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NOTE

from:	General Secretariat
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Subject:	Proposal for a Regulation of the European Parliament and of the Council on European Venture Capital Funds - Text agreed by Coreper

Delegations will find attached the text of the above-mentioned Regulation, as agreed by Coreper (part 1) on 23 March 2012, which constitutes the mandate for the Presidency to start negotiations with the European Parliament.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on European Venture Capital Funds

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,¹

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Central Bank,²

Having regard to the opinion of the European Economic and Social Committee,³

Acting in accordance with the ordinary legislative procedure,

Whereas:

¹ OJ C , , p. .

² OJ C ...p...

³ OJ C , , p. .

- (1) Venture capital provides finance to undertakings that are generally very small, in the initial stages of their corporate existence and display a strong potential for growth and expansion. In addition, venture capital funds provide these undertakings with valuable expertise and knowledge, business contacts, brand-equity and strategic advice. By providing finance and advice to these undertakings, venture capital funds stimulate economic growth, contribute to the creation of jobs, boost innovative undertakings, increase their investment in research and development and foster entrepreneurship, innovation and competitiveness in the Union.

- (2) It is necessary to lay down a common framework of rules regarding the use of the designation "EuVECA", in particular the composition of the portfolio of funds that operate under this designation, their eligible investment targets, the investment tools they may employ and the categories of investors that are eligible to invest in such funds by uniform rules in the Union. In the absence of such a common framework, there is a risk that Member States take diverging measures at national level having a direct negative impact on, and creating obstacles to, the good functioning of the internal market, since venture capital funds that wish to operate across the Union would be subject to different rules in different Member States. Moreover, diverging quality requirements on portfolio composition, investment targets and eligible investors could lead to different levels of investor protection and generate confusion as to the investment proposition associated with a "EuVECA ". Investors should, furthermore, be able to compare the investment propositions of different venture capital funds. It is necessary to remove significant obstacles to cross-border fundraising by venture capital funds and to avoid distortions of competition between those funds, and to prevent any further likely obstacles to trade and significant distortions of competition from arising in the future. Consequently, the appropriate legal basis is Article 114 TFEU, as interpreted in accordance with the consistent case law of the Court of Justice of the European Union.

- (3) It is necessary to adopt a Regulation establishing uniform rules applicable to the European Venture Capital Funds and imposing corresponding obligations on their managers in all Member States that wish to raise capital across the Union using the designation "EuVECA". These requirements should ensure the confidence of investors that wish to invest in venture capital funds.
- (4) Defining the quality requirements for the use of the designation "EuVECA" in the form of a Regulation would ensure that those requirements will be directly applicable to the managers of collective investment undertakings that raise funds using this designation. This would ensure uniform conditions for the use of this designation by preventing diverging national requirements as a result of the transposition of a Directive. This Regulation would entail that managers of collective investment undertakings that use this designation would need to follow the same rules in all of the Union, which would also boost confidence of investors that wish to invest in venture capital funds. A Regulation would also reduce regulatory complexity and the managers' cost of compliance with often divergent national rules governing venture capital funds, especially for those managers that want to raise capital on a cross-border basis. A Regulation should also contribute to eliminating competitive distortions.
- (4a) It should be possible for a qualifying venture capital fund to be either externally or internally managed. Where the qualifying venture capital fund is internally managed, the qualifying venture capital fund is also the manager and should therefore comply with all requirements for managers of qualifying venture capital funds under this Regulation and be registered as such. A qualifying venture capital fund which is internally managed should however not be permitted to be the external manager of other collective investment undertakings or UCITS.

- (5) In order to clarify the relationship between this Regulation and other rules on collective investment undertakings and their managers, it is necessary to establish that this Regulation should apply to managers of collective investment undertakings, other than UCITS in accordance with Article 1 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS),⁴ who are established in the Union and are registered with the competent authority in their home Member State in accordance with Directive 2011/61/EC of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010⁵, provided that those managers manage portfolios of qualifying venture capital funds. However, venture capital fund managers who are registered under this Regulation and who are external managers can additionally manage UCITS subject to authorisation under Directive 2009/65/EC.
- (5a) Furthermore, this Regulation applies only to managers of those collective investment undertakings whose assets under management in total do not exceed the threshold mentioned in Article 3 (2) (b) of Directive 2011/61/EU.
- (6) Where managers of collective investment undertakings do not wish to use the designation "EuVECA ", this Regulation should not apply. In these cases, existing national rules and general Union rules should continue to apply.

⁴ OJ L 302, 17.11.2009, p. 32.

⁵ OJ L 174, 1.7.2011, p.1.

- (7) This Regulation should establish uniform rules on the nature of qualifying venture capital funds, notably on the portfolio undertakings into which the qualifying venture capital funds are to be permitted to invest and the investment instruments to be used. This is necessary so that a clear demarcation line can be drawn between a qualifying venture capital fund and other alternative investment funds that engage in other, less specialised, investment strategies, for example buyouts, which this Regulation is not seeking to promote.
- (8) In line with the aim of precisely circumscribing the collective investment undertakings which will be covered by this Regulation and in order to ensure their focus on providing capital to small undertakings in the initial stages of their corporate existence, the qualifying venture capital funds are those funds that invest at least 70 percent of their aggregate capital contributions and uncalled committed capital to investments in such undertakings. Also the qualifying venture capital fund can never invest more than 30 percent of its aggregate capital contributions and uncalled committed capital in assets other than qualifying investments. The above mentioned limits shall be calculated on the basis of amounts investible after deduction of all relevant costs and within a time frame laid down in the rules or instruments of incorporation of the qualifying venture capital fund. Relevant costs are all fees, charges and expenses which are directly or indirectly borne by investors and which are agreed between the manager of the qualifying venture capital fund and the investors.
- 8aa) Should the manager of a qualifying venture capital fund attract additional capital commitments in the lifetime of the qualifying venture capital fund, then the additional commitments should be taken into account when the next investment in assets other than qualifying assets is contemplated. Additional capital commitments shall be permitted according to criteria and conditions set out in the qualifying venture capital fund's rules or instruments of incorporation.

