Plenary sitting

A9-0020/2023

2.2.2023

*****I**
REPORT

on the proposal for a directive of the European Parliament and of the Council amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds
(COM(2021)0721 – C9-0439/2021 – 2021/0376(COD))

Committee on Economic and Monetary Affairs

Rapporteur: Isabel Benjumea Benjumea

Symbols for procedures

*	Consultation procedure
***	Consent procedure
***I	Ordinary legislative procedure (first reading)
***II	Ordinary legislative procedure (second reading)
***III	Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

Amendments by Parliament set out in two columns

Deletions are indicated in ***bold italics*** in the left-hand column. Replacements are indicated in ***bold italics*** in both columns. New text is indicated in ***bold italics*** in the right-hand column.

The first and second lines of the header of each amendment identify the relevant part of the draft act under consideration. If an amendment pertains to an existing act that the draft act is seeking to amend, the amendment heading includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend.

Amendments by Parliament in the form of a consolidated text

New text is highlighted in ***bold italics***. Deletions are indicated using either the ▌ symbol or strikeout. Replacements are indicated by highlighting the new text in ***bold italics*** and by deleting or striking out the text that has been replaced.
By way of exception, purely technical changes made by the drafting departments in preparing the final text are not highlighted.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a directive of the European Parliament and of the Council amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds
(COM(2021)0721 – C9-0439/2021 – 2021/0376(COD))

(Ordinary legislative procedure: first reading)*The European Parliament*,

– having regard to the Commission proposal to Parliament and the Council (COM(2021)0721),

– having regard to Article 294(2) and Article 53(1) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C9-0439/2021),

– having regard to the opinion of the Committee on Legal Affairs on the use of delegated acts,

– having regard to Article 294(3) of the Treaty on the Functioning of the European Union,

– having regard to the opinion of the European Central Bank of 3 October 2022[1],

– having regard to Rules 59 and 41 of its Rules of Procedure,

– having regard to the report of the Committee on Economic and Monetary Affairs (A9-0020/2023),

1. Adopts its position at first reading hereinafter set out;

2. Approves its statement annexed to this resolution;

3. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;

4. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

AMENDMENTS BY THE EUROPEAN PARLIAMENT[*]

to the Commission proposal

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds

[1] OJ C 379, 3.10.2022, p. 1.
[*] Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol ▌.

(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 53(1) 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 Economic and Social Committee[2],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) In accordance with Article 69 of Directive 2011/61/EU of the European Parliament and of the Council[3], the Commission has reviewed the application and the scope of that Directive and concluded that the objectives of integrating the Union market for alternative investment funds (‘AIF’), ensuring a high level of investor protection and protecting financial stability have mostly been met. However, in that review the Commission also concluded that there is a need to harmonise rules for the managers of alternative investment funds (‘AIFMs’) managing loan-originating AIFs, to clarify standards applicable to AIFMs that delegate their functions to third parties, to ensure equal treatment of custodians, to improve cross-border access to depositary services, to optimise supervisory data collection and to facilitate the use of liquidity management tools (LMTs) across the Union. Therefore, amendments are necessary to address those regulatory gaps to improve the functioning of Directive 2011/61/EU.

(2) A robust delegation regime, an equal treatment of custodians, coherence of supervisory reporting ***through the removal of duplications and redundant requirements*** and a harmonised approach to the use of LMTs are equally necessary for the management of undertakings for collective investment in transferable securities (‘UCITS’). Therefore, it is appropriate to also amend Directive 2009/65/EC of the European Parliament and of the Council[4], which lays down rules regarding the authorisation and operation of UCITS, in the areas of delegation, asset safekeeping, supervisory reporting and liquidity risk management.

(2a) The alternative asset industry collectively invests over EUR 1,5 trillion in Europe. Union institutional investors invest over EUR 370 billion in alternative assets managers. The Union alternative asset industry provides over EUR 250 billion to European businesses in private credit and European investors are responsible for 30 % of global capital allocated to the whole industry but there is still room to grow by providing European institutional investors with greater choice and enhancing the competitiveness of Europe’s capital markets.

(2b) The size of EU AIFs has continued to expand, increasing by 8 % between 2019 and 2022, and AIFs accounted for one-third of the EEA30 fund industry at the end of

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[2] OJ C , , p. .

[3] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

[4] 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) (OJ L 302, 17.11.2009, p. 32).

2020. Professional investors own most of the shares of AIFs, yet retail investor share is significant at 14 % of the net asset value (NAV).

(3) To increase the efficiency of AIFM activities, the list of authorised ancillary services set out in Article 6(4) of Directive 2011/61/EU should be extended to include benchmark administration governed by Regulation (EU) 2016/1011 of the European Parliament and of the Council[5] and credit servicing governed by Directive 2021/…./EU of the European Parliament and of the Council.[6]

(3a) In order to enhance legal certainty, it should be clarified that the management of AIFs also comprises the activities of originating loans on behalf of an AIF and servicing securitisation special purpose vehicles referred to in points 3 and 4 ofAnnex I of Directive 2011/61/EU.

(4) To ensure legal certainly it should be clarified that AIFMs providing ancillary services involving financial instruments are subject to the rules laid down in Directive 2014/65/EU of the European Parliament and of the Council[7]. With regard to other assets, which are not financial instruments, AIFMs should be required to comply with the requirements of Directive 2011/61/EU.

(5) To ensure the uniform application of the requirements laid down in Articles 7 and 8 of Directive 2011/61/EU for the necessary human resources of AIFMs, it should be clarified that at the time of application for an authorisation, AIFMs should provide the competent authorities with information about the human and technical resources that the AIFM will employ to carry out its functions and, where applicable, to supervise delegates. At least two senior managers should be employed or conduct the business of the AIFM on a full-time ***or a full-time equivalent*** basis and be resident in the Union. ***To ensure that AIFMs comply with the requirements regarding conflict of interest and acting in the best interest of the AIFs and their investors, AIFMs should ensure that at least one member of their governing body is a non-executive director.***

6. ▌

7. ▌

(7a) The marketing of AIFs is not always conducted by the AIFM directly but by one or several distributors either on behalf of the AIFM or on their own behalf. There could also be cases where an independent financial advisor markets a fund without the AIFM's knowledge. Most fund distributors are subject to regulatory requirements pursuant to Directives 2014/65/EU or 2016/97/EU, which define the scope and extent of their responsibilities towards their own clients. Directive 2011/61/EU should therefore acknowledge the diversity of distribution arrangements and distinguish between arrangements whereby a distributor operates on behalf of the AIFM, which should be considered to be a delegation arrangement, and arrangements whereby a

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[5] Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1–65).

