Article 80

Conflicts of interest

1. In accordance with point (b) of Article 20(2) of Directive 2011/61/EU, the criteria to assess whether a delegation conflicts with the interests of the AIFM or the investor in the AIF shall at least include:

(a) where the AIFM and the delegate are members of the same group or have any other contractual relationship, the extent to which the delegate controls the AIFM or has the ability to influence its actions;

(b) where the delegate and an investor in the relevant AIF are members of the same group or have any other contractual relationship, the extent to which this investor controls the delegate or has the ability to influence its actions;

(c) the likelihood that the delegate makes a financial gain, or avoids a financial loss, at the expense of the AIF or the investors in the AIF;

(d) the likelihood that the delegate has an interest in the outcome of a service or an activity provided to the AIFM or the AIF;

(e) the likelihood that the delegate has a financial or other incentive to favour the interest of another client over the interests of the AIF or the investors in the AIF;

(f) the likelihood that the delegate receives or will receive from a person other than the AIFM an inducement in relation to the collective portfolio management activities provided to the AIFM and the AIFs it manages in the form of monies, goods or services other than the standard commission or fee for that service.

2. The portfolio or risk management function may be considered to be functionally and hierarchically separated from other potentially conflicting tasks only where the following conditions are satisfied:

(a) persons engaged in portfolio management tasks are not engaged in the performance of potentially conflicting tasks such as controlling tasks;

(b) persons engaged in risk management tasks are not engaged in the performance of potentially conflicting tasks such as operating tasks;

(c) persons engaged in risk management functions are not supervised by those responsible for the performance of operating tasks;

(d) the separation is ensured throughout the whole hierarchical structure of the delegate up to its governing body and is reviewed by the governing body and, where it exists, the supervisory function of the delegate.

3. Potential conflicts of interest shall be deemed properly identified, managed, monitored and disclosed to the investors of the AIF only if:

(a) the AIFM ensures that the delegate takes all reasonable steps to identify, manage and monitor potential conflicts of interest that may arise between itself and the AIFM, the AIF or the investors in the AIF. The AIFM shall ensure that the delegate has procedures in place corresponding to those required under Articles 31 to 34;

(b) the AIFM ensures that the delegate discloses potential conflicts of interest as well as the procedures and measures to be adopted by it in order to manage such conflicts of interest to the AIFM which shall disclose them to the AIF and the investors in the AIF in accordance with Article 36.

Article 81

Consent and notification of sub-delegation

1. A subdelegation shall become effective where the AIFM demonstrates its consent to it in writing.

2. Pursuant to point (b) of Article 20(4) of Directive 2011/61/EU, the notification shall contain details of the delegate, the name of the competent authority where the sub-delegate is authorised or registered, the delegated functions, the AIFs affected by the sub-delegation, a copy of the written consent by the AIFM and the intended effective date of the sub-delegation.

Article 82

Letter-box entity and AIFM no longer considered to be managing an AIF

1. An AIFM shall be deemed a letter-box entity and shall no longer be considered to be the manager of the AIF at least in any of the following situations:

(a) the AIFM no longer retains the necessary expertise and resources to supervise the delegated tasks effectively and manage the risks associated with the delegation;
(b) the AIFM no longer has the power to take decisions in key areas which fall under the responsibility of the senior management or no longer has the power to perform senior management functions in particular in relation to the implementation of the general investment policy and investment strategies;

c) the AIFM loses its contractual rights to inquire, inspect, have access or give instructions to its delegates or the exercise of such rights becomes impossible in practice;

d) the AIFM delegates the performance of investment management functions to an extent that exceeds by a substantial margin the investment management functions performed by the AIFM itself. When assessing the extent of delegation, competent authorities shall assess the entire delegation structure taking into account not only the assets managed under delegation but also the following qualitative criteria:

(i) the types of assets the AIF or the AIFM acting on behalf of the AIF is invested in, and the importance of the assets managed under delegation for the risk and return profile of the AIF;

(ii) the importance of the assets under delegation for the achievement of the investment goals of the AIF;

(iii) the geographical and sectoral spread of the AIFs investments;

(iv) the risk profile of the AIF;

(v) the type of investment strategies pursued by the AIF or the AIFM acting on behalf of the AIF;

(vi) the types of tasks delegated in relation to those retained; and

(vii) the configuration of delegates and their sub-delegates, their geographical sphere of operation and their corporate structure, including whether the delegation is conferred on an entity belonging to the same corporate group as the AIFM.

2. The Commission shall monitor, in the light of market developments, the application of this Article. The Commission shall review the situation after two years and shall, if necessary, take appropriate measures to further specify the conditions under which the AIFM shall be deemed to have delegated its functions to the extent that it becomes a letter box entity and can no longer be considered to be manager of the AIF.

3. ESMA may issue guidelines to ensure a consistent assessment of delegation structures across the Union.

CHAPTER IV
DEPOSITARY
SECTION 1
Particulars of the written contract
(Article 21(2) of Directive 2011/61/EU)

Article 83
Contractual particulars

1. A contract by which the depositary is appointed in accordance with Article 21(2) of Directive 2011/61/EU shall be drawn up between the depositary on the one hand and the AIFM and, as the case may be, or the AIF on the other hand and shall include at least the following elements:

(a) a description of the services to be provided by the depositary and the procedures to be adopted for each type of asset in which the AIF may invest and which shall then be entrusted to the depositary;

(b) a description of the way in which the safe-keeping and oversight function is to be performed depending on the types of assets and the geographical regions in which the AIF plans to invest. With respect to the custody duties this description shall include country lists and procedures for adding and, as the case may be, or withdrawing countries from that list. This shall be consistent with the information provided in the AIF rules, instruments of incorporation and offering documents regarding the assets in which the AIF may invest;

(c) a statement that the depositary’s liability shall not be affected by any delegation of its custody functions unless it has discharged itself of its liability in accordance with Article 21(13) or (14) of Directive 2011/61/EU;

(d) the period of validity and the conditions for amendment and termination of the contract including the situations which could lead to the termination of the contract and details regarding the termination procedure and, if applicable, the procedures by which the depositary should send all relevant information to its successor;

(e) the confidentiality obligations applicable to the parties in accordance with relevant laws and regulations. These obligations shall not impair the ability of competent authorities to have access to the relevant documents and information;

(f) the means and procedures by which the depositary transmits to the AIFM or the AIF all relevant information that it needs to perform its duties including the exercise of any rights attached to assets, and in order to allow the AIFM and the AIF to have a timely and accurate overview of the accounts of the AIF;