- 8a) The qualifying investments should be in the form of equity or quasi equity instruments. Quasi equity instruments comprise a type of financing instrument that has both equity and debt elements, where the return on the instrument is linked to the profit or loss of the qualifying portfolio undertaking, and where the repayment of the instrument in the event of default is not fully secured. Such instruments would include a variety of financing instruments such as subordinated loans, silent participations, participating loans, profit participating rights, convertible bonds and bonds with warrants. As a possible complement to - but not a substitute for - equity and quasi equity instruments, secured or unsecured loans, e.g. bridge financing, granted by the qualifying venture capital fund to a qualifying portfolio undertaking in which the qualifying venture capital fund already holds qualifying investments should be permitted, provided that no more than 30 percent of the aggregate capital contributions and uncalled committed capital in the qualifying venture capital fund is used for such loans. Furthermore, to reflect existing business practises in the venture capital market, a qualifying venture capital fund should be allowed to buy existing shares of a qualifying portfolio undertaking from other qualifying venture capital funds. Also, for the purposes of ensuring the widest possible opportunities for fundraising, investments into other qualifying venture capital funds should be permitted. To prevent dilution of the investments into qualifying portfolio undertakings, qualifying venture capital funds should only be permitted to invest into other qualifying venture capital funds, provided that those qualifying venture capital funds have not themselves invested more than 10 percent of their aggregate capital contributions and uncalled committed capital in other qualifying venture capital funds.
- (8b) By their nature, venture capital funds do not participate in systemically important banking activities outside of the usual prudential regulatory framework (so-called 'shadow banking'). Neither do they follow typical private equity strategies, such as leveraged buyouts, since their core focus is instead on providing finance to small and medium sized enterprises through primary investments. This Regulation focuses therefore on allowing such typical core activities of venture capital funds. It follows from this that activities such as 'shadow banking' and leveraged buyouts are not allowed.

- (9) In order to put in place an essential safeguard that differentiates qualifying venture capital funds under this Regulation from the broader category of alternative investment funds which trade in issued securities on secondary markets, it is necessary to lay down rules so that qualifying venture capital funds makes investments primarily in directly issued instruments.
- (10) In order to allow venture capital fund managers a certain degree of flexibility in the investment and liquidity management of their qualifying venture capital funds, trading e.g. shares or participations in non qualifying portfolio undertakings or acquisitions of non-qualifying investments should be permitted up to a maximum threshold not exceeding 30 percent of aggregate capital contributions and uncalled capital investments. Holdings of cash and cash equivalents should not be taken into account when calculating this limit as cash and cash equivalents are not to be considered as investments.
- (11) In order to ensure that the designation "EuVECA" is reliable and easily recognisable for investors across the Union this Regulation should establish that only venture capital fund managers which comply with the uniform quality criteria as set out in this Regulation shall be eligible to use the designation "EuVECA" when marketing qualifying venture capital funds across the Union.
- (12) In order to ensure that qualifying venture capital funds have a distinct and identifiable profile which is suited to their purpose, there should be uniform rules on the composition of the portfolio and on the investment techniques which are permitted for such qualifying funds.

- (13) In order to ensure that qualifying venture capital funds do not contribute to the development of systemic risks, and so as to ensure that such funds concentrate, in their investment activities, on supporting qualifying portfolio undertakings, borrowing or leverage at the level of the fund should not be permitted. The venture capital fund manager should not borrow, issue debt obligations, provide guarantees, at the level of the qualifying venture capital fund, nor employ at the level of the qualifying venture capital fund any method by which the exposure of the fund will be increased, whether through borrowing of cash or securities, the engagement into derivative positions or by any other means. Cash advances from investors of the qualifying venture capital fund of a temporary nature that are fully covered by capital commitments from those investors should not be considered to increase the exposure of the qualifying venture capital fund and should therefore be allowed. Also, in order to permit the fund to cover extraordinary liquidity needs that might arise between a call of committed capital from investors and the actual reception of the capital in its accounts, short-term borrowing should be allowed.
- (14) In order to ensure that qualifying venture capital funds are only marketed to investors who have the experience, knowledge and expertise to make their own investment decisions and properly assess the risks these funds carry, and in order to maintain investor confidence and trust in qualifying venture capital funds, certain specific safeguards should be laid down. Therefore, qualifying venture capital funds should only be marketed to investors who are professional clients or who can be treated as professional clients under Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.⁶ However, in order to have a sufficiently broad investor base for investment into qualifying venture capital funds it is also desirable that certain other investors have access to qualifying venture capital funds, including high net worth individuals. For those other investors, however, specific safeguards should be laid down in order to ensure that qualifying venture capital funds are only marketed to investors that have the appropriate

⁶ OJ L 145, 30.4.2004, p. 1.

profile for making such investments. These safeguards exclude marketing through the use of periodic savings plans. Furthermore, investments made by executives or directors of a venture capital fund manager should be possible when investing in the qualifying venture capital fund they manage, as such individuals are knowledgeable enough to participate in venture capital investments.

