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

2. No delegation of portfolio management or risk management shall be conferred on:
   (a) the depositary or a delegate of the depositary; or
   (b) any other entity whose interests may conflict with those of the AIFM or the investors of the AIF, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

3. The AIFM’s liability towards the AIF and its investors shall not be affected by the fact that the AIFM has delegated functions to a third party, or by any further sub-delegation, 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.

4. The third party may sub-delegate any of the functions delegated to it provided that the following conditions are met:
   (a) the AIFM consented prior to the sub-delegation;
   (b) the AIFM notified the competent authorities of its home Member State before the sub-delegation arrangements become effective;
   (c) the conditions set out in paragraph 1, on the understanding that all references to the ‘delegate’ are read as references to the ‘sub-delegate’.

5. No sub-delegation of portfolio management or risk management shall be conferred on:
   (a) the depositary or a delegate of the depositary; or
   (b) any other entity whose interests may conflict with those of the AIFM or the investors of the AIF, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

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

7. The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:
   (a) the conditions for fulfilling the requirements set out in paragraphs 1, 2, 4 and 5;
   (b) 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 the manager of the AIF as set out in paragraph 3.

SECTION 4

Depositary

Article 21

Depositary

1. For each AIF it manages, the AIFM shall ensure that a single depositary is appointed in accordance with this Article.

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

3. The depositary shall be:
   (a) a credit institution having its registered office in the Union and authorised in accordance with Directive 2006/48/EC;
   (b) an investment firm having its registered office in the Union, subject to capital adequacy requirements in accordance with Article 20(1) of Directive 2006/49/EC including capital requirements for operational risks and authorised in accordance with Directive 2004/39/EC and which also provides the ancillary service of safe-keeping and administration of financial instruments for the account of clients in accordance with point (1) of Section B of Annex I to Directive 2004/39/EC; such investment firms shall in any case have own funds not less than the amount of initial capital referred to in Article 9 of Directive 2006/49/EC; or
   (c) another category of institution that is subject to prudential regulation and ongoing supervision and which, on 21 July 2011, falls within the categories of institution determined by Member States to be eligible to be a depositary under Article 23(3) of Directive 2009/65/EC.
For non-EU AIFs only, and without prejudice to point (b) of paragraph 5, the depositary may also be a credit institution or any other entity of the same nature as the entities referred to in points (a) and (b) of the first subparagraph of this paragraph provided that the conditions in point (b) of paragraph 6 are met.

In addition, Member States may allow that in relation to AIFs which have no redemption rights exercisable during the period of 5 years from the date of the initial investments and which, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with point (a) of paragraph 8 or generally invest in issuers or non-listed companies in order to potentially acquire control over such companies in accordance with Article 26, the depositary may be an entity which carries out depositary functions as part of its professional or business activities in respect of which such entity is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct and which can provide sufficient financial and professional guarantees to enable it to perform effectively the relevant depositary functions and meet the commitments inherent in those functions.

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

(a) an AIFM shall not act as depositary;

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

5. The depositary shall be established in one of the following locations:

(a) for EU AIFs, in the home Member State of the AIF;

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

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

(a) the competent authorities of the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, in so far as different, of the home Member State of the AIFM, have signed cooperation and exchange of information arrangements with the competent authorities of the depositary;

(b) the depositary is subject to effective prudential regulation, including minimum capital requirements, and supervision which have the same effect as Union law and are effectively enforced;

(c) the third country where the depositary is established is not listed as a Non-Cooperative Country and Territory by FATF;

(d) the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, in so far as different, the home Member State of the AIFM, have signed an agreement with the third country where the depositary is established which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements;

(e) the depositary shall by contract be liable to the AIF or to the investors of the AIF, consistently with paragraphs 12 and 13, and shall expressly agree to comply with paragraph 11.

Where a competent authority of another Member State disagrees with the assessment made on the application of points (a), (c) or (e) of the first subparagraph by the competent authorities of the home Member State of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

On the basis of the criteria referred to in point (b) of paragraph 17, the Commission shall adopt implementing acts, stating that prudential regulation and supervision of a third country have the same effect as Union law and are effectively enforced. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 59(2).

7. 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 units or shares of an AIF have been received and that all cash of the AIF has been booked in cash accounts opened in the name of the AIF. Delegation by the depositary to a third party of its custody tasks in accordance with paragraph 11 is allowed if the relevant conditions are met.

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