[6] OJ C , , p. .

[7] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

distributor acts on its own behalf, in which case the provisions of that Directive regarding delegation should not apply.

(8) To enhance the uniform application of Directive 2011/61/EU it should be clarified that the delegation rules laid down in Article 20 apply to all functions listed in Annex I to that Directive and to the ancillary services referred to in Article 6(4) of that Directive.

(9) ***Investment funds providing loans can be a source of alternative financing for the real economy. Indeed, such funds can provide critical funding for Union small and medium-sized enterprises for which traditional lending sources are more difficult to access. Moreover, it should be recognised that the existence of sources of private credit promotes investor confidence in the Union market. However, diverging national regulatory approaches hinder the establishment of an efficient internal market for loan-originating AIFs by promoting regulatory arbitrage and varying levels of investor protection.*** Common rules should also be laid down to establish an efficient internal market for loan-originating AIFs, to ensure a uniform level of investor protection in the Union, to make it possible for AIFs to develop their activities by originating loans in all Member States of the Union and to facilitate the access to finance by EU companies, a key objective of the Capital Markets Union ('CMU').[8] However, given the fast-growing private credit market, it is necessary to address the potential micro risks and macro prudential risks that loan originating AIFs could pose and spread to the broader financial system. The rules applicable to AIFMs managing loan-originating funds should be harmonised in order to improve risk management across the financial market and increase transparency for investors.

(10) To support the professional management of AIFs and to mitigate risks to the financial stability, AIFMs that manage AIFs that engage in lending activities, including purchasing loans on the secondary market, should have effective policies, procedures and processes for the granting of loans, assessing credit risk and administering and monitoring its credit portfolio, which should be reviewed periodically.

(11) To contain the risk of interconnectedness among loan-originating AIFs and other financial market participants, AIFMs of those AIFs should, where a borrower is a financial institution, be required to diversify their risk and subject their exposure to specific limits.

(12) In order to limit conflicts of interest, AIFMs and their staff should not receive loans from loan-originating AIFs that they manage. Similarly, the AIF's depositary and its staff or the AIFM's delegate and its staff ***and entities within the same group as the AIFM*** should be prohibited from receiving loans from the associated AIFs.

(13) Directive 2011/61/EU should recognise the right of AIFs to originate loans and trade those loans on the secondary market. To avert moral hazard and maintain the general credit quality of loans originated by AIF's, such loans should be subject to risk retention requirements. ***AIFs should not follow an originate-to-distribute investment strategy, namely an investment strategy under*** which loans are originated with the sole purpose of selling them.

(14) Long-term, illiquid loans held by AIF ***might*** create liquidity mismatches if the AIFs open-ended structure allows investors to redeem their fund units or shares on a frequent

[8] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Capital Markets Union for people and businesses-new action plan (COM/2020/590 final).

basis. ***Therefore, where an AIFM is not able to demonstrate to the competent authorities of its home Member State that the AIF has a sound liquidity risk management system, it is*** necessary to mitigate risks related to maturity transformation by imposing a closed-ended structure for AIFs originating loans because close-ended funds would not be vulnerable to redemption demands and could hold originated loans to maturity. ***In order to ensure consistent criteria for the determination by competent authorities of whether a loan-originating AIF can maintain an open-ended structure, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 of the Treaty on the Functioning of the European Union (TFEU) in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[1a] to establish those criteria. Those regulatory technical standards should be adopted on the basis of a draft developed by the European Securities and Markets Authority (ESMA).***

(15) It should be clarified that where an AIFM is subject to the requirements laid down in Directive 2011/61/EU in relation to its managed AIF's lending activities and to the requirements laid down in Regulations (EU) 345/2013[9], (EU) 346/2013[10] and (EU) 2015/760[11] of the European Parliament and of the Council, the specific product rules laid down in Article 3 of Regulations (EU) 345/2013 and Article 3 of Regulation (EU) 346/2013, Chapter II of Regulation (EU) 2015/760, should override more general rules set out in Directive 2011/61/EU.

(16) To support market monitoring by the supervisory authorities the information gathering and sharing through supervisory reporting could be improved. Duplicative reporting requirements that exist under Union and national legislation, in particular Regulation (EU) No 600/2014 of the European Parliament and of the Council[12], Regulation (EU) 2019/834 of the European Parliament and of the Council[13], Regulation (EU) No 1011/2012 of the European Central Bank[14] and Regulation (EU) No 1073/2013 of the European Central Bank[15], could be eliminated to improve efficiency and reduce administrative burdens for AIFMs. The European supervisory authorities ('ESAs') and the European Central Bank (ECB), with the support of national competent authorities, where necessary, should assess the data needs of the different supervisory authorities so that the changes to the supervisory reporting template for AIFMs are effective. ***The***

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[9] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1–17).

[10] Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18–38).

[11] Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98–121).

[12] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 Text with EEA relevance (OJ L 173, 12.6.2014, p. 84).

[13] Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (OJ L 141, 28.5.2019, p. 42).

[14] Regulation (EU) No 1011/2012 of the European Central Bank of 17 October 2012 concerning statistics on holdings of securities (OJ L 305, 1.11.2012, p. 6).

[15] Regulation (EU) No 1073/2013 of the European Central Bank of 18 October 2013 concerning statistics on the assets and liabilities of investment funds (OJ L 297, 7.11.2013, p. 73).

reporting requirements on the obligation to report information on the assets and liabilities of investment funds to the national central bank should be aligned.

(17) In preparation for the future changes to the supervisory reporting obligations the scope of the data that can be required from AIFMs should be widened by removing the limitations, which focus on major trades and exposures or counterparties***, and by adding other categories of data to be supplied to competent authorities***. If ESMA determines that a full portfolio disclosure to supervisors on a periodic basis is warranted, the provisions of Directive 2011/61/EU should accommodate the necessary broadening of the reporting scope.

