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THE EUROPEAN UNION**

**Brussels, 22 June 2012**

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**NOTE**

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Subject:	Proposal for a Regulation of the European Parliament and of the Council on European Social Entrepreneurship Funds - General approach

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Delegations will find attached a proposal for the Council's general approach on the above-mentioned proposal.

## Proposal for a

## REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

## on European Social Entrepreneurship 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,

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

Having regard to the opinion of the European Central Bank,<sup>1</sup>

Having regard to the opinion of the European Economic and Social Committee,<sup>2</sup>

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Increasingly, as investors also pursue social goals and are not only seeking financial returns, a social investment market has been emerging in the Union, comprised in part by investment funds targeting social undertakings. Such investment funds provide funding to social undertakings which are acting as drivers of social change by offering innovative solutions to social problems and making a valuable contribution to meeting the objectives of the Europe 2020 Strategy.

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<sup>1</sup> OJ C ...p...

<sup>2</sup> OJ C ,, p. .

- (2) It is necessary to lay down a common framework of rules regarding the use of the designation "EuSEF", in particular on 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 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 European Social Entrepreneurship Fund (EuSEF). Investors should, furthermore, be able to compare the investment propositions of different EuSEFs. It is necessary to remove significant obstacles to cross-border fundraising by EuSEFs 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 EuSEFs and imposing corresponding obligations on their managers in all Member States that wish to raise capital across the Union using the designation "EuSEF ". These requirements should ensure the confidence of investors that wish to invest in such funds.

- (4) Defining the quality requirements for the use of the designation "EuSEF" in the form of a Regulation should 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 funds that focus on social undertakings. A Regulation would also reduce regulatory complexity and the manager's cost of compliance with often divergent national rules governing such 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 EuSEF to be either externally or internally managed. Where the EuSEF is internally managed, the EuSEF is also the manager and should therefore comply with all requirements for managers of EuSEFs under this Regulation and be registered as such. A EuSEF 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 generally applicable Union 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)<sup>3</sup>, 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

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<sup>3</sup> OJ L 302, 17.11.2009, p.32.

European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010<sup>4</sup>, provided that those managers manage portfolios of EuSEFs. However, EuSEF 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 "EuSEF " then this Regulation does not apply. In those cases, existing national rules and general Union rules should continue to apply.
- (7) This Regulation should establish uniform rules on the nature of EuSEFs, notably on the portfolio undertakings into which the EuSEFs 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 EuSEF and other alternative investment funds that engage in other, less specialised, investment strategies, for example buyouts, which this Regulation is not seeking to promote. In order to ensure the necessary clarity and certainty this Regulation should also lay down uniform criteria to identify social undertakings as eligible qualifying portfolio undertakings. A social undertaking is an operator in the social economy whose main objective is to have a social impact rather than make a profit for their owners or shareholders. It operates by providing goods and services for the market in an entrepreneurial and innovative fashion and uses its profits primarily to achieve social objectives. It is managed in an open and responsible manner and, in particular, involve employees, consumers and stakeholders affected by its commercial activities.

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<sup>4</sup> OJ L 174, 1.7.2011, p.1.

- (7a) As social undertakings have the achievement of positive social impact as their principle objective rather than maximising their profits, this Regulation should only provide its support to qualifying portfolio undertakings that have the achievement of a measurable and positive social impact as their focus. A measurable and positive social impact could include the provision of services to immigrants who are otherwise excluded, or by reintegrating marginalised groups in the labour market by providing employment, support or training. These undertakings use their profits to achieve their primary social objective and are managed in an accountable and transparent way. For the, in general, exceptional cases, in which a qualifying portfolio undertaking wishes to distribute profits to shareholders and owners, the qualifying portfolio undertaking should have predefined procedures and rules on how profits are distributed to shareholders and owners. Those rules should specify that distribution of profits does not undermine the primary social objective.
- (8) Social undertakings include a large range of undertakings, taking various legal forms, that provide social services or goods to vulnerable, marginalised, disadvantaged or excluded persons. Such services include access to housing, healthcare, assistance for elderly or disabled persons, child care, access to employment and training as well as dependency management. Social undertakings also include undertakings that employ a method of production of goods or services with a social objective, but whose activities may be outside the realm of the provision of social goods or services. Those activities include social and professional integration by means of access to employment for people disadvantaged in particular by insufficient qualifications or social or professional problems leading to exclusion and marginalisation. Those activities may also concern environmental protection with a societal impact, such as anti-pollution, recycling and renewable energy.

