Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (Text with EEA relevance)

REGULATION (EU) No 346/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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on European social entrepreneurship funds

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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) Increasingly, as investors also pursue social goals and are not only seeking financial returns, a social investment market has been emerging in the Union, comprising, in part, investment funds targeting social undertakings. Such investment funds provide funding to social undertakings that act as drivers of social change by offering innovative solutions to social problems, for example by helping to tackle the social consequences of the financial crisis, and by making a valuable contribution to meeting the objectives of the Europe 2020 Strategy set out in the Commission Communication of 3 March 2010 entitled ‘Europe 2020: A strategy for delivering smart, sustainable and inclusive growth’.

(2) This Regulation is part of the Social Business Initiative established by the Commission in its Communication of 25 October 2011 entitled ‘Social Business Initiative — Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation’.

(3) It is necessary to lay down a common framework of rules regarding the use of the designation ‘EuSEF’ for qualifying social entrepreneurship funds, in particular on the composition of the portfolio of funds that operate under that designation, their eligible investment targets, the investment tools they may employ and the categories of investors that are eligible to invest in them by uniform rules in the Union. In the absence of such a common framework, there is a risk that Member States take diverging measures

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at national level having a direct negative impact on, and creating obstacles to, the proper 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 qualifying social entrepreneurship funds. Investors should, furthermore, be able to compare the investment propositions of different qualifying social entrepreneurship funds. It is necessary to remove significant obstacles to cross-border fundraising by qualifying social entrepreneurship funds, 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 for this Regulation is Article 114 of the Treaty on the Functioning of the European Union (TFEU), as interpreted by consistent case law of the Court of Justice of the European Union.

(4) It is necessary to adopt a regulation establishing uniform rules applicable to qualifying social entrepreneurship funds and imposing corresponding obligations on their managers in all Member States that wish to raise capital across the Union using the designation ‘EuSEF’. Those requirements should ensure the confidence of investors that wish to invest in such funds. The regulation should not apply to existing national schemes that allow investment in social businesses and that do not use the designation ‘EuSEF’.

(5) Defining the quality requirements for the use of the designation ‘EuSEF’ in the form of a regulation ensures that those requirements are directly applicable to the managers of collective investment undertakings that raise funds using that designation. This also ensures uniform conditions for the use of the designation by preventing diverging national requirements as a result of the transposition of a directive. Managers of collective investment undertakings that use the designation should follow the same rules across the Union, which will also boost the confidence of investors. This Regulation reduces regulatory complexity and the managers’ costs of compliance with often divergent national rules governing such funds, especially for those managers that want to raise capital on a cross-border basis. It also contributes to eliminating competitive distortions.

(6) It should be possible for a qualifying social entrepreneurship fund to be externally or internally managed. Where a qualifying social entrepreneurship fund is internally managed, the fund is also the manager and should therefore comply with all relevant requirements for managers under this Regulation and be registered in accordance with this Regulation. A qualifying social entrepreneurship fund which is internally managed should not, however, be permitted to be the external manager of other collective investment undertakings or of undertakings for collective investment in transferable securities (UCITS).

(7) 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 only apply to managers of collective investment undertakings

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other than UCITS falling within the scope 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)], which are established in the Union and are registered with the competent authority in their home Member State in accordance with Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers[(5)], provided that those managers manage portfolios of qualifying social entrepreneurship funds. However, external managers of qualifying social entrepreneurship funds that are registered under this Regulation should also be allowed to manage UCITS, subject to authorisation under Directive 2009/65/EC.

(8) Furthermore, this Regulation applies only to managers of those collective investment undertakings 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. The calculation of the threshold for the purposes of this Regulation is the same as for the threshold of point (b) of Article 3(2) of Directive 2011/61/EU.

(9) However, managers registered in accordance with this Regulation and with assets under management that in total subsequently exceed the threshold referred to in point (b) of Article 3(2) of Directive 2011/61/EU, and that therefore become subject to authorisation with the competent authorities of their home Member State in accordance with Article 6 of that Directive, should be able to continue to use the designation 'EuSEF' in relation to the marketing of qualifying social entrepreneurship funds in the Union, provided that they comply with the requirements laid down in that Directive and that they continue to comply with certain requirements for the use of the designation 'EuSEF' specified in this Regulation at all times in relation to the qualifying social entrepreneurship fund. This applies both to existing qualifying social entrepreneurship funds and to qualifying social entrepreneurship funds established after exceeding the threshold.

(10) 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.

(11) This Regulation should establish uniform rules on the nature of qualifying social entrepreneurship funds, in particular on qualifying portfolio undertakings into which the qualifying social entrepreneurship 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 social entrepreneurship fund and alternative investment funds that engage in other, less specialised, investment strategies, for example buyouts, which this Regulation is not seeking to promote.