(18) In order to ensure consistent harmonisation of the supervisory reporting obligations, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 of the Treaty on the Functioning of the European Union (TFEU) in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[16] to set out the contents, forms and procedures to standardise the supervisory reporting process by AIFMs. The regulatory technical standards should set out the contents, forms and procedures to standardise the supervisory reporting process, thus replacing the reporting template laid down in the Commission Delegated Regulation (EU) 231/2013[17]. Those regulatory and implementing technical standards should be adopted on the basis of a draft developed by ESMA.

(19) To standardise the supervisory reporting process the Commission should also be empowered to adopt implementing technical standards developed by ESMA as regards the forms and data standards, reporting frequency and timing to reporting by AIFMs. The Commission should adopt those implementing technical standards by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1095/2010.

(20) In order to ensure a more effective response to liquidity pressures in times of market stress and to protect investors better, rules should be laid down in Directive 2011/61/EU to implement the recommendations of the European Systemic Risk Board (ESRB).[18]

(21) To enable managers of open-ended AIFs based in any Member State to deal with redemption pressures under stressed market conditions, they should be required to choose at least ***two*** LMTs from the harmonised list set out in the Annex, ***with the exception of money market funds in accordance with Regulation (EU) 2017/1131 which can select only one liquidity management tool*** in addition to the possibility to suspend redemptions. When an AIFM takes a decision to activate or deactivate ***certain LMTs in situations of liquidity stress or in other defined circumstances***, it should notify the supervisory authorities. This would allow supervisory authorities to better handle potential spill-overs of liquidity tensions into the wider market.

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[16] Regulation (EU) No 1095/2010 of the European Parliament and of 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 (OJ L 331, 15.12.2010, p. 84).

[17] Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (OJ L 83, 22.3.2013, p. 1–95).

[18] Recommendation of the European Systemic Risk Board of 7 December 2017 on liquidity and leverage risks in investment funds ESRB/2017/6, 2018/C 151/01.

(22) To be able to make an investment decision in line with their risk appetite and liquidity needs, investors should be informed of the conditions for the use of LMTs.

(23) In order to ensure consistent harmonisation in the area of liquidity risk management by the managers of open-ended funds, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 of the Treaty on the Functioning of the European Union (TFEU) in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[19] to specify the ***rules on disclosure to competent authorities and investors of information related to the selection and calibration of*** ▌ LMTs to facilitate market and supervisory convergence. Those regulatory technical standards should be adopted on the basis of a draft developed by ESMA. ***Those standards should recognise that the primary responsibility for liquidity risk management remains with the AIFM.***

(24) To ensure investor protection ***where there are*** financial stability risks, ***in exceptional circumstances and after consulting the manager concerned***, the competent authorities should be able to request that a manager of an open-ended fund activate or deactivate the appropriate LMT.

(25) Depositaries play an important role for safeguarding the interests of investors and should be able to perform their duties regardless of the type of the custodian that safe keeps the funds' assets. Therefore, it is necessary to include central securities depositories (CSDs) in the custody chain when they provide custody services to AIFs in order to ensure that, in all cases, there is a stable information flow between the custodian of an AIF's asset and the depositary. To avoid superfluous efforts, the depositaries should not perform ex-ante due diligence where they intend to delegate custody to CSDs.

(26) In order to improve supervisory cooperation and effectiveness, the host competent authorities should be able to address a reasoned request to the competent authority of an AIFM to take supervisory action against a particular AIFM.

(27) Furthermore, to improve supervisory cooperation, ESMA should be able to request that a competent authority presents a case before ESMA, where that case has cross-border implications and may affect investor protection or financial stability. ESMA analyses of such cases will give other competent authorities a better understanding of the discussed issues and will contribute to preventing similar instances in the future and protect the integrity of the AIF market.

(28) To support supervisory convergence in the area of delegation ESMA should conduct peer review on the supervisory practices with a particular focus on preventing the creation of letter-box entities. ESMA's analysis of the peer reviews will feed into the review of the measures adopted in this Directive and inform the European Parliament, the Council and the Commission of any additional measures that may be needed to support the effectiveness of the delegation regimes laid down in Directive 2011/61/EU.

(28a) AIFs can make an important contribution to the development of the CMU. The growth of the market for AIFs also needs to be consistent with other Union objectives and that market should therefore be encouraged to be smart, sustainable and inclusive. AIFMs are required to comply with Regulation (EU) 2019/2088 and should also ensure that their remuneration policies are consistent with long-term risks,

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[19] Regulation (EU) No 1095/2010 of the European Parliament and of 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 (OJ L 331, 15.12.2010, p. 84).

including environmental, social and governance risks (ESG risks) and sustainability goals. This is even more important where AIFMs make claims as to the sustainable investment policies of the AIFs that they manage. ESMA should update its guidelines on sound remuneration policies under Directive 2011/61/EU as regards aligning incentives with ESG risks in remuneration policies.

(28b) The marketing of UCITS is not always conducted by the management company directly but by one or several distributors either on behalf of the management company or on their own behalf. There could also be cases where an independent financial advisor markets a fund without the management company's knowledge. Most fund distributors are subject to regulatory requirements pursuant to Directive 2014/65/EU or 2016/97/EU, which define the scope and extent of their responsibilities towards their own clients. Directive 2009/65/EC should therefore acknowledge the diversity of distribution arrangements and distinguish between arrangements whereby a distributor operates on behalf of the management company, which should be considered to be a delegation arrangement, and arrangements whereby a distributor acts on its own behalf, in which case the provisions of that Directive regarding delegation should not apply.

(29) Some concentrated markets lack a competitive supply of depositary services. To address this shortage of service providers that can lead to increased costs for AIFMs and a less efficient AIF market, ***Member States should be able to authorise, on a case-by-case basis,*** AIFMs or AIFs to procure depositary services located in other Member States while the Commission assesses, in the context of its review of Directive 2011/61/EU, whether it would be appropriate to propose measures to achieve a more integrated market. ***As part of that review, the Commission should carry out a comprehensive study on the potential benefits and risks of introducing a Union depositary passport, in particular in terms of reducing costs, allowing the choice of more competitive depositary services from other Member States and extending the choices available to managers.***

(30) Opening up the possibility to appoint a depositary in another Member State should be ***accessible on a case-by-case basis*** accompanied by increased supervisory reach. Therefore, the depositary should be required to cooperate not only with its competent authorities but also with the competent authorities of the AIF that has appointed it and to the competent authorities of the AIFM that manages the AIF, if those competent authorities are located in a different Member State than that of the depositary.