- (8a) 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 social undertakings as the eligible qualifying portfolio undertaking, the EuSEFs are those funds that invest at least 70 percent of their aggregate capital contributions and uncalled committed capital in such undertakings. Also the EuSEF 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 EuSEF. Relevant costs are all fees, charges and expenses which are directly or indirectly borne by investors and which are agreed between the EuSEF manager and the investors.
- (8b) Should the EuSEF manager attract additional capital commitments in the lifetime of the EuSEF, 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 EuSEF's rules or instruments of incorporation.
- (9) Taking into account the specific funding needs of social undertakings, it is necessary to achieve clarity regarding the types of instruments a EuSEF should use for such funding. Therefore, this Regulation should lay down uniform rules on the eligible instruments to be used by a EuSEF when making investments, which include equity instruments, debt instruments, investments into other EuSEFs and secured or unsecured loans. However, to prevent dilution of the investments into qualifying portfolio undertakings, EuSEFs should only be permitted to invest into other EuSEFs, provided that those EuSEFs have not themselves invested more than 10 percent of their aggregate capital contributions and uncalled committed capital in other EuSEFs.

- (9a) By their nature, EuSEFs 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 social undertakings through primary investments. This Regulation focuses therefore on allowing such typical core activities of EuSEFs. It follows from this that activities such as 'shadow banking' and leveraged buyouts are not allowed.
- (10) To maintain the necessary flexibility in its investment portfolio, EuSEFs may invest in other assets than qualifying investments to the extent that these investments do not exceed the 30 percent limit for non-qualifying investments. Holdings of cash and cash equivalents should not be taken into account for the calculation of this limit as cash and cash equivalents are not to be considered as investments. EuSEFs should engage in investments throughout their portfolio that are consistent with their ethical investment strategy, for instance they should not undertake investments such as in the weapons industry, that risk breaches of human rights or that entail electronic waste-dumping.
- (11) In order to ensure that the designation "EuSEF " is reliable and easily recognisable for investors across the Union this Regulation should establish that only EuSEF managers which comply with the uniform quality criteria as set out in this Regulation should be eligible to use this designation when marketing EuSEFs across the Union.
- (12) In order to ensure that EuSEFs 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 funds.



- (13) In order to ensure that EuSEFs 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 EuSEF manager should not borrow, issue debt obligations, provide guarantees, at the level of the EuSEF, nor employ at the level of the EuSEF 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 EuSEF of a temporary nature that are fully covered by capital commitments from those investors should not be considered to increase the exposure of the EuSEF 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 EuSEFs 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 EuSEF, certain specific safeguards should be laid down. Therefore, EuSEFs 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.<sup>5</sup> However, in order to have a sufficiently broad investor base for investments into EuSEFs it is also desirable that certain other investors have access to these funds, including high net worth individuals. For those other investors, specific safeguards should be laid down in order to ensure that EuSEFs are only marketed to

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<sup>5</sup> OJ L 145, 30.4.2004, p. 1.

investors that have the appropriate 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 EuSEF manager should be possible when investing in the EuSEF they manage, as such individuals are knowledgeable enough to participate in such investments.

- (15) To ensure that only EuSEF managers who fulfil uniform quality criteria as regards their behaviour in the market use the designation "EuSEF", this Regulation should establish rules on the conduct of business and the relationship of the EuSEF manager to its investors. For the same reason, this Regulation should also 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 EuSEF manager intends to delegate functions to third parties, the manager's liability towards the EuSEF 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 EuSEF and to the extent that it becomes a letter-box entity. The EuSEF 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 EuSEF manager, and, in particular, must not prevent the EuSEF manager from acting, or the EuSEF from being managed, in the best interests of its investors.
- (16) The creation of positive social impacts in addition to the generation of financial returns for investors is a key characteristic of investment funds targeting social undertakings, one which distinguishes them from other types of investment funds. This Regulation should therefore require that the EuSEF managers put in place procedures for measuring the positive social impacts which are to be achieved by investment into qualifying portfolio undertakings.