- (15) To ensure that only venture capital fund managers who fulfil uniform quality criteria as regards their behaviour in the market use the designation "EuVECA", this Regulation should establish rules on the conduct of business and the relationship of the venture capital fund manager to its investors. For the same reason this Regulation should lay down uniform conditions concerning the handling of conflicts of interest by such managers. These rules should also require the manager to have the necessary organisational and administrative arrangements in place to ensure a proper handling of conflicts of interest.
- (15a) Where a venture capital fund manager intends to delegate functions to third parties, the manager's liability towards the qualifying venture capital fund and its investors shall not be affected by the fact that the manager has delegated functions to a third party, nor shall the manager be permitted to delegate to the extent that, in essence, it can no longer be considered to be the manager of the qualifying venture capital fund and to the extent that it becomes a letter-box entity. The venture capital fund manager should, also, remain responsible for the proper performance of delegated functions and compliance with this Regulation at all time. Also, delegations must not undermine the effectiveness of supervision of the venture capital fund manager, and, in particular, must not prevent the venture capital fund manager from acting, or the qualifying venture capital fund from being managed, in the best interests of its investors.
- (16) In order to ensure the integrity of the designation "EuVECA" this Regulation should also contain quality criteria as regards the organisation of a venture capital fund manager. Therefore, this Regulation should lay down uniform, proportionate requirements for the need to maintain adequate technical and human resources as well as sufficient own funds for the proper management of qualifying venture capital funds.

- (17) It is necessary for the purpose of investor protection to ensure that the assets of the qualifying venture capital fund are properly evaluated. Therefore, the rules or instruments of incorporation of qualifying venture capital funds should contain rules on the valuation of assets. This should ensure the integrity and transparency of the valuation.
- (18) In order to ensure that venture capital fund managers which make use of the designation "EuVECA" give sufficient account of their activities, uniform rules on annual reports should be established.
- (19) It is necessary, for the purposes of ensuring the integrity of the designation "EuVECA" in the eyes of investors that it is only used by venture capital fund managers who are fully transparent as to their investment policy and their investment targets. This Regulation should therefore set out uniform rules on disclosure requirements that are incumbent on a venture capital fund manager in relation to its investors. In particular, there should be pre-contractual disclosure obligations related to the investment strategy and objectives of the qualifying venture capital funds, the investment instruments which are used, information on costs and associated charges, and the risk/reward profile of the investment proposed by a qualifying fund. In view of achieving a high degree of transparency, such disclosure requirements should also include information on how the remuneration of the venture capital fund manager is calculated.
- (20) In order to ensure effective supervision of the uniform requirements contained in this Regulation, the competent authority of the home Member State shall supervise compliance of the venture capital fund manager with the uniform requirements set out in this Regulation. To this effect, the qualifying venture capital manager who wishes to market its qualifying funds under the designation "EuVECA" should inform the competent authority of his home Member State of this intention. The competent authority should register the venture capital fund manager if all necessary information has been provided and if suitable arrangements to comply with the requirements of this Regulation are in place. This registration should be valid across the entire Union.

- (21) In order to ensure effective supervision of compliance with the uniform criteria set out in this Regulation, this Regulation should contain rules on the circumstances under which information supplied to the competent authority in the home Member State needs to be updated.
- (22) For the effective supervision of the requirements of this Regulation, this Regulation should also lay down a process for cross-border notifications between the competent supervisory authorities, to be triggered by the registration of the venture capital fund manager in its home Member State.
- (23) In order to maintain transparent conditions for the marketing of qualifying venture capital funds across the Union, the European Securities and Markets Authority (ESMA) should be entrusted with maintaining a central database listing all qualifying venture capital fund managers and the qualifying venture capital funds they manage that are registered in accordance with this Regulation.
- (23aa) Where the competent authority of the host Member State have clear and demonstrable grounds for believing that the venture capital fund manager acts in breach of this Regulation within its territory, it shall promptly inform the competent authority of the home Member State, which shall take appropriate measures.
- (23a) If, despite the measures taken by the competent authority of the home Member State or because the competent authority of the home Member State fails to act within a reasonable timeframe, or the venture capital fund manager persists in acting in a manner that is clearly in conflict with this Regulation, the competent authority of the host Member State, may, after informing the competent authority of the home Member State, take all the appropriate measures needed in order to protect investors, including the possibility of preventing the manager concerned from carrying out any further marketing of its venture capital funds within the territory of the host Member State and/or if necessary, bring the matter to the attention of ESMA.