(31) In order to better protect investors, the information flow from AIFMs to AIF investors should be increased. To allow an AIFs investors to better track the investment fund's expenses, AIFMs should identify fees that will be borne by the AIFM or its affiliates as well as periodically report on all fees and charges that are directly or indirectly allocated to the AIF or to any of its investments. AIFMs should also be required to report to investors on the portfolio composition of originated loans.

(32) To increase market transparency and effectively employ available AIF market data, ESMA should be permitted to disclose the market data at its disposal in an aggregate or summary form and therefore the confidentiality standard should be relaxed to permit such data use.

(33) The requirements for third-country entities with access to the internal market should be aligned to the standards laid down in the ***last updated version of the*** Council conclusions

▌on the revised EU list on non-cooperative jurisdictions for tax purposes[20] and Directive (EU) 2015/849 of the European Parliament and of the Council.[21] In addition, non-EU AIFs or non-EU AIFMs that are subject to national rules and that are active in individual Member States should satisfy the requirement that they are not located in a third country that is deemed un-cooperative in tax matters ***at the time of the notification to competent authorities of the AIFM's home Member State. A third country that has been continuously mentioned in the Annex II to those Council conclusions for a period of over three years should be considered to be mentioned in the Annex I to those conclusions***.

(34) Directive 2009/65/EC should ensure for the management companies of UCITS comparable conditions where there is no reason for maintaining regulatory differences for UCITS and AIFMs. This concerns delegation regime, regulatory treatment of custodians, supervisory reporting requirements and the availability and use of LMTs.

(35) To ensure the uniform application of the substance requirements for management companies of UCITS, it should be clarified that at the time of application for the authorisation, management companies should provide the competent authorities with information about the human and technical resources that they will employ to carry out their functions and, where applicable, supervise delegates. At least two senior managers should be employed or conduct the business of the management company on a full-time basis and be resident in the Union. ***To ensure that management companies comply with the requirements regarding conflict of interest and acting in the best interest of the UCITSs and their investors, management companies should ensures that at least one member of its governing body is a non-executive director.***

(36) To ensure a uniform application of Directive 2009/65/EC it should be clarified that the delegation rules laid down in Article 13 of that Directive apply to all functions listed in Annex II of that Directive and to the ancillary services referred to in Article 6(3) of that Directive.

(37) To align the legal frameworks of Directives 2011/61/EU and 2009/65/EC with regard to delegation, it should be required that UCITS management companies justify to the competent authorities the delegation of their functions and provide objective reasons for the delegation.

(38) ▌

(39) ▌(40) In order to further align the rules on delegation applicable to AIFMs and UCITS and to achieve a more uniform application of Directives 2011/61/EU and 2009/65/EC, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of specifying the conditions for delegation from a UCITS management company to a third party and the conditions under which a UCITS management company can be deemed a letter-box entity and therefore can no longer be considered to be the manager of the UCITS. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the

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[20] OJ C 64, 27.2.2020, p.8.

[21] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

principles laid down in the Inter-institutional Agreement of 13 April 2016 on Better Law-Making[22]. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

(41) This Directive implements the ESRB[23] recommendations to harmonise LMTs and their use by the managers of open-ended funds, which includes UCITS, to enable a more effective response to liquidity pressures in times of market stress and better protection of investors.

(42) To enable UCITS management companies based in any Member State to deal with redemption pressures under stressed market conditions, they should be required to choose at least ***two*** LMT from the harmonised list set out in the Annex, ***with the exception of money market funds in accordance with Regulation (EU) 2017/1131 which may select only one liquidity management tool*** in addition to the possibility to suspend redemptions. When a management company takes a decision to activate or deactivate ***certain*** LMT***s in situations of liquidity stress or in other defined circumstances***, it should notify the supervisory authorities. This would allow supervisory authorities to better handle potential spill-overs of liquidity tensions into the wider market.

(43) To be able to make an investment decision in line with their risk appetite and liquidity needs, UCITS investors should be informed of the conditions for use of LMTs.

(44) To ensure investor protection ***if there are*** financial stability risks, ***in exceptional circumstances and after consulting the management company concerned***, the competent authorities should be able to request that a UCITS management company activates or deactivates the appropriate LMT.

(45) In order to ensure consistent harmonisation in the area of liquidity risk management by the managers of UCITS, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 of the Treaty on the Functioning of the European Union (TFEU) in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[24] to specify the process for choosing and using LMTs to facilitate market and supervisory convergence. Those regulatory technical standards should be adopted on the basis of a draft developed by ESMA. ***Those standards should recognise that the primary responsibility for liquidity risk management remains with the UCITS manager.***

(46) To support market monitoring by the supervisory authorities, the information gathering and sharing through supervisory reporting should be improved by subjecting UCITS to supervisory reporting obligations, ***in particular as regards the delegation of functions***. The ESAs and the ECB should be requested, with the support of national competent authorities where necessary, to assess the data needs of the different supervisory authorities considering the existing reporting requirements under other Union and

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[22] OJ L 123, 12.5.2016, p. 1.

[23] Recommendation of the European Systemic Risk Board of 7 December 2017 on liquidity and leverage risks in investment funds ESRB/2017/6, 2018/C 151/01.

[24] Regulation (EU) No 1095/2010 of the European Parliament and of 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 (OJ L 331, 15.12.2010, p. 84).

national legislation, in particular Regulation (EU) No 600/2014, Regulation (EU) No 2019/834, Regulation (EU) No 1011/2012 and Regulation (EU) No 1073/2013. The outcome of this preparatory work would permit an informed policy decision as to what extent and in which form UCITS should be reporting to the competent authorities on their trades.