- (16a) Currently funds that are targeting social outcomes or impacts typically assess and collate information on the extent to which social undertakings are achieving the outcomes they are targeting. There are a wide range of different kinds of social outcomes or impacts that a social undertaking might target. Different ways of identifying the social impacts and measuring them have thereby developed. For instance, a firm that is seeking to aid disadvantaged persons may report on the numbers of such persons aided, for instance employed who otherwise would not be employed. Or, a firm that is seeking to improve the rehabilitation into society of prisoners on release may assess its performance in terms of recidivism rates. The funds aid the undertakings in preparing and providing information on their goals and achievements, and gathering it for investors. While information about social impacts is very important for investors, it is difficult to compare between different social undertakings and different funds both because of the differences in social outcomes being targeted and because of the variety of current approaches. In order to encourage the greatest consistency and comparability in the longer term in such information and the greatest efficiency in the procedures for obtaining the information, it is desirable to develop delegated acts in this area. Such delegated acts should also ensure greater clarity for supervisors, EuSEF and social undertakings. The Commission shall consider consulting widely with relevant stakeholders and ESMA during the preparatory stage in specifying the details of these procedures through delegated acts.
- (17) In order to ensure the integrity of the designation "EuSEF ", this Regulation should also contain quality criteria as regards the organisation of a EuSEF 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 EuSEFs.
- (18) It is necessary for the purpose of investor protection to ensure that EuSEFs assets are properly evaluated. Therefore the rules or instruments of incorporation of the EuSEF should contain rules on the valuation of assets. This should ensure the integrity and the transparency of the valuation.

- (19) In order to ensure that EuSEF managers which make use of the designation "EuSEF " give sufficient account of their activities, uniform rules on annual reports should be established.
- (20) To ensure the integrity of the designation "EuSEF " in the eyes of investors, it is necessary that the designation only be used by 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 EuSEF manager in relation to his investors. These requirements include those elements that are specific to investments into social undertakings, so that greater consistency and comparability of such information may be achieved. This includes information about the criteria and the procedures which are used to select particular qualifying portfolio undertakings as investment targets. This also includes information about the positive social impact to be achieved by the investment policy and how this should be monitored and assessed. To ensure the necessary confidence and the trust of investors in such investments, this further includes information about the assets of the EuSEF which are not invested into qualifying portfolio undertakings and how these are selected.
- (21) In order to ensure effective supervision of the uniform requirements contained in this Regulation, the competent authority of the home Member State should supervise compliance of the EuSEF manager with the uniform requirements set out in this Regulation. To this effect, the EuSEF manager who wishes to market his funds under the designation "EuSEF " should inform the competent authority of his home Member State of this intention. The competent authority should register the 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.
- (22) In order to ensure effective supervision of compliance with the uniform criteria set out, 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.

- (23) For the effective supervision of the requirements laid down, this Regulation should also establish a process for cross-border notifications between the competent supervisory authorities, to be triggered by the registration of the EuSEF manager in its home Member State.
- (24) In order to maintain transparent conditions for the marketing of EuSEFs across the Union, the European Securities and Markets Authority (ESMA) should be entrusted with maintaining a central database listing all EuSEFs managers and the EuSEFS they manage that are registered in accordance with this Regulation.
- (24aa) Where the competent authority of the host Member State have clear and demonstrable grounds for believing that the EuSEF 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.
- (24a) 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 EuSEF 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 EuSEFs within the territory of the host Member State and/or if necessary, bring the matter to the attention of ESMA.
- (25) In order to ensure the effective supervision of the uniform criteria established, this Regulation should contain a list of supervisory powers that competent authorities of the home Member State shall have at their disposal.

- (26) In order to ensure proper enforcement, this Regulation should contain administrative sanctions and measures for the breach of its key provisions, namely the rules on portfolio composition, on safeguards relating to the identity of eligible investors, and on the use of the designation "EuSEF" only by registered EuSEF 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 the fund manager from the register.
- (27) Supervisory information should be exchanged between the competent authorities in the home and host Member States and ESMA.
- (28) 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.
- (29) 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.
- (30) 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.<sup>6</sup> ESMA should be entrusted with drafting implementing technical standards for the format of the notification procedure in Article 16.

