies throughout the EU are not unique to AIFM. Certain techniques for the acquisition of voting rights (e.g. through derivative positions and stock borrowing) raise important questions in relation to the transparency of stake building to companies and other stakeholders. However, insofar as these techniques are available to all market actors, this does not constitute an AIFM-specific issue.
<b>Acquisition of control of companies by AIFM</b>	Concerns in relation to the impact of private equity activity on their portfolio companies relate to: (1) the sustainability of the debt taken on by the portfolio company in a leveraged buy-out transaction and (2) the rights of employees throughout the buy-out transaction in particular. Empirical evidence on these points is not conclusive. There are national and European regulatory provisions providing general safeguards to accommodate these concerns. However, greater transparency and public accountability of private equity activities would help to ensure that the interests of all relevant stakeholders are taken into account in the governance of the portfolio companies.

**Table 8: Objectives**

<b>General objectives</b>	<b>Specific objectives</b>	<b>Operational objectives</b>	<b>Problem addressed</b>
A complete and consistent framework for the supervision and prudential oversight of AIFM	All AIFM are subject to appropriate authorisation and registration requirements	Ensure that all AIFM satisfy a specific set of requirements (minimum capital, fit and proper, transparency) before operating across the EU	Registration and authorisation of AIFM
	Proper monitoring of macro-prudential risks	Enhance transparency of AIFM activity, including the systematic use of leverage, to enable the effective monitoring of systemic risks Ensure that relevant macro-prudential data is shared at European level	Macro-prudential (systemic) risks, the use of leverage
	Proper monitoring and limitation of micro-prudential risks	Impose risk management controls on major risks to which AIFM are exposed (market, liquidity, counterparty – credit and settlement risks (especially in case of short selling) and operational risks)	Micro-prudential risks
	Common approach to protect professional investors in AIFM-managed funds	Reduce potential for weakness in investor disclosures as barrier to effective due diligence Ensure proper management of conflicts of interest. Impose appropriate controls and processes in key risk areas, such as valuation and custody	Investor protection
	Greater public accountability of AIFM holding controlling stakes in companies	Increase transparency of AIFM when acquiring a controlling stake in, and managing, companies	Acquisition of control of companies by AIFM; Impact on market for corporate control
	Develop the single market in AIF	Remove barriers to the efficient cross-border distribution of AIF to professional investors without compromising the effectiveness of regulation and supervision	Market efficiency and integrity
	Ensure that actions are proportionate to the risks posed and appropriately differentiated to take account of differences in AIFM business models.	Focus action on AIFM of systemic relevance and, in addition to actions of relevance to all fund types, impose requirements that are calibrated to specific activities and behaviours.	Relevant to all