(47) In order to ensure consistent harmonisation of the supervisory reporting obligations, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 of the Treaty on the Functioning of the European Union (TFEU) in accordance with Articles 10 to 14 and Article 15 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[25] to set out the contents, forms and procedures to standardise the supervisory reporting process by UCITS. Those regulatory technical standards should be adopted on the basis of a draft developed by ESMA.

(48) To standardise the supervisory reporting process the Commission should also be empowered to adopt implementing technical standards developed by ESMA as regards the forms and data standards, reporting frequency and timing to reporting by UCITS. The Commission should adopt those implementing technical standards by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1095/2010.

(49) To ensure investor protection, and in particular to ensure that in all cases there is a stable information flow between the custodian of the UCITS' asset and the depositary, the depositary regime should be extended to include CSDs in the custody chain when they provide custody services to UCITS. To avoid superfluous efforts, the depositaries should not perform ex-ante due diligence where they intend to delegate custody to CSDs.

(50) To support supervisory convergence in the area of delegation ESMA should conduct peer reviews on the supervisory practices particularly focusing on preventing creation of letter-box entities. ESMA's analysis of the peer reviews would feed into the review of the measures adopted in this Directive and inform the European Parliament, the Council and the Commission what additional measures may be needed to support effectiveness of the delegation regime laid down in Directive 2009/65/EC.

(51) In order to improve supervisory cooperation and effectiveness, the competent authorities of the host Member State should be able to address a reasoned request to the competent authority of the UCITS home Member State to take supervisory action against a particular UCITS.

(52) Furthermore, to improve supervisory cooperation, ESMA should be able to request that a competent authority presents a case before the ESMA, where that case has cross-border implications and may affect investor protection or financial stability. ESMA analyses of such cases will give other competent authorities a better understanding of the discussed issues and will contribute to preventing similar instances in the future and protect the integrity of the UCITS markets.

(52a) Member States should require UCITS management companies and AIFMs to act honestly and fairly as regards the fees and costs charged to investors. At present,

[25] Regulation (EU) No 1095/2010 of the European Parliament and of 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 (OJ L 331, 15.12.2010, p. 84).

divergent market and supervisory practices exist as to what industry and supervisors might consider as 'due' or 'undue' costs and evidence has shown a disparity in the costs charged in different Member States and in the costs charged to retail investors compared to professional investors. To ensure that UCITS management companies and AIFMs do not charge undue costs to retail investors, ESMA should be required to study the reasons for high costs being charged and possible actions needed to address them. In the case of UCITS, ESMA should be able, in the light of that study, and without prejudice to other legislative or regulatory options, to develop draft regulatory technical standards stipulating criteria for the assessment of undue costs and actions national competent authorities should take in respect of inappropriate or undue costs.

(52b) In carrying out its functions under Directives 2009/65/EC and 2011/61/EU, ESMA should take a risk-based approach.

(52c) In order to give managers or management companies sufficient time to adapt to the new requirements, managers or management companies of existing AIFs or UCITS should be subject to a grandfathering clause,

HAVE ADOPTED THIS DIRECTIVE

Article 1

Amendments to Directive 2011/61/EU

Directive 2011/61/EU is amended as follows:

(1) in Article 4, paragraph 1 ***is amended as follows:***

(a) point (ag) is replaced by the following:

'(ag) 'professional investor' means an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to Directive 2014/65/EC;'

(b) the following point (ap) is added:

'(ap) central securities depository' means a central securities depository as defined in Article 2(1), point (1), of Regulation (EU) No 909/2014 of the European Parliament and of the Council*

* Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1)';

(c) the following points are inserted:

(apa) 'loan origination' means the granting of loans by an AIF as the original lender;

(apb) 'shareholder loan' means a loan which is granted by an AIF to an undertaking in which it holds directly or indirectly at least 5 % of the capital or voting rights, where the loan cannot be sold to third-parties independently of the capital instruments held by the AIF in the same undertaking;

(apc) 'loan-originating AIF' means an AIF whose principal activity is to originate loans and for which the notional value of its originated loans exceeds 60 % of its net asset

value;

(apd) ***‘capital’ means aggregate capital contributions and uncalled committed capital, calculated on the basis of amounts investible after deduction of all fees, charges and expenses that are directly or indirectly borne by investors;***

(ape) ***‘leveraged AIF’ means an AIF whose exposures are increased by the managing AIFM, whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means.***

(2) Article 6 is amended as follows:

(a) in paragraph 4, the following points (c) and (d) are added:

‘(c) benchmark administration in accordance with Regulation (EU) 2016/1011;

(d) credit servicing in accordance with of Directive 2021/… of the European Parliament and of the Council;’;

(b) paragraph 6 is replaced by the following:

‘6. Articles 2(2), Article 15, Article 16 except for the first subparagraph of paragraph (5), and Articles 23, 24 and 25 of Directive 2014/65/EU shall apply where the services referred to in paragraph 4, points (a) and (b), are provided by AIFMs.’;

(3) Article 7 is amended as follows:

(a) paragraph 2 is replaced by the following:

‘2. Member States shall require that an AIFM applying for an authorisation provides the following information relating to the AIFM to the competent authorities of its home Member State:

(a) information about the persons effectively conducting the business of the AIFM, in particular with regard to the functions referred to in Annex I, including:

(i) a ▌ description of their role, title and level of seniority;

(ii) a description of their reporting lines and responsibilities in the AIFM and outside the AIFM;

(iii) an overview of their time allocated to each responsibility;

(iv) a description of the technical and human resources that support their activities;

(b) information on the identities of the AIFM’s shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and on the amounts of those holdings;

(c) a programme of activity setting out the organisational structure of the AIFM, including information on how the AIFM intends to comply with its obligations under Chapters II, III, IV, and, where applicable, Chapters V, VI, VII and VIII ***of this Directive, and with its obligations under Regulation (EU) 2019/2088*** and a detailed description of the appropriate human and technical resources that will be used by the AIFM to this effect;

(d) information on the remuneration policies and practices pursuant to Article 13;

(e) information on arrangements made for the delegation and sub-delegation to third parties of functions as referred to in Article 20 ***comprising:***

(i) the legal name and relevant legal identifier of the AIFM;

(ii) the legal name and relevant legal identifier of the AIF and its investment strategy;

(iii) the legal name and relevant legal identifier of each delegate, its jurisdiction of establishment and, where relevant, its supervisory authority;

(iv) a brief description of the delegated risk management functions, including whether each such delegation amounts to a partial or full delegation;

(v) a brief description of the delegated portfolio management functions, by investment strategy and relevant geographies, including whether each such delegation amounts to a partial or full delegation;

(vi) a brief description of other functions listed in Annex I which the AIFM additionally performs;

(vii) for each of the following, a description of the human and technical resources';

- ***employed by or committed to the AIFM for performing day-to-day portfolio or risk management tasks within the AIFM;***
- ***employed by or committed to the delegate for performing those services on a delegated basis; and***
- ***employed by or committed to the AIFM for monitoring and controlling the delegate;***

(viii) an explanation of the added value of the delegation to the investor.'