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<sup>6</sup> OJ L 331, 15.12.2010, p. 84.

- (31) 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 details for the identification of qualifying portfolio undertakings, the types of conflicts of interests EuSEF managers need to avoid and the steps to be taken in that respect, the details of the procedures to measure the social impacts to be achieved by the qualifying portfolio undertakings and details for the specification of transparency requirements. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. This work should also take into account self regulatory initiatives and codes of conduct.
- (32) 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.
- (33) By 22 July 2017, the Commission should start a review of this Regulation in order to take account of the development of the market of EuSEFs. 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 "EuSEF" has been used by EuSEF managers in different Member States, whether domestically or on a cross border basis, the use of the different qualifying investments by EuSEFs and how this has impacted the development of social undertakings across the Union, the practical application of the criteria for identifying qualifying portfolio undertakings and the impact of this on the development of social undertakings across the Union, 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.

- (34) 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 and the freedom to conduct a business.
- (35) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>7</sup> 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<sup>8</sup> by the EU institutions and bodies and on the free movement of such data, 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.
- (36) The objective of this Regulation, namely to develop an Internal Market for EuSEFs by laying down a framework for the registration of EuSEF managers facilitating the marketing of EuSEFs throughout the Union, can only be achieved at Union level. The Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS REGULATION:

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<sup>7</sup> OJ L 281, 23.11.1995 p. 31.

<sup>8</sup> 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 "EuSEF" in relation to the marketing of EuSEF in the Union, and thereby contributing to the smooth functioning of the internal market.

This Regulation also lays down uniform rules for the marketing of EuSEF to eligible investors across the Union, for the portfolio composition of EuSEFs, for the eligible investment instruments and techniques, as well as on the organisation, transparency and conduct of EuSEF managers that market EuSEFs across the Union.

### *Article 2*

1. This Regulation applies to managers of collective investment undertakings as defined in point (b) of Article 3 (1), 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 these managers manage portfolios of EuSEFs.
2. EuSEF 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*

1. For the purposes of this Regulation, the following definitions shall apply:
  - (a) 'European Social Entrepreneurship Fund' (EuSEF) 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 EuSEF. 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 EuSEF 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) an equity instrument that is:
      - issued by a qualifying portfolio undertaking and acquired directly by the EuSEF 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 EuSEF in exchange for an equity instrument issued by the qualifying portfolio undertaking;

- (ii) securitised and un-securitised debt instruments, issued by a qualifying portfolio undertaking;
  - (iii) units or shares of one or several other EuSEFs, provided that those EuSEFs have not themselves invested more than 10 percent of their aggregate capital contributions and uncalled committed capital in EuSEFs;
  - (iv) secured or unsecured loans granted by the EuSEF to a qualifying portfolio undertaking;
  - (v) any other type of participation in a qualifying portfolio undertaking.
- (d) 'qualifying portfolio undertaking' means an undertaking that, at the time of an investment by the EuSEF, 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, which either has an annual turnover not exceeding EUR 50 million, or an annual balance sheet in total not exceeding EUR 43 million, which is not itself a collective investment undertaking and which:
- (i) has the achievement of measurable, positive social impacts as its primary objective in accordance with its articles of association, statutes or any other rules or instruments of incorporation establishing the business, where:
    - the undertaking provides services or goods to vulnerable, marginalised, disadvantaged or excluded persons; or
    - the undertaking employs a method of production of goods or services that embodies its social objective;

- (ii) uses its profits to achieve its primary social objective in accordance with its articles of association, statutes or any other rules or instruments of incorporation establishing the business. Those rules or instruments of incorporation shall have in place predefined procedures and rules for any circumstances in which profits are distributed to shareholders and owners;
  - (iii) is managed in an accountable and transparent way, in particular by involving workers, customers and stakeholders affected by its business activities.
- (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) 'marketing' means a direct or indirect offering or placement at the initiative of the EuSEF manager or on behalf of that manager of units or shares of a EuSEF it manages to or with investors domiciled or with a registered office in the Union;
  - (g) '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 EuSEF, to acquire an interest in the EuSEF or make capital contributions to the EuSEF;
  - (h) 'EuSEF manager' means a legal person whose regular business is managing at least one EuSEF;
  - (i) 'home Member State' means the Member State where the EuSEF 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;
  - (j) 'host Member State' means the Member State, other than the home Member State, where the EuSEF manager markets EuSEFs in accordance with this Regulation.