- (24) In order to ensure the effective supervision of the uniform criteria established in this Regulation, this Regulation should contain a list of supervisory powers that the competent authorities of the home Member State shall have at their disposal.
- (25) In order to ensure proper enforcement, this Regulation should contain administrative sanctions and measures for the breach of key provisions of this Regulation, which are the rules on portfolio composition, on safeguards relating to the identity of eligible investors, and on the use of the designation "EuVECA" only by registered venture capital fund managers. It should be established that a breach of these key provisions entails the prohibition of the use of the designation and the removal of venture capital fund manager from the register.
- (26) Supervisory information should be exchanged between the competent authorities in the home and host Member States and ESMA.
- (27) Effective regulatory cooperation among the entities tasked with supervising compliance with the uniform criteria set out in this Regulation requires that a high level of professional secrecy should apply to all relevant national authorities and to ESMA.
- (28) Technical standards in financial services should ensure consistent harmonisation and a high level of supervision across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust ESMA with the elaboration of draft implementing technical standards where these do not involve policy choices, for submission to the Commission.
- (29) The Commission should be empowered to adopt implementing technical standards by means of implementing acts pursuant to Article 291 of the Treaty on the Functioning of the European Union and in accordance with Article 15 of Regulation (EU) No 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.⁷ ESMA should be entrusted with drafting implementing technical standards for the format of the notification procedure in Article 15.

⁷ OJ L 331, 15.12.2010, p. 84.

- (30) In order to specify the requirements set out in this Regulation, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of specifying the types of conflicts of interests venture capital funds managers need to avoid and the steps to be taken in that respect. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level.
- (31) The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.
- (32) By 22 July 2017, the Commission should start a review of this Regulation in order to take account of the development of the venture capital market. The review shall include a general survey of the functioning of the rules in this Regulation and the experience acquired in applying them, including the extent to which the designation "EuVECA" has been used by venture capital fund managers in different Member States, whether domestically or on a cross border basis, the use of the different qualifying investments by venture capital fund managers, especially whether there is a need to adjust the qualifying investments, e.g. allowing acquisitions of shares from so-called 'business angel's' and collective investment undertakings other than qualifying venture capital funds as qualifying investments, the scope of this Regulation and the interaction between this Regulation and other rules on collective investment undertakings and their managers, especially those of Directive 2011/61/EU. Accordingly, the review-clause in this Regulation follows the date of review of Directive 2011/61/EU. On the basis of the review, the Commission should submit a report to the European Parliament and the Council accompanied, if appropriate, by legislative changes.
- (33) This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, including the right to respect for private and family life (Article 7) and the freedom to conduct a business (Article 16).

- (34) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁸ governs the processing of personal data carried out in the Member States in the context of this Regulation and under the supervision of the Member States competent authorities, in particular the public independent authorities designated by the Member States. Regulation (EU) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the EU institutions and bodies and on the free movement of such data,⁹ governs the processing of personal data carried out by ESMA within the framework of this Regulation and under the supervision of the European Data Protection Supervisor.
- (35) This Regulation is without prejudice to the application of state aid rules to qualifying venture capital funds.
- (36) The objective of this Regulation, notably to ensure uniform requirements apply to the marketing of qualifying venture capital funds, cannot be sufficiently achieved by the Member States. The Union may therefore adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation provides for a simple registration system for venture capital fund managers, thereby taking full account of the need to balance safety and reliability associated with the use of the designation "EuVECA" with the efficient operation of the venture capital market and the cost for its various stakeholders. In doing so, this Regulation does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS REGULATION:

⁸ OJ L 281 , 23.11.1995 p. 31.

⁹ OJ L 8, 12.1.2001, p. 1.

CHAPTER I

SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1

This Regulation lays down uniform requirements and conditions for those managers of collective investment undertakings who wish to use the designation "EuVECA" in relation to the marketing of qualifying venture capital funds in the Union, and thereby contributing to the smooth functioning of the internal market. It lays down uniform rules for the marketing of qualifying venture capital funds to eligible investors across the Union, for the portfolio composition of qualifying venture capital funds, for the eligible investment instruments and techniques to be used by qualifying venture capital funds as well as for the organisation, conduct and transparency of venture capital fund managers that market qualifying venture capital funds across the Union.

Article 2

1. This Regulation applies to managers of collective investment undertakings as defined in point (b) of Article 3, whose assets under management in total do not exceed the threshold mentioned in Article 3 (2) (b) of Directive 2011/61/EU, who are established in the Union and who are subject to registration with the competent authorities of their home Member State in accordance with point (a) of Article 3 (3) of Directive 2011/61/EU, provided that those managers manage portfolios of qualifying venture capital funds.
2. Venture capital fund managers who are registered under this Regulation can additionally manage UCITS subject to authorisation under Directive 2009/65/EC so long as they are external managers.

Article 3

For the purposes of this Regulation, the following definitions apply:

- (a) 'qualifying venture capital fund' means a collective investment undertaking that invests at least 70 percent of its aggregate capital contributions and uncalled committed capital in assets that are qualifying investments within a time frame laid down in the rules or instruments of incorporation of the qualifying venture capital fund. The 70 percent shall be calculated on the basis of amounts investible after deduction of all relevant costs;
- (aa) 'relevant costs' means all fees, charges and expenses which are directly or indirectly borne by investors and which are agreed between the manager of the qualifying venture capital fund and the investors;
- (b) 'collective investment undertaking' means an AIF as defined in Article 4 (1) (a) of Directive 2011/61/EU;
- (c) 'qualifying investments' means any of the following instruments:
 - (i) equity or quasi equity instruments that are
 - issued by a qualifying portfolio undertaking and acquired directly by the qualifying venture capital fund from the qualifying portfolio undertaking, or
 - issued by a qualifying portfolio undertaking in exchange for an equity security issued by the qualifying portfolio undertaking, or
 - issued by an undertaking of which the qualifying portfolio undertaking is a majority-owned subsidiary and which is acquired by the qualifying venture capital fund in exchange for an equity instrument issued by the qualifying portfolio undertaking;