(aa) the ***following paragraph is inserted:***

'4a. ***An AIFM shall report to the competent authority any material changes that may affect the scope of the authorisation by that authority and in particular any modification on the arrangements of the delegation and sub-delegation to third parties provided at the time of authorisation.***'

(b) paragraph 5 is replaced by the following:

'5. The competent authorities shall, on a quarterly basis, inform ESMA of authorisations granted or withdrawn in accordance with this Chapter, ***and of any changes in the scope of authorisations by those authorities, and in particular of material changes to the information provided in accordance with paragraphs 2 and 3 of this Article***.

ESMA shall keep a central public register identifying each AIFM authorised under this Directive, a list of the AIFs managed and/or marketed in the Union by such AIFMs and the

competent authority for each such AIFM. The register shall be made available in electronic format.

▌

(ba) paragraph 6 is replaced by the following:

'***6. In order to ensure consistent harmonisation of this Article, ESMA may develop draft regulatory technical standards to specify the information to be provided to the competent authorities in the application for the authorisation of the AIFM, including the programme of activity, and to specify situations where the name of the AIFs it intends to manage could be materially deceptive or misleading to the investor.***

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.';

(bb) paragraph 7 is replaced by the following:

'***7. In order to ensure uniform conditions for the application of this Article, ESMA may develop draft implementing technical standards to determine standard forms, templates and procedures for the provision of information provided for in the first subparagraph of paragraph 6. ESMA may design such forms, templates and procedures with the objective of obtaining information which is comparable between AIFMs and between jurisdictions. ESMA may also take into account the information requirements for the provision of the report referred to in paragraph 9.***

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph of this paragraph in accordance with Article 15 of Regulation (EU) No 1095/2010.'

(c) the following paragraph ▌9 ***is*** added:

▌

9. ***By … [24 months after the date of application of this amending directive],*** ESMA shall provide the European Parliament, the Council and the Commission with ▌***a report***, ▌analysing market practices regarding delegation▌ and compliance with Articles 7 and 20.';

(4) in Article 8(1), point (c) is replaced by the following:

'(c) the persons who effectively conduct the business of the AIFM are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the AIF managed by the AIFM, the names of those persons and of every person succeeding them in the office being communicated forthwith to the competent authorities of the home Member States of the AIFM and the conduct of the business of the AIFM being decided by at least two natural persons who are either employed full-time by that AIFM or who are committed full-time ***or on a full-time equivalent basis*** to conduct the business of that AIFM and who are resident in the Union meeting such conditions;

(ca) where an AIFM manages an Alternative Investment Fund that is marketed to retail investors, the AIFM ensures that at least one member of its governing body is a non-executive director. The AIFM, in appointing a non-executive director of its governing body, shall determine whether such a member is independent in character and judgement and whether there are relationships or circumstances, which are likely to affect that member's judgement. The AIFM shall take reasonable steps to ensure that any non-executive directors appointed to its governing body have sufficient expertise and experience to be able to make judgements

on whether the AIFM is managing AIFs in the best interest of investors. Non-executive directors shall contribute to ensuring that the AIFM complies with the requirements regarding conflicts of interests and acting in the best interests of the AIFs and their investors, as specified in this Directive;

(4a) in Article 12, the following paragraph is inserted:

'3a. For the purposes of point (f) of the first subparagraph of paragraph 1, ESMA shall ... [by 18 months from entry into force of this amending Directive] submit a report to the European Parliament, the Council and the Commission:

(1) assessing the costs charged by AIFMs to investors in AIFs, and the reasons for cost levels and for differences between them;

(2) proposing criteria for assessing whether the level of such costs is or is not appropriate, in particular when compared to the level of costs in other jurisdictions worldwide;

(3) proposing, if necessary, options for action by competent authorities or by legislators in respect of inappropriate or undue levels of such costs. The report shall assess the potential impact of each such option.

That report may be combined with the report required pursuant Article 14(2a) of Directive 2009/65/EC of the European Parliament and of the Council[26].

Competent Authorities shall have the power to require, on a one-time basis, information on costs from AIFMs insofar as that is needed for the purpose of that report. The competent authorities shall avoid duplication with existing reporting obligations.

Competent authorities shall provide data to ESMA to contribute to that report ... [by X months before the date specified in the first subparagraph].'

(4b) Article 14 is amended as follows:

(a) the following paragraph is inserted :

2a. Where an AIFM intends to manage an AIF on behalf of a third-party, including but not limited to under a mandate in accordance with Article 6(4)(a) or under a delegation in accordance with Article 20, and where the third-party is to have significant control over the AIF's design, distribution and management, the AIFM shall employ heightened scrutiny of the potential for conflicts of interest. AIFMs engaging in such a relationship shall submit detailed explanations and evidence on their compliance with paragraphs 1 and 2 of this Article to the competent authorities of their home Member State. In particular, they shall specify how they prevent systematic conflicts of interest or any other material conflicts of interest arising from the relationship, how any existing or potential conflicts are effectively managed in the best interest of investors and how this is clearly and comprehensively disclosed to investors.

(b) the following paragraph is added:

"4a. In order to ensure uniform conditions of application of this Article, ESMA shall develop draft regulatory technical standards to specify:

(a) the types of relationship between the AIFM and a third-party when the AIFM

[26] 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) (recast) (OJ L 302, 17.11.2009, p. 32).

manages an AIF on behalf of the third-party and of conflicts of interest as referred to in paragraph 2a;

(b) the criteria to be used by the relevant competent authorities to assess whether AIFMs comply with their obligations under paragraph 2a.