(k) '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 Article 2 (1).

(l) 'UCITS' means an undertaking for collective investment in transferable securities authorised in accordance with Article 5 of Directive 2009/65/EC.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 24 specifying the examples of services or goods and the methods of production of services or goods that embody a social objective referred to in point (i) of paragraph 1 (d) of this Article taking into account the different kinds of qualifying portfolio undertakings and those circumstances in which profits can be distributed to owners and investors.

## CHAPTER II

### CONDITIONS FOR THE USE OF THE DESIGNATION "EuSEF "

#### *Article 4*

EuSEF managers who comply with the requirements set out in this Chapter shall be entitled to use the designation "EuSEF" in relation to the marketing of EuSEFs across the Union.

#### *Article 5*

1. EuSEF managers shall ensure that, when acquiring assets other than qualifying investments no more than 30 percent of the EuSEF'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 EuSEF; 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. EuSEF managers shall not borrow, issue debt obligations, provide guarantees, at the level of the EuSEF, nor employ any method, at the level of the EuSEF, 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 EuSEF 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. EuSEF managers shall market the units and shares of the EuSEFs under management exclusively to investors which are considered to be professional clients in accordance of 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 that is concluded for the commitment to invest, that they are aware of the risks associated with the envisaged commitment;
  - (c) the EuSEF 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 EuSEF manager is reasonably assured, in light of the nature of the commitment 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 EuSEF manager confirms in writing that he has undertaken the assessment referred to in point (c) and has reached the conclusion referred to in point (d).

2. Paragraph 1 shall not apply to the investments made by executives or directors of a EuSEF manager when investing in the EuSEFs they manage.

*Article 7*

EuSEF managers shall, in relation to the EuSEF 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 be reasonably expected to affect the interests of investors and the qualifying portfolio undertakings;
- (c) conduct of their business activities so as to promote the best interests of the EuSEFs they manage, the investors in those EuSEFs, 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 EuSEF.



### *Article 7a*

1. Where a EuSEF manager intends to delegate functions to third parties, the manager's liability towards the EuSEF 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 EuSEF and to the extent that it becomes a letter-box entity.
2. The delegation must not undermine the effectiveness of supervision of the EuSEF manager, and, in particular, must not prevent the EuSEF manager from acting, or the EuSEF from being managed, in the best interests of its investors.

### *Article 8*

1. EuSEF managers shall, in relation to the EuSEFs 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 EuSEFs and their investors and to ensure that the EuSEFs they manage are fairly treated.
2. EuSEF managers shall identify in particular those conflicts of interest that may arise between
  - (a) EuSEF managers, those persons who effectively conduct the business of the EuSEF manager, employees or any person who directly or indirectly controls or is controlled by the EuSEF manager, and the EuSEF managed by the EuSEF manager or the investors in those EuSEFs;

- (b) a EuSEF or the investors in that EuSEF, and another EuSEF managed by that EuSEF manager, or the investors in that other EuSEF;
  - (c) the EuSEF or the investors in that EuSEF, and a collective investment undertaking or UCITS managed by the same EuSEF manager or the investors in that collective investment undertaking or UCITS.
- 3. EuSEF managers shall maintain and operate effective organisational and administrative arrangements in order to comply with the requirements laid down in paragraph 1 and 2.
- 4. Disclosures of conflicts of interest as referred to in paragraph 1 shall be provided, where organisational arrangements made by the EuSEF 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. EuSEF 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 24 specifying:
  - (a) the types of conflicts of interest as referred to in paragraph 2 of this Article;
  - (b) the steps EuSEF 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*

- 1. EuSEF managers shall employ for each EuSEF they manage procedures to measure the extent to which the qualifying portfolio undertakings, in which the EuSEF invests, achieve the positive social impact that they are committed to. The managers shall ensure that these procedures are clear and transparent.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 24 specifying the details of the procedures referred to in paragraph 1 of this Article, in relation to different qualifying portfolio undertakings.

#### *Article 10*

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

It shall be incumbent upon the EuSEF 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 13.