- (ia) secured or unsecured loans granted by the qualifying venture capital fund to a qualifying portfolio undertaking in which the qualifying venture capital fund already holds qualifying investments, provided that no more than 30 percent of the aggregate capital contributions and uncalled committed capital in the qualifying venture capital fund is used for such loans;
 - (iaa) shares of a qualifying portfolio undertaking acquired by a qualifying venture capital fund from other qualifying venture capital funds. Until five years after the date of application of this Regulation, shares of a qualifying portfolio undertaking acquired by a qualifying venture capital fund from other venture capital funds, as established under national regimes, are also permitted.
 - (ii) units or shares of one or several other qualifying venture capital funds, provided that those qualifying venture capital funds have not themselves invested more than 10 percent of their aggregate capital contributions and uncalled committed capital in qualifying venture capital funds.
- (d) 'qualifying portfolio undertaking' means an undertaking that, at the time of an investment by the qualifying venture capital fund, is not admitted to trading on a regulated market or on a multilateral trading facility (MTF) as defined in point (14) and point (15) of Article 4 (1) of Directive 2004/39/EC, unless the trading platform is a SME growth market, and either has an annual turnover not exceeding EUR 50 million, or an annual balance sheet in total not exceeding EUR 43 million, and which is not itself a collective investment undertaking;
- (e) 'equity' means ownership interest in an undertaking, represented by the shares or other forms of participation in the capital of the qualifying portfolio undertaking, issued to its investors;
- (f) 'quasi-equity' means a type of financing instrument that has both equity and debt elements, where the return on the instrument is linked to the profit or loss of the qualifying portfolio undertaking, and where the repayment of the instrument in the event of default is not fully secured;

- (g) 'marketing' means a direct or indirect offering or placement at the initiative of the venture capital fund manager or on behalf of the venture capital fund manager of units or shares of a venture capital fund it manages to or with investors domiciled or with a registered office in the Union;
- (h) 'committed capital' means any commitment pursuant to which an investor is obliged, within the time frame laid down in the rules or instruments of incorporation of the qualifying venture capital fund, to acquire an interest in the venture capital fund or make capital contributions to the venture capital fund;
- (i) 'venture capital fund manager' means a legal person whose regular business is managing at least one qualifying venture capital fund;
- (j) 'home Member State' means the Member State where the venture capital fund manager is established and is subject to registration with the competent authorities in accordance with point (a) of Article 3 (3) of Directive 2011/61/EU;
- (k) 'host Member State' means the Member State, other than the home Member State, where the venture capital fund manager markets qualifying venture capital funds in accordance with this Regulation;
- (l) 'competent authority' means the national authority which the home Member State designates, by law or regulation, to undertake the registration of managers of collective investment undertakings as referred to in paragraph (1) of Article 2;
- (m) 'UCITS' means an undertaking for collective investment in transferable securities authorised in accordance with Article 5 of Directive 2009/65/EC.

CHAPTER II

CONDITIONS FOR THE USE OF THE DESIGNATION "EuVECA"

Article 4

Venture capital fund managers who comply with the requirements set out in this Chapter shall be entitled to use the designation "EuVECA" in relation to the marketing of qualifying venture capital funds in the Union.

Article 5

1. The venture capital fund manager shall ensure that, when acquiring assets other than qualifying investments, no more than 30 percent of the fund's aggregate capital contributions and uncalled committed capital is used for the acquisition of assets other than qualifying investments within a time frame laid down in the rules or instruments of incorporation of the qualifying venture capital fund; the 30 percent shall be calculated on the basis of amounts investible after the deduction of all relevant costs; holdings in cash and cash equivalents shall not be taken into account for calculating this limit as cash and cash equivalents are not to be considered as investments.
2. The venture capital fund manager shall not borrow, issue debt obligations, provide guarantees, at the level of the qualifying venture capital fund, nor employ at the level of the qualifying venture capital fund any method by which the exposure of the fund will be increased, whether through borrowing of cash or securities, the engagement into derivative positions or by any other means.
 - 2a. The prohibition set out in paragraph 2 shall not apply to cash advances from investors of the qualifying venture capital fund of a temporary nature where these cash advances are fully covered by capital commitments from the investors.

3. The prohibition set out in paragraph 2 shall not apply to borrowing for a non-renewable term of no longer than 120 calendar days to provide liquidity between a call for and receipt of committed capital from investors.

Article 6

1. Venture capital fund managers shall market the units and shares of qualifying venture capital funds exclusively to investors which are considered to be professional clients in accordance with Section I of Annex II of Directive 2004/39/EC or may, on request, be treated as professional clients in accordance with Section II of Annex II of Directive 2004/39/EC, or to other investors where:
 - (a) those other investors commit to invest a minimum of EUR 100.000;
 - (b) those other investors state in writing, in a separate document from the contract to be concluded for the commitment to invest, that they are aware of the risks associated with the envisaged commitment or investment;
 - (c) the venture capital fund manager undertakes an assessment of the expertise, experience and knowledge of the investor, without presuming that the investor has the market knowledge and experience of those listed in Section I of Annex II of Directive 2004/39/EC;
 - (d) the venture capital fund manager is reasonably assured, in light of the nature of the commitment or investment envisaged, that the investor is capable of making his own investment decisions and understanding the risks involved and that a commitment of this kind is appropriate for such an investor;

(e) the venture capital fund manager confirms in writing that he has undertaken the assessment referred to in point (c) and that the conditions set out in point (d) are fulfilled.

