Regulation (EU) 2017/1991 of the European Parliament and of the Council of 25 October 2017 amending Regulation (EU) No 345/2013 on European venture capital funds and Regulation (EU) No 346/2013 on European social entrepreneurship funds (Text with EEA relevance)

REGULATION (EU) 2017/1991 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 25 October 2017

amending Regulation (EU) No 345/2013 on European venture capital funds and Regulation (EU) No 346/2013 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[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Regulations (EU) No 345/2013[(4)] and (EU) No 346/2013[(5)] of the European Parliament and of the Council lay down uniform requirements and conditions for managers of collective investment undertakings that wish to use the designations ‘EuVECA’ or ‘EuSEF’ in the Union for the marketing of qualifying venture capital funds and qualifying social entrepreneurship funds respectively. Regulations (EU) No 345/2013 and (EU) No 346/2013 contain rules governing, in particular, qualifying investments, qualifying portfolio undertakings and eligible investors. Under Regulations (EU) No 345/2013 and (EU) No 346/2013, only managers with assets under management that in total do not exceed the threshold referred to in point (b) of Article 3(2) of Directive 2011/61/EU of the European Parliament and of the Council[(6)] qualify for the use of the designations ‘EuVECA’ and ‘EuSEF’ respectively.

(2) The communication of the Commission of 26 November 2014 on an Investment Plan for Europe provides a comprehensive strategy to tackle the lack of financing which is holding back Europe’s potential to grow and to provide jobs for its citizens. It aims to unlock private investment by using public funding and by improving the legal framework for the investment environment.

Changes to legislation: *There are currently no known outstanding effects for the Regulation (EU) 2017/1991 of the European Parliament and of the Council. (See end of Document for details)*

(3) The communication of the Commission of 30 September 2015 on an Action Plan on Building a Capital Markets Union is an important element of the Investment Plan. It aims to reduce fragmentation in the financial markets and to increase the supply of capital to businesses, from inside and outside the Union, through the establishment of a genuine single capital market. That communication specifies that Regulations (EU) No 345/2013 and (EU) No 346/2013 need to be amended to ensure that the frameworks are best able to support investment in small and medium-sized enterprises (SMEs).

(4) The market for qualifying venture capital funds and qualifying social entrepreneurship funds should be opened up in order to increase scale effects, to reduce transaction and operational costs, to improve competition and to strengthen investor choice. Enlarging the base of prospective managers contributes to opening up that market, and would benefit undertakings seeking investment by giving them access to financing from a greater and more varied range of risk investment sources. The scope of Regulations (EU) No 345/2013 and (EU) No 346/2013 should therefore be extended by opening up the use of the designations 'EuVECA' and 'EuSEF' to managers of collective investment undertakings authorised under Article 6 of Directive 2011/61/EU.

(5) In order to maintain a high level of investor protection, managers of collective investment undertakings authorised under Article 6 of Directive 2011/61/EU should continue to be subject to the requirements of that Directive and should continue to comply with certain provisions of Regulation (EU) No 345/2013 or Regulation(EU) No 346/2013, namely those concerning eligible investments, targeted investors and information requirements. The competent authorities on which Directive 2011/61/EU confers supervisory powers should also exercise those powers with respect to such managers.

(6) In order to ensure that competent authorities are aware of every new use of the designations 'EuVECA' and 'EuSEF', managers of collective investment undertakings authorised under Article 6 of Directive 2011/61/EU should register each qualifying venture capital fund or qualifying social entrepreneurship fund that they intend to manage and market. That should ensure that such managers may maintain their business models by being able to manage collective investment undertakings established in other Member States and further widen the range of products they offer.