#### *Article 11*

Rules for the valuation of assets shall be laid down in the rules or instruments of incorporation of the EuSEF 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 12*

1. EuSEF managers shall make available an annual report to the competent authority of the home Member State for each EuSEF 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 EuSEF and the activities of the past year. It shall contain the audited financial accounts for the EuSEF. It shall be produced in accordance with existing reporting standards and the terms agreed between the EuSEF manager and the investors. EuSEF managers shall provide the report to investors on request. EuSEF managers and investors may agree additional disclosures amongst themselves.

2. The annual report shall at least include the following elements:
  - (a) details, as appropriate, of the overall social outcomes achieved by the investment policy and the method used to measure these outcomes;
  - (b) a statement of any divestments in relation to qualifying portfolio undertakings that have occurred;
  - (c) a description of whether divestments in relation to the other assets of the EuSEF which are not invested into qualifying portfolio undertakings occurred on the basis of the criteria as referred to in point (e) of Article 13 (1);
  - (d) a summary of the activities the EuSEF manager has undertaken in relation to the qualifying portfolio undertakings as referred to in point (k) of Article 13(1).
3. Where the EuSEF manager is required to make public an annual financial report in accordance with Article 4 of Directive 2004/109/EC of the European Parliament and Council<sup>9</sup> in relation to the EuSEF the information referred to in paragraph 1 and 2 of this Article may be provided either separately or as an additional part of the annual financial report.

### *Article 13*

1. EuSEF managers shall, in relation to the EuSEFs they manage, inform their investors prior to their investment decision at least about the following elements:
  - (a) the identity of the EuSEF manager and of any other service providers contracted by the EuSEF manager in relation to their management, and a description of their duties;

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<sup>9</sup> OJ L 390, 31.12.2004, p. 38.

- (aa) the amount of own funds available to the EuSEF manager, as well as a detailed statement as to why the EuSEF manager deems these own funds sufficient for maintaining the adequate human and technical resources necessary for the proper management of its EuSEFs;
- (b) a description of the investment strategy and objectives of the EuSEF, including a description of the types of the qualifying portfolio undertakings and the process and criteria which are used for identifying them, the investment techniques it may employ, and any applicable investment restrictions;
- (bb) the obligations under [b] apply mutatis mutandis to EuSEFs that invest in other EuSEFs;
- (c) the positive social impact being targeted by the investment policy of the EuSEF, including where relevant, projections of such outcomes as may be reasonable, and information on past performance in this area;
- (d) the methodologies to be used to measure social impacts;
- (e) a description of the assets other than qualifying portfolio undertakings and the process and the criteria which are used for selecting these assets unless they are cash or cash equivalents;
- (f) a description of the risk profile of the EuSEF and any risks associated with the assets in which the fund may invest or the investment techniques that may be employed;
- (g) a description of the EuSEF's valuation procedure and of the pricing methodology for valuing assets, including the methods used for valuing qualifying portfolio undertakings;
- (h) a description of all relevant costs and of the maximum amounts thereof ;

- (i) a description of how the remuneration of the EuSEF manager is calculated;
  - (j) where available, the historical financial performance of the EuSEF;
  - (k) the business support services and the other support activities the EuSEF manager 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 EuSEF invests, or, where these services or activities are not provided, an explanation of that fact;
  - (l) a description of the procedures by which the EuSEF may change its investment strategy or investment policy, or both.
2. 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.
3. Where the EuSEF manager is required to publish a prospectus in accordance with Directive 2003/71/EC of the European Parliament and the Council<sup>10</sup> or in accordance with national law in relation to the EuSEF, the information referred to in paragraph 1 of this Article may be provided either separately or as a part of the prospectus.
4. The Commission shall be empowered to adopt delegated acts in accordance with Article 24 specifying:
- (a) the content of the information referred to in point (b) to (e) and (k) of paragraph 1 of this Article;
  - (b) how the information as referred to in point (b) to (e) and (k) of paragraph 1 of this Article can be presented in a uniform way in order to ensure the highest possible level of comparability.

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<sup>10</sup> OJ L 345, 31.12.2003, p. 64.