Power is conferred on the Commission to adopt the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

(5) Article 15 is amended as follows:

(a) in paragraph 3, the following point (d) is added:

‘(d) for loan ***originating*** activities, ***other than in respect of shareholder loans where such loans do not exceed in aggregate 150 % of the capital of the AIF***, implement effective policies, procedures and processes for the granting of credit, for assessing the credit risk and for administering and monitoring their credit portfolio, keep those policies, procedures and processes up to date and effective and review them regularly and at least once a year.’;

(b) the following paragraphs 4a to 4e***a*** are inserted between the paragraphs 4 and 5:

‘4a. An AIFM shall ensure that a loan originated to any single borrower by the AIF it manages does not exceed 20 % of the AIF’s capital where the borrower is one of the following:

(a) a financial undertaking within the meaning of Article 13(25) of Directive 2009/138/EC;

(b) a collective investment undertaking within the meaning of Article 4(1), point (a), of this Directive or within the meaning of Article 1(2) of Directive 2009/65/EC.’

The restriction set out in the first subparagraph shall be without prejudice to the thresholds, restrictions and conditions set out in Regulations (EU) 2015/760[27], (EU) 345/2013[28] and (EU) 346/2013[29].

4b. The investment limit of 20 % laid down in paragraph 4a shall:

(a) apply by the date specified in the rules or instruments of incorporation of the AIF;

(b) cease to apply once the AIF starts to sell assets in order to redeem investors' units or shares after the end of the life of the AIF;

(c) be temporarily suspended for up to 12 months where the AIF raises additional capital or reduces its existing capital.

4c. The application date referred to in paragraph 4b, point (a), shall take account of the particular features and characteristics of the assets to be invested by the AIF, and shall be no later than half the life of the AIF as indicated in the AIF’s constitutive documents. In exceptional circumstances, the competent authority of the AIFM, upon submission of a duly justified investment plan, may approve an extension of this time limit by no more than one additional

[27] Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98–121).

[28] Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1–17).

[29] Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18–38).

year.

4d. The AIF shall not grant loans to the following entities:

(a) its AIFM or the staff of its AIFM;

(aa) an entity within the same group as the AIFM as defined in Article 2(11) of Directive 2013/34/EU of the European Parliament and the Council[30], except where that entity is a financial undertaking that exclusively finances borrowers that are not mentioned in points (a), (b) and (c) of this paragraph;

(b) ***its depositary and delegates of*** its depositary;

(c) the entity to which its AIFM has delegated functions in accordance with Article 20.

4da. The proceeds of the loan, minus the fees for the administration of the loan, shall be attributed to the fund in full. All costs and expenses linked to the administration of the loan shall be clearly disclosed in accordance with Article 23 of this Directive.

4e. An AIFM shall ensure that the AIF it manages retains, on an ongoing basis ***and until maturity***, 5% of the notional value of the loans it has originated and subsequently sold on the secondary market.

The requirement set out in the first subparagraph does not apply to the loans that the AIF has purchased on the secondary market ***or where one of the following applies:***

a) the sale of the loan is necessary for the AIF not to be in breach of its mandate or of one of its investment or diversification rules and such potential breach is unintentional on the part of the manager, for instance as a result of the exercise of subscription or redemption rights;
b) the disposal is necessary as a result of the Union sanctions;
c) the AIF needs to dispose of the loans in order to redeem investors' units or shares as part of the wind down of the AIF.

4ea. Member States shall prohibit AIFMs from managing AIFs whose investment strategy is to originate loans with the sole purpose of transferring those loans to third parties ("originate-to-distribute").';

(6) in Article 16, the following paragraphs 2a to 2h are inserted:

'2a. An AIFM shall ensure that the ***loan originating*** AIF it manages is closed-ended ***when the AIFM is not able to demonstrate to the competent authorities of its home Member State that the AIF has a sound liquidity risk management system that ensures the compatibility of its liquidity management system with its redemption policy***.

The requirement set out in the first subparagraph shall be without prejudice to the thresholds, restrictions or conditions set out in Regulations (EU) 345/2013, (EU) 346/2013, and (EU) 2015/760.

2aa. ESMA shall develop regulatory technical standards as regards the assessment by competent authorities whether a loan-originating AIF has a sound liquidity management

[30] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

system and may maintain an open-ended structure, having regard to the underlying loan exposure, average repayment time of the loans and overall granularity and composition of AIF portfolios. In drawing up those regulatory technical standards, ESMA shall consider whether that assessment should include specific liquidity management tools including those set out in points 1 and 2 of the list set out in Annex V and also whether such AIFs should be subject to any additional disclosure as regards the specificities of loan-originating funds and their use of liquidity management tools in addition to the requirements set out in paragraph 2b.

2b. After assessing the suitability in relation to the pursued investment strategy, the liquidity profile and the redemption policy, an AIFM that manages an open-ended AIF shall select at least ***two*** appropriate liquidity management tool***s*** from the list set out in Annex V, points 2 to ***7***, for possible use in the interest of the AIF's investors. ***That selection shall not prevent an AIFM from using other tools referred to in Annex V, points 2 to 8.*** The AIFM shall implement detailed policies and procedures for the activation and deactivation of any selected liquidity management tool and the operational and administrative arrangements for the use of such tool***s***.

By way of derogation from the first subparagraph, an AIFM may select only one liquidity management tool from Annex V, points 2 to 7, for an AIF it manages, if that AIF is authorised as a money market fund in accordance with Regulation (EU) 2017/1131.

2c. An AIFM that manages an open-ended AIF may, in the interest of AIF investors, temporarily suspend the repurchase or redemption of the AIF units or activate other liquidity management tools selected from the list set out in Annex V, points 2 to ***8***, ***where those tools are*** included in the fund rules or the instruments of incorporation of the AIFM.

The temporary suspension referred to in the first subparagraph may only be provided for in exceptional cases where circumstances so require and where suspension is justified having regard to the interests of the AIF investors.