(7) The range of eligible undertakings in which qualifying venture capital funds can invest should be expanded, in order to further increase the supply of capital to businesses. The definition of qualifying portfolio undertakings should therefore include companies with up to 499 employees (small mid-caps) not admitted to trading on a regulated market or on a multilateral trading facility, and SMEs listed on SME growth markets. The new investment options should also allow growth stage entities that already have access to other sources of financing, such as SME growth markets, to receive capital from qualifying venture capital funds which in turn should contribute to the development of the SME growth markets. In addition, investments by qualifying venture capital funds in qualifying portfolio undertakings do not automatically disqualify those qualifying portfolio undertakings from being eligible for public programmes. In order to further

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enhance investment, it should remain possible to set up a fund of funds structure under Regulations (EU) No 345/2013 and (EU) No 346/2013.

(8) In order to make the use of the designation 'EuSEF' more appealing and to further increase the supply of capital to social businesses, the range of eligible undertakings in which qualifying social entrepreneurship funds can invest should be expanded by extending the definition of positive social impact. Such extension would simplify the regulatory landscape for social entrepreneurship funds, and would facilitate the participation of investors in such funds by addressing the discrepancies between different interpretations of what constitutes positive social impact in different Union contexts.

(9) Qualifying venture capital funds should also be allowed to participate, in the longer term, in the funding ladder for unlisted SMEs, unlisted small mid-caps and SMEs listed on SME growth markets, to further enhance their potential for making returns from high-growth companies. Therefore, follow-on investments subsequent to the first investment should be allowed.

(10) Registration procedures should be simple and cost-effective. Therefore, registration of a manager in accordance with Regulations (EU) No 345/2013 and (EU) No 346/2013 should also serve the purpose of the registration referred to in Directive 2011/61/EU in relation to the management of the qualifying venture capital funds or qualifying social entrepreneurship funds. Registration decisions and refusals to register under Regulation (EU) No 345/2013 or Regulation(EU) No 346/2013 should, where appropriate, be subject to administrative or judicial review in accordance with national law.

(11) The information provided in the application for registration and made available to the European Supervisory Authority (European Securities and Markets Authority) ('ESMA'), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council[7] should be used when organising and conducting peer reviews in accordance with Regulation (EU) No 1095/2010, solely in the framework of Directive 2011/61/EU, and Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1095/2010 including the rules on collection of information. This should not pre-empt in any way the outcome of the upcoming legislative reviews of Regulation (EU) No 1095/2010 and of Directive 2011/61/EU.

(12) The fees and other charges that host Member States impose on qualifying venture capital fund managers and on qualifying social entrepreneurship fund managers contribute to regulatory divergence and may sometimes represent significant obstacles to cross-border activities. Such fees and charges impede the free flow of capital across Union borders, thereby undermining the principles of the internal market. It is therefore necessary to emphasise and clarify that the prohibition on the imposition by the host Member State of requirements or administrative procedures in relation to the marketing of qualifying venture capital funds and qualifying social entrepreneurship funds in its territory includes a prohibition on the imposition of fees and other charges on the managers for the marketing of such funds if no supervisory task has to be performed.

(13) Regulations (EU) No 345/2013 and (EU) No 346/2013 require that managers of qualifying venture capital funds and qualifying social entrepreneurship funds, which

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are not authorised in accordance with Directive 2011/61/EU, have sufficient own funds at all times. In order to develop an appropriate and proportionate own funds requirement for qualifying venture capital fund managers and for qualifying social entrepreneurship fund managers, the level of own funds should be based on cumulative criteria and should be significantly lower and less complex than the amounts laid down in Directive 2011/61/EU to take into account the specificities, nature and small size of those funds, and to respect the principle of proportionality. To ensure a consistent understanding of those requirements for those managers across the Union, the application of minimum capital requirements and own funds should be provided for in this Regulation. Due to the particular role that qualifying venture capital funds and qualifying social entrepreneurship funds could play in the context of the Capital Markets Union, in particular fostering the financing of venture capital and social entrepreneurship, it is necessary to provide for specific and targeted own funds rules for registered managers that diverge from the own funds framework for authorised managers laid down in Directive 2011/61/EU.