(12) In order to ensure the necessary clarity and certainty, this Regulation should also lay down uniform criteria to identify social undertakings as qualifying portfolio undertakings. A social undertaking should be defined as an operator in the social economy, the main objective of which is to have a social impact rather than to make a profit for its owners or shareholders. It operates by providing goods and services for the market and uses its profits primarily to achieve social objectives. It is managed in an

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accountable and transparent manner, in particular, by involving employees, consumers and stakeholders that are affected by its commercial activities.

(13) As the principal objective of social undertakings is to have a positive social impact rather than to maximise profits this Regulation should only promote support for 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 the reintegration of marginalised groups into the labour market by providing employment, training or other support. Social undertakings use their profits to achieve their primary social objective and are managed in an accountable and transparent way. Where, on an exceptional basis, a qualifying portfolio undertaking wishes to distribute profits to its shareholders and owners, it should have predefined procedures and rules on how profits are to be distributed. Those rules should specify that such distribution of profits does not undermine the primary social objective of the qualifying social portfolio undertaking.

(14) Social undertakings include a large range of undertakings, taking various legal forms, which 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 which embodies their social objective, but the activities of which 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.

(15) In line with the aim of precisely circumscribing the collective investment undertakings which are to be covered by this Regulation and in order to ensure a focus on providing capital to social undertakings, qualifying social entrepreneurship funds should be deemed to be funds that intend to invest at least 70 % of their aggregate capital contributions and uncalled committed capital in such undertakings. Qualifying social entrepreneurship funds should not be permitted to invest more than 30 % of their aggregate capital contributions and uncalled committed capital in assets other than qualifying investments. This means that whereas the 30 % threshold should be the maximum limit for non-qualifying investments at all times, the 70 % threshold should be reserved for qualifying investments during the life of the qualifying social entrepreneurship fund. Those thresholds should be calculated on the basis of amounts investible after deduction of all relevant costs and holdings of cash and cash equivalents. This Regulation should set out the details necessary for the calculation of the referred investment thresholds.

(16) The purpose of this Regulation is to enhance the growth of social undertakings in the Union. Investments in qualifying portfolio undertakings established in third countries can bring more capital to qualifying social entrepreneurship funds and can thereby

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benefit social undertakings in the Union. However, under no circumstances should this Regulation benefit investments made in portfolio undertakings established in third countries characterised by a lack of appropriate cooperation arrangements between the competent authorities of the home Member State of the manager of the qualifying social entrepreneurship fund and with each other Member State in which the units or shares of the qualifying social entrepreneurship fund are intended to be marketed or by a lack of effective exchange of information in tax matters.

(17) A qualifying social entrepreneurship fund should, as a first step, be established in the Union in order to be entitled to use the designation 'EuSEF' as established by this Regulation. The Commission should, within two years of the date of application of this Regulation, review the limitation on the use of the designation 'EuSEF' to funds established in the Union, taking into account experience of applying the Commission Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters.

(18) Managers of social entrepreneurship funds should be able to attract additional capital commitments during the life of a fund. Such additional capital commitments during the life of the qualifying social entrepreneurship fund should be taken into account when the next investment in assets other than qualifying assets is contemplated. Additional capital commitments should be permitted in accordance with criteria and subject to conditions set out in the qualifying social entrepreneurship fund's rules or instruments of incorporation.

(19) Taking into account the specific funding needs of social undertakings, it is necessary to achieve clarity regarding the types of instruments that a qualifying social entrepreneurship fund should use for such funding. Therefore, this Regulation lays down uniform rules on the eligible instruments to be used by a qualifying social entrepreneurship fund when making investments, which include equity and quasi-equity instruments, debt instruments, such as promissory notes and certificates of deposit, investments into other qualifying social entrepreneurship funds, secured or unsecured loans, and grants. To prevent dilution of the investments into qualifying portfolio undertakings, qualifying social entrepreneurship funds should only be permitted to invest in other qualifying social entrepreneurship funds where those other qualifying social entrepreneurship funds have not themselves invested more than 10 % of their aggregate capital contributions and uncalled committed capital into other qualifying social entrepreneurship funds.

(20) The core activities of qualifying social entrepreneurship funds are to provide financing to social undertakings through primary investments. Qualifying social entrepreneurship funds should neither participate in systemically important banking activities outside of the usual prudential regulatory framework (so-called 'shadow banking') nor follow typical private equity strategies, such as leveraged buyouts.

(21) To maintain the necessary flexibility in its investment portfolio, qualifying social entrepreneurship funds should be able to invest in assets other than qualifying investments to the extent that those other investments do not exceed the 30 % threshold for non-qualifying investments. Holdings of cash and cash equivalents should not be