2d. An AIFM shall, without delay, notify the competent authorities of its home Member State ***in any of the following circumstances:***

- ***when, in situations of liquidity stress, an AIFM activates or deactivates one of the liquidity management tools listed in Annex V, points 1 and 2 ;***
- ***when activating or deactivating side pockets as referred to in point 8 of that Annex;***
- when activating or deactivating ***any other*** liquidity management tool ***in a manner that is not in the ordinary course of business as envisaged in the fund documentation***.

The competent authorities of the home Member State of the AIFM shall notify, without delay, the competent authorities of a host Member State of the AIFM ***and*** ESMA ▌ of any notifications received in accordance with this paragraph. ***The competent authorities of the home Member State of the AIFM shall notify the ESRB if there is any potential risk to the stability and integrity of the financial system. ESMA shall have the power to share the information received in accordance with this paragraph with competent authorities.***

2e. Member States shall ensure that at least the liquidity management tools set out in Annex V are available to AIFMs managing open-ended AIFs.

2f. ESMA shall develop ***guidelines*** to specify ***best practice as regards*** the characteristics of the liquidity management tools set out in Annex V ***taking account of the diversity of investment***

strategies and underlying assets.

2g. ***By ... [12 months after entry into force of this amending Directive]*** ESMA shall develop draft regulatory technical standards on ***the disclosure to competent authorities and to investors of information related to the selection and calibration of*** liquidity management tools by the AIFMs for liquidity risk management and for mitigating financial stability risks. ***Those standards shall recognise that the primary responsibility for liquidity risk management remains with the AIFM. They shall allow adequate time for adaptation before they apply, in particular for existing AIFs.***

2h. Power is delegated to the Commission to adopt the regulatory technical standards referred to in paragraphs ***2aa*** and 2g of this Article in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.';

(7) Article 20 is amended as follows:

(a) paragraph 1 is amended as follows:

(a) the introductory phrase is replaced by the following:

'1. AIFMs, which intend to delegate to third parties the task of carrying out, on their behalf, one or more of the functions listed in Annex I or of the services referred to in Article 6(4), shall notify the competent authorities of their home Member State before the delegation arrangements become effective. The following conditions shall be met:';

(b) point (f) is replaced by the following:

'(f) the AIFM must be able to demonstrate that the delegate is qualified and capable of undertaking the functions and providing the services in question, that it was selected with all due care and that the AIFM is in a position to monitor effectively at any time the delegated activity, to give at any time further instructions to the delegate and to withdraw the delegation with immediate effect when this is in the interest of investors.';

(b) paragraph 3 is replaced by the following:

'3. The AIFM's liability towards its clients, the AIF and its investors shall not be affected by the fact that the AIFM has delegated functions to a third party, or by any further sub-delegation, ***irrespective of the regulatory status or location of any delegate or subdelegate***, nor shall the AIFM delegate its functions to the extent that, in essence, it can no longer be considered to be the manager of the AIF ▌ and to the extent that it becomes a letter-box entity.';

'3a. The AIFM shall ensure that the management of funds for which it is the AIFM complies with the requirements set out in this Directive. That obligation shall apply irrespective of the regulatory status or location of any delegate or subdelegate.'

(c) in paragraph 4, the introductory phrase is replaced by the following:

'4. The third party may sub-delegate any of the functions and provision of services delegated to it provided that the following conditions are met:';

(d) the following paragraph is inserted:

'***6a. By way of derogation from paragraphs 1 to 6 of this Article, where the marketing function as referred to in Annex I, paragraph 2, point (b) is performed by one or several distributors which are acting on their own behalf and which market the AIF under Directive 2014/65/EU or through insurance-based investment products in accordance with Directive 2016/97/EU, such function shall not be considered to be a delegation subject to the***

requirements set out in paragraphs 1 to 6 of this Article irrespective of any distribution agreement between the AIFM and the distributor.';

(8) Article 21 is amended as follows:

(-a) the following paragraph is inserted:

'***5a. The home Member State of an AIF may entitle its national competent authorities to allow, following a case-by-case assessment, institutions referred to in Article 21(3), point (a) and established in another Member State to be appointed as a depositary, provided that the following conditions are fulfilled:***

(i) the competent authorities have received a motivated request by the AIFM for the appointment of a depositary in another Member State; that request shall demonstrate the lack of the relevant depositary services able to meet the needs of the AIF having regard to its operational strategy; and

(ii) the national depositary market of the home Member State of the AIF fulfils at least one of the following conditions:

- that market consists of fewer than seven depositaries providing depositary services to EU AIFs, authorised or registered under the applicable national law in accordance with Article 4, point (k), point (i) of this Directive, and managed by an EU AIFMs authorised in accordance with Article 7(1) of this Directive, and none of those depositaries has assets safekept within the meaning of Article 21(8), points (a) and (b) exceeding EUR 1 billion or the equivalent in any other currency. Assets held by a depositary acting under Article 36(1a) of this Directive and the own assets of a depositary shall be excluded from the determination whether this condition is met;

- the aggregate amount in that market of assets safekept, in the meaning of Article 21(8), points (a) and (b), on behalf of EU AIFs, authorised or registered under the applicable national law in accordance with Article 4, point (k), point (i) of this Directive, and managed by an EU AIFM ,authorised in accordance with Article 7(1) of this Directive, does not exceed the amount of EUR 60 billion or the equivalent in any other currency. Assets safekept by depositaries acting under Article 36(1a) of this Directive and the own assets of depositaries shall be excluded from the determination whether this condition is met.';

(a) in paragraph 6, points (c) and (d) are replaced by the following:

'(c) the third country where the depositary is established is not identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849 ***at the time of the AIFM's application for authorisation in accordance with Article 7(1)***;';

(d) the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, in so far as different, the home Member State of the AIFM, have signed an agreement with the third country where the depositary is established which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements and the third country is not mentioned in Annex I to the ***relevant last updated version of the*** Council conclusions ▌ on the revised EU list on non-cooperative jurisdictions for tax purposes[31];' ***If a third country where the non-EU AIF is established is***

[31] OJ C 64, 27.2.2020, p. 8.

added to that annex after the time of the AIFM's application for authorisation in accordance with Article 7(1), closed-ended funds shall continue to be considered to meet the criteria of this paragraph for a period of two years.

For the purposes of this paragraph, a third country that has been continuously mentioned in Annex II to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes for a period of over three years shall be considered to be mentioned in