2. Paragraph 1 shall not apply to the investments made by executives or directors of a venture capital fund manager when investing in the qualifying venture capital funds they manage.

Article 7

Venture capital fund managers shall, in relation to the qualifying venture capital funds they manage:

- (a) act honestly with due skill, care and diligence and fairly in conducting their activities;
- (b) apply appropriate policies and procedures for preventing malpractices that might reasonably be expected to affect the interests of investors and the qualifying portfolio undertakings;
- (c) conduct their business activities so as to promote the best interests of the qualifying venture capital funds they manage, the investors in those qualifying venture capital funds they manage and the integrity of the market;
- (d) apply a high level of diligence in the selection and ongoing monitoring of investments in qualifying portfolio undertakings;
- (e) possess adequate knowledge and understanding of the qualifying portfolio undertakings they invest in;
- (f) treat all investors fairly;
- (g) ensure that no investor shall obtain preferential treatment, unless such preferential treatment is disclosed in the rules or instruments of incorporation of the qualifying venture capital fund.

Article 7a

1. Where a venture capital fund manager intends to delegate functions to third parties, the manager's liability towards the qualifying venture capital fund and its investors shall not be affected by the fact that the manager has delegated functions to a third party, nor shall the manager delegate to the extent that, in essence, it can no longer be considered to be the manager of the qualifying venture capital fund and to the extent that it becomes a letter-box entity.
2. The delegation must not undermine the effectiveness of supervision of the venture capital fund manager, and, in particular, must not prevent the venture capital fund manager from acting, or the qualifying venture capital fund from being managed, in the best interests of its investors.

Article 8

1. Venture capital fund managers shall, in relation to the qualifying venture capital funds they manage, identify and avoid conflicts of interest and, where they cannot be avoided, manage and monitor and, in accordance with paragraph 4, disclose promptly, those conflicts of interest in order to prevent them from adversely affecting the interests of the qualifying venture capital funds and their investors and to ensure that the qualifying venture capital funds they manage are fairly treated;
2. The venture capital fund manager shall identify in particular those conflicts of interest that may arise between:
 - (a) venture capital fund managers, those persons who effectively conduct the business of the venture capital fund manager, employees or any person who directly or indirectly controls or is controlled by the venture capital fund manager, and the qualifying venture capital fund managed by the venture capital fund managers or the investors in those qualifying venture capital funds;

- (b) the qualifying venture capital fund or the investors in that qualifying venture capital fund, and another qualifying venture capital fund managed by the same venture capital fund manager or the investors in that other qualifying venture capital fund;
 - (c) the qualifying venture capital fund or the investors in that qualifying venture capital fund, and a collective investment undertaking or UCITS managed by the same venture capital fund manager or the investors in that collective investment undertaking or UCITS.
- 3. Venture capital fund managers shall maintain and operate effective organisational and administrative arrangements in order to comply with the requirements set out in paragraphs 1 and 2.
- 4. Disclosures of conflicts of interest as referred to in paragraph 1 shall be provided, where organisational arrangements made by the venture capital fund manager to identify, prevent, manage and monitor conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to investors' interests will be prevented. The venture capital fund managers shall clearly disclose the general nature or sources of conflicts of interest to the investors before undertaking business on their behalf.
- 5. The Commission shall be empowered to adopt delegated acts in accordance with Article 23 measures specifying:
 - (a) the types of conflicts of interest as referred to in paragraph 2 of this Article;
 - (b) the steps venture capital fund managers shall take, in terms of structures and organisational and administrative procedures in order to identify, prevent, manage, monitor and disclose conflicts of interest.

Article 9

At all times, venture capital fund managers shall have sufficient own funds and use adequate and appropriate human and technical resources as are necessary for the proper management of qualifying venture capital funds.

It shall be incumbent upon the venture capital fund managers, at all times, to ensure that they are able to justify the sufficiency of their own funds to maintain operational continuity and disclose their reasoning as to why these funds are sufficient as specified in article 12.

Article 10

Rules for the valuation of assets shall be laid down in the rules or instruments of incorporation of the qualifying venture capital fund and shall ensure a sound and transparent valuation process.

Valuation procedures used shall ensure that the assets are valued properly and that the asset value is calculated at least once a year.

Article 11

1. The venture capital fund manager shall make available an annual report to the competent authority of the home Member State for each qualifying venture capital fund under management no later than 6 months following the end of the financial year. The report shall describe the composition of the portfolio of the qualifying venture capital fund and the activities of the past year. It shall contain the audited financial accounts for the qualifying venture capital fund. It shall be produced in accordance with existing reporting standards and the terms agreed between the venture capital fund manager and the investors. The venture capital fund manager shall provide the report to investors on request. Venture capital fund managers and investors may agree additional disclosures amongst themselves.

2. Where the venture capital fund manager is required to make public an annual financial report in accordance with Directive 2004/109/EC of the European Parliament and Council¹⁰ in relation to the qualifying venture capital fund, the information referred to in paragraph 1 of this Article may be provided either separately or as an additional part of the annual financial report.

Article 12

1. Venture capital fund managers shall, in relation to the qualifying venture capital funds they manage, inform their investors at least about the following elements prior to their investment decision:
 - (a) the identity of the venture capital fund manager and any other service providers contracted by the venture capital fund manager in relation to their management of the qualifying venture capital funds, and a description of their duties;
 - aa) the amount of own funds available to the venture capital fund manager, as well as a detailed statement as to why the venture capital fund manager deems these own funds sufficient for maintaining the adequate human and technical resources necessary for the proper management of its qualifying venture capital funds;
 - (b) a description of the investment strategy and objectives of the qualifying venture capital fund, including a description of the types of the qualifying portfolio undertakings and non-qualifying investments which the qualifying venture capital fund may undertake, the techniques it may employ, and any applicable investment restrictions;
 - (bb) the obligations under [b] apply mutatis mutandis to qualifying venture capital funds that invest in other qualifying venture capital funds;

¹⁰ OJ L 390, 31.12.2004, p. 38.

- (c) a description of the risk profile of the qualifying venture capital fund and any risks associated with the assets in which the fund may invest or investment techniques that may be employed;
 - (d) a description of the qualifying venture capital fund's valuation procedure and of the pricing methodology for the valuation of assets, including the methods used for the valuation of qualifying portfolio undertakings;
 - (e) a description of how the remuneration of the venture capital fund manager is calculated;
 - (f) a description of all relevant costs and of the maximum amounts thereof;
 - (g) where available, the historical performance of the qualifying venture capital fund;
 - (ga) the business support services and the other support activities the manager of the qualifying venture capital fund is providing or arranging through third parties in order to facilitate the development, growth or in some other respect the on-going operations of the qualifying portfolio undertakings in which the qualifying venture capital fund invests, or, where these services or activities are not provided, an explanation of that fact;
 - (h) a description of the procedures by which the qualifying venture capital fund may change its investment strategy or investment policy, or both.
- 1a. All of the information referred to in paragraph 1 shall be fair, clear and not misleading. It shall be kept up-to-date and reviewed regularly where relevant.

2. Where the qualifying venture capital fund is required to publish a prospectus in accordance with Directive 2003/71/EC of the European Parliament and of the Council¹¹ or in accordance with national law in relation to the qualifying venture capital fund, the information referred to in paragraph 1 of this Article may be provided either separately or as a part of the prospectus.

¹¹ OJ L 345, 31.12.2003, p. 64.

CHAPTER III

SUPERVISION, ADMINISTRATIVE COOPERATION

Article 13

1. Venture capital fund managers who intend to use the designation "EuVECA" for the marketing of their qualifying venture capital funds shall inform the competent authority of their home Member State of this intention and shall provide the following information:
 - (a) the identity of the persons who effectively conduct the business of managing qualifying venture capital funds;
 - (b) the identity of the qualifying venture capital funds whose units or shares shall be marketed and their investment strategies;
 - (c) information on the arrangements made for complying with the requirements of Chapter II;
 - (d) a list of Member States where the venture capital fund manager intends to market each qualifying venture capital fund.

2. The competent authority of the home Member State shall only register the venture capital fund manager if it is satisfied that
 - (aa) the persons who effectively conduct the business of managing the qualifying venture capital fund are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the manager of the qualifying venture capital fund;
 - (a) the information required under paragraph 1 is complete;

- (b) the arrangements notified according to point (c) of paragraph 1 are suitable in order to comply with the requirements of Chapter II.
3. The registration shall be valid for the entire territory of the Union and shall allow venture capital fund managers to market qualifying venture capital funds under the designation "EuVECA" throughout the Union.

Article 14

The Venture capital fund manager shall inform the competent authority of the home Member State where the venture capital fund manager intends to market:

- (a) a new qualifying venture capital fund;
- (b) an existing qualifying venture capital fund in a Member State not mentioned in the list referred to in point (d) of Article 13 (1).

Article 15

1. Immediately after the registration of a venture capital fund manager, the addition of a new qualifying venture capital fund, or the addition of a new Member State where the venture capital fund manager intends to market qualifying venture capital funds, the competent authority of the home Member State shall notify this to the Member States indicated in accordance with point (d) of Article 13 (1) and to ESMA.
2. The host Member States indicated in accordance with point (d) of Article 13 (1) shall not impose, on the venture capital fund manager registered in accordance with Article 13, any requirements or administrative procedures in relation to the marketing of its qualifying venture capital funds, nor shall they require any approval of the marketing prior to its commencement.
3. In order to ensure uniform application of this article, ESMA shall develop draft implementing technical standards to determine the format of the notification.

4. ESMA shall submit those draft implementing technical standards to the Commission by [insert date].
5. Power is conferred on the Commission to adopt the implementing technical standards referred to in paragraph 3 of this Article in accordance with the procedure laid down in Article 15 of Regulation (EU) No 1095/2010.

Article 16

ESMA shall maintain a central database, publicly accessible on the internet, listing all qualifying venture capital fund managers registered in the Union in accordance with this Regulation and the qualifying venture capital funds they manage.

