Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (Text with EEA relevance)

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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) Venture capital provides finance to undertakings that are generally very small, that are in the initial stages of their corporate existence and that display a strong potential for growth and expansion. In addition, venture capital funds provide undertakings with valuable expertise and knowledge, business contacts, brand equity and strategic advice. By providing finance and advice to those undertakings, venture capital funds stimulate economic growth, contribute to the creation of jobs and capital mobilisation, foster the establishment and expansion of innovative undertakings, increase their investment in research and development and foster entrepreneurship, innovation and competitiveness in line with 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' (Europe 2020) and in the context of the long-term challenges of the Member States, such as those identified in the report of the European Strategy and Policy Analysis System of March 2012 entitled 'Global Trends 2030 — citizens in an interconnected and polycentric world'.

(2) It is necessary to lay down a common framework of rules regarding the use of the designation 'EuVECA' for qualifying venture capital funds, in particular 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 venture capital funds that wish to operate across the Union would be subject to different rules in different Member States. Moreover, diverging quality requirements on portfolio composition, investment targets and eligible investors could lead to different levels of investor protection and generate confusion as to the investment proposition associated with qualifying venture capital funds. Investors should, furthermore, be able to compare the investment propositions of different qualifying venture capital funds. It is necessary to remove significant obstacles to cross-border fundraising by qualifying venture capital 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.

(3) It is necessary to adopt a Regulation establishing uniform rules applicable to qualifying venture capital funds and imposing corresponding obligations on their managers in all Member States that wish to raise capital across the Union using the designation 'EuVECA'. Those requirements should ensure the confidence of investors that wish to invest in venture capital funds.

(4) Defining the quality requirements for the use of the designation 'EuVECA' in the form of a regulation 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 venture capital funds, especially for those managers that want to raise capital on a cross-border basis. It also contributes to eliminating competitive distortions.

(5) As stated in the Commission Communication of 7 December 2011, entitled 'An action plan to improve access to finance for SMEs', the Commission was to complete its examination of tax obstacles to cross-border venture capital investments in 2012, with a view to presenting solutions in 2013 aimed at eliminating the obstacles while at the same time preventing tax avoidance and tax evasion.

(6) It should be possible for a qualifying venture capital fund to be externally or internally managed. Where a qualifying venture capital 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 venture capital 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).

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(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, 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 venture capital funds. However, external managers of qualifying venture capital funds that are registered in accordance with 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 referred to in point (b) of Article 3(2) of Directive 2011/61/EU.

(9) However, venture capital fund managers registered in accordance with this Regulation 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 'EuVECA' in relation to the marketing of qualifying venture capital 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 'EuVECA' specified in this Regulation at all times in relation to the qualifying venture capital funds. This applies both to existing qualifying venture capital funds and to qualifying venture capital funds established after exceeding the threshold.

(10) Where managers of collective investment undertakings do not wish to use the designation 'EuVECA', this Regulation should not apply. In these cases, existing national rules and general Union rules should continue to apply.

(11) This Regulation should establish uniform rules on the nature of qualifying venture capital funds, in particular on qualifying portfolio undertakings into which the qualifying venture capital funds are to be permitted to invest and the investment instruments to be used. This is necessary so that a clear demarcation line can be drawn between a qualifying venture capital fund and alternative investment funds that engage in other, less specialised, investment strategies, for example buyouts or speculative real estate investments, which this Regulation is not seeking to promote.

(12) 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 small undertakings in the initial stages of their corporate existence, qualifying venture capital funds should be deemed to be funds that intend to invest at least

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70 % of their aggregate capital contributions and uncalled committed capital in such undertakings. Qualifying venture capital 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 venture capital 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 thresholds.

(13) The purpose of this Regulation is to enhance the growth and innovation of small and medium-sized enterprises (SMEs) in the Union. Investments in qualifying portfolio undertakings established in third countries can bring more capital to qualifying venture capital funds and thereby benefit SMEs 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 a qualifying venture capital fund and with each other Member State in which units or shares of the qualifying venture capital fund are intended to be marketed or by a lack of effective exchange of information in tax matters.

(14) A qualifying venture capital fund should, as a first step, be established in the Union in order to be entitled to use the designation ‘EuVECA’ 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 ‘EuVECA’ 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.

(15) Managers of qualifying venture capital funds should be able to attract additional capital commitments during the life of that fund. Such additional capital commitments during the life of the qualifying venture capital 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 venture capital fund’s rules or instruments of incorporation.

(16) Qualifying investments should be in the form of equity or quasi-equity instruments. Quasi-equity instruments comprise a type of financing instrument, which is a combination of equity and debt, where the return on the instrument is linked to the profit or loss of the qualifying portfolio undertaking, and where the repayment of the instrument in the event of default is not fully secured. Such instruments include a variety of financing instruments such as subordinated loans, silent participations, participating loans, profit participating rights, convertible bonds and bonds with warrants. As a possible complement to — but not a substitute for — equity and quasi-equity instruments, secured or unsecured loans, such as bridge financing, granted by the qualifying venture capital fund to a qualifying portfolio undertaking in which the qualifying venture capital fund already holds qualifying investments, should be

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permitted, provided that no more than 30 % of the aggregate capital contributions and uncalled committed capital in the qualifying venture capital fund is used for such loans. Furthermore, to reflect existing business practices in the venture capital market, a qualifying venture capital fund should be allowed to buy existing shares of a qualifying portfolio undertaking from existing shareholders of that undertaking. Also, for the purposes of ensuring the widest possible opportunities for fundraising, investments into other qualifying venture capital funds should be permitted. To prevent dilution of the investments into qualifying portfolio undertakings, qualifying venture capital funds should only be permitted to invest into other qualifying venture capital funds, provided that those qualifying venture capital funds have not themselves invested more than 10 % of their aggregate capital contributions and uncalled committed capital in other qualifying venture capital funds.

(17) The core activities of venture capital funds are providing finance to SMEs through primary investments. Venture capital 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.

(18) In line with Europe 2020, this Regulation aims to promote venture capital investments into innovative SMEs anchored in the real economy. Credit institutions, investment firms, insurance undertakings, financial holding companies and mixed-activity holding companies should therefore be excluded from the definition of qualifying portfolio undertakings under this Regulation.

(19) In order to put in place an essential safeguard that differentiates qualifying venture capital funds under this Regulation from the broader category of alternative investment funds which trade in issued securities on secondary markets, it is necessary to lay down rules so that qualifying venture capital funds make investments primarily in directly issued instruments.

(20) In order to allow managers of qualifying venture capital funds a certain degree of flexibility in the investment and liquidity management of their qualifying venture capital funds, trading, such as in shares or participations in non-qualifying portfolio undertakings or acquisitions of non-qualifying investments, should be permitted up to a maximum threshold of 30 % of aggregate capital contributions and uncalled capital.

(21) In order to ensure that the designation 'EuVECA' is reliable and easily recognisable for investors across the Union, only managers of qualifying venture capital funds which comply with the uniform quality criteria as set out in this Regulation should be eligible to use the designation 'EuVECA' when marketing qualifying venture capital funds across the Union.

(22) In order to ensure that qualifying venture capital funds have a distinct and identifiable profile which is suited to their purpose, there should be uniform rules on the composition of the portfolio and on the investment techniques which are permitted for such funds.

(23) In order to ensure that qualifying venture capital funds do not contribute to the development of systemic risks, and that such funds concentrate, in their investment