## CHAPTER III

### SUPERVISION AND ADMINISTRATIVE COOPERATION

#### *Article 14*

1. EuSEF managers who intend to use of the designation "EuSEF" for the marketing of their EuSEF 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 EuSEFs;
  - (b) the identity of the EuSEFs 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 EuSEF manager intends to market each EuSEF.
  
2. The competent authority of the home Member State shall only register the EuSEF manager if it is satisfied that the following conditions are met:
  - (aa) the persons who effectively conduct the business of managing the EuSEF are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the manager of the EuSEF;
    - (a) the information required referred to in 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 EuSEF managers to market EuSEFs under the designation "EuSEF" throughout the Union.

#### *Article 15*

The EuSEF manager shall update the information provided to the competent authority of the home Member State where the EuSEF manager intends:

- (a) to market a new EuSEF;
- (b) to market an existing EuSEF in a Member State not mentioned in the list referred to in point (d) of Article 14 (1).

#### *Article 16*

1. Immediately after the registration of a EuSEF manager, the addition of a new EuSEF, or the addition of a new Member State where the EuSEF manager intends to market EuSEFs, the competent authority of the home Member State shall notify this to the Member States indicated in accordance with point (d) of Article 14 (1) of this Regulation and to ESMA.
2. The host Member States indicated in accordance with point (d) of Article 14 (1) of this Regulation shall not impose, on the EuSEF manager registered in accordance with Article 14, any requirements or administrative procedures in relation to the marketing of its EuSEFs, 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 in accordance with the procedure laid down in Article 15 of Regulation (EU) No 1095/2010.<sup>11</sup>

#### *Article 17*

ESMA shall maintain a central database, publicly accessible on the internet, listing all EuSEF managers registered in the Union in accordance with this Regulation and the EuSEFs they manage.

#### *Article 18*

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 EuSEF 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 EuSEF 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 EuSEFs within the territory of the host Member State; and/or
  - (b) if necessary, bring the matter to the attention of ESMA.

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<sup>11</sup> OJ L 331, 15.12.2010, p.84.

### *Article 19*

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 have in particular the power to:

- (a) request access to any document in any form, and to receive or take a copy of it thereof;
- (b) require the EuSEF manager to provide information without delay;
- (c) require information from any person related to the activities of the EuSEF manager or the EuSEF;
- (d) carry out on site inspections with or without prior announcements;
- (e) take appropriate measures to ensure that a EuSEF manager continues to comply with the requirements of this Regulation;
- (f) issue an order to ensure that a EuSEF 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 20*

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 21*

1. The competent authority of the home Member State shall take the appropriate measures referred to in paragraph 2 where a EuSEF manager:
  - (a) fails to comply with the requirements that apply to the portfolio composition in breach of Article 5;
  - (b) markets, in breach of Article 6, the units and shares of a EuSEF to non-eligible investors;
  - (c) uses the designation "EuSEF" without being registered with the competent authority of their home Member State in accordance with Article 14.
  
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 EuSEF manager complies with articles 5, 6 and 14 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 "EuSEF" and remove the EuSEF 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 14 (1) and ESMA of the removal of the EuSEF manager from the register referred to in point [(a)] of paragraph 2 of this Article.
  
4. The right to market one or more EuSEFs under the designation "EuSEF" 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 22*

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 23*

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 and ESMA, 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 EuSEF managers and EuSEFs 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 EuSEF Managers and EuSEFs.
3. Where competent authorities and ESMA receive confidential information in accordance with paragraph 1, 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 24*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions set out in this Article.
2. The delegation of power referred to in Articles 3 (2), 8 (5), 9 (2) and 13 (4) 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 powers referred to Articles 3 (2), 8 (5), 9 (2) and 13 (4) 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 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of 2 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 2 months at the initiative of the European Parliament or the Council.

*Article 25*

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 "EuSEF" has been used by EuSEF managers in different Member States, whether domestically or on a cross border basis;
  - (b) the use of the different qualifying investments by EuSEFs and how this has impacted the development of social undertakings across the Union;
  - (c) the practical application of the criteria for identifying qualifying portfolio undertakings and the impact of this on the development of social undertakings across the Union;
  - (d) the scope of this Regulation;
  - (e) 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 26*

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 Articles 3 (2), 8 (5), 9 (2) and 13 (4), which shall apply from the date of entry into force of the 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*

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