Article 17

1. The competent authority of the home Member State shall supervise compliance with the requirements set out in this Regulation.
2. Where the competent authority of the host Member State have clear and demonstrable grounds for believing that the venture capital fund manager acts in breach of this Regulation within its territory, it shall promptly inform the competent authority of the home Member State, which shall take appropriate measures.
3. If, despite the measures taken by the competent authority of the home Member State or because the competent authority of the home Member State fails to act within a reasonable timeframe, or the venture capital fund manager persists in acting in a manner that is clearly in conflict with this Regulation, the competent authority of the host Member State, may, as a consequence take the following actions:
 - (a) after informing the competent authority of the home Member State, take all the appropriate measures needed in order to protect investors, including the possibility of preventing the manager concerned from carrying out any further marketing of its venture capital funds within the territory of the host Member State; and/or
 - (b) if necessary, bring the matter to the attention of ESMA.

Article 18

The competent authorities of the home Member State shall, in conformity with national law, have all supervisory and investigatory powers that are necessary for the exercise of their functions. They shall in particular have the power to:

- (a) request access to any document in any form, and to receive or take a copy thereof;
- (b) require the venture capital fund manager to provide information without delay;
- (c) require information from any person related to the activities of the venture capital fund manager or the qualifying venture capital fund;
- (d) carry out on site inspections with or without prior announcements;
- (da) take appropriate measures to ensure that a venture capital fund manager continues to comply with the requirements of this Regulation;
- (e) issue an order to ensure that a venture capital fund manager complies with the requirements of this Regulation and desists from a repetition of any conduct that may consist of a breach of this Regulation.

Article 19

1. Member States shall lay down the rules on administrative sanctions and measures applicable to breaches of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The administrative sanctions and measures provided for shall be effective, proportionate and dissuasive.

2. By [24 months after entry into force of this Regulation] the Member States shall notify the rules referred to in paragraph 1 to the Commission and ESMA. They shall notify the Commission and ESMA without delay of any subsequent amendment thereto.

Article 20

1. The competent authority of the home Member State shall take the appropriate measures referred to in paragraph 2 where a venture capital fund manager:
 - (a) fails to comply with the requirements that apply to portfolio composition in breach of Article 5;
 - (b) markets, in breach of Article 6, the units and shares of a qualifying venture capital fund to non-eligible investors;
 - (c) uses the designation "EuVECA" without being registered with the competent authority of their home Member State in accordance with Article 13.
2. In the cases referred to in paragraph 1 the competent authority of the home Member State shall take the following measures, as appropriate:
 - (aa) take measures to ensure that a venture capital fund manager complies with articles 5, 6 and 13 of this Regulation and desists from a repetition of any conduct that may consist of a breach of these Articles;
 - (a) prohibit the use of the designation "EuVECA" and remove the venture capital fund manager from the register.
3. The competent authority of the home Member State shall inform the competent authorities of the host Member States indicated in accordance with point (d) of Article 13 (1) and ESMA of the removal of the venture capital fund manager from the register referred to in point [(a)] of paragraph 2 of this Article.

4. The right to market one or more qualifying venture capital funds under the designation "EuVECA" in the Union expires with immediate effect from the date of the decision of the competent authority referred to in point [(a)] of paragraph 2 of this Article.

Article 21

1. Competent authorities and ESMA shall cooperate with each other whenever necessary for the purpose of carrying out their respective duties under this Regulation.
2. They shall exchange all information and documentation necessary to identify and remedy breaches to this Regulation.

Article 22

1. All persons who work or who have worked for the competent authorities or ESMA, as well as auditors and experts instructed by the competent authorities, are bound by the obligation of professional secrecy. No confidential information which those persons receive in the course of their duties shall be divulged to any person or authority whatsoever, save in summary or aggregate form such that venture capital fund managers and qualifying venture capital funds cannot be individually identified, without prejudice to cases covered by criminal law and proceedings under this Regulation.
2. The competent authorities of the Member States or ESMA shall not be prevented from exchanging information in accordance with this Regulation or other Union law applicable to venture capital fund managers and qualifying venture capital funds.
3. Where competent authorities and ESMA receive confidential information in accordance with paragraph 2, they may use it only in the course of their duties and for the purpose of administrative and judicial proceedings.

CHAPTER IV

TRANSITIONAL AND FINAL PROVISIONS

Article 23

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in paragraph 5 of Article 8 shall be conferred on the Commission for a period of four years from the date of entering into force of this Regulation. The Commission shall draw up a report in respect of the delegation of powers not later than nine months before the end of the four year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.
3. The delegation of power referred to in paragraph 5 of Article 8 may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to paragraph 5 of Article 8 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or the Council.

Article 24

1. By 22 July 2017, the Commission shall start a review of this Regulation. The review shall include a general survey of the functioning of the rules in this Regulation and the experience acquired in applying them, including:
- (a) the extent to which the designation "EuVECA" has been used by venture capital fund managers in different Member States, whether domestically or on a cross border basis;
 - (aa) the use of the different qualifying investments by venture capital fund managers and especially whether there is a need to adjust the qualifying investments in this Regulation;
 - (b) the scope of this Regulation;
 - (c) the interaction between this Regulation and other rules on collective investment undertakings and their managers, especially those of Directive 2011/61/EU.
2. After consulting ESMA the Commission shall submit a report to the European Parliament and the Council accompanied, if appropriate, by a legislative proposal.

Article 25

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*. It shall apply from the [22 July 2013], except for paragraph 5 of Article 8, which shall apply from the date of entry into force of this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