(14) ESMA should be able to develop draft regulatory technical standards, for submission to the Commission. Those standards should specify the information to be provided to competent authorities in applications for the registration of managers or funds under Regulations (EU) No 345/2013 and (EU) No 346/2013, and the parts of that information that should be made available to ESMA by the competent authorities for the purpose of enabling ESMA to organise and conduct peer reviews under Regulation (EU) No 1095/2010.

(15) Since this Regulation opens up the use of the designations ‘EuVECA’ and ‘EuSEF’ to managers of collective investment undertakings authorised under Article 6 of Directive 2011/61/EU, the central database, maintained by ESMA in accordance with Regulations (EU) No 345/2013 and (EU) No 346/2013 should also include information concerning the qualifying venture capital funds and qualifying social entrepreneurship funds that are managed and marketed by those managers.

(16) In order to avoid any potential market disruption it is necessary to provide existing managers of existing qualifying venture capital funds and existing qualifying social entrepreneurship funds during the terms of those funds with a derogation from rules on own funds under this Regulation. Such managers should nevertheless ensure that they are able to justify at all times the sufficiency of their own funds to maintain operational continuity.

(17) In the context of the next review of Regulations (EU) No 345/2013 and (EU) No 346/2013, the Commission should investigate whether it would be beneficial to create an additional voluntary option for retail investors through the use of a feeder fund under Regulations (EU) No 345/2013 and (EU) No 346/2013 for those qualifying venture capital funds and qualifying social entrepreneurship funds that wish to enlarge their investor base. The Commission should also investigate whether lowering the relatively high minimum investment threshold might be beneficial, especially as it can be seen as a potential barrier to more investment in such funds. It should also investigate whether it might be appropriate to extend the use of the designation ‘EuSEF’ to certain

crowdfunding and microfinancing entities with a high social impact. Although venture capital remains a highly risky form of investment, it should be recalled that similarly risky, unregulated forms of investment are increasingly available to consumers. Such forms of investment, such as crowdfunding, are currently unregulated at the Union level, whereas the use of the designations 'EuVECA' and 'EuSEF' is regulated and supervised.

(18) The Commission's work on a Capital Markets Union identified the definition of marketing and discrepancies in the interpretation of that definition by national competent authorities as significant barriers to cross-border investments. The Commission should review the suitability of that definition.

(19) In addition, the Commission should analyse the appropriateness of introducing a management passport for managers of qualifying venture capital funds and qualifying social entrepreneurship funds and the suitability of the definition of marketing for venture capital. Following that analysis, the Commission should submit a report to the European Parliament and to the Council, accompanied, if appropriate, by a legislative proposal.

(20) Since the objectives of this Regulation, namely to further strengthen an internal market for qualifying venture capital funds and qualifying social entrepreneurship funds by strengthening the use of designations 'EuVECA' and 'EuSEF', cannot be sufficiently achieved by the Member States but can rather, by reason of their scale and effects, be better 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 European Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(21) This Regulation should be without prejudice to the application of State aid rules to qualifying venture capital funds. Such funds may serve as vehicles for State aid to promote risk capital investments in SMEs through, for example, more favourable treatment of private investors than of public investors, provided such aid is compatible with State aid rules and in particular with Commission Regulation (EU) No 651/2014[8].

(22) Regulations (EU) No 345/2013 and (EU) No 346/2013 should be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 345/2013 is amended as follows:

(1) In Article 2, paragraph 2 is replaced by the following:

2. Articles 3 to 6, Article 12, points (c) and (i) of Article 13(1), Articles 14a to 19, the second subparagraph of Article 20(3), and Articles 21 and 21a of this Regulation shall apply to managers of collective investment undertakings authorised under Article 6 of Directive 2011/61/EU that manage portfolios of qualifying venture capital funds and intend to use the designation "EuVECA" in relation to the marketing of those funds in the Union..

(2) In Article 3, the first paragraph is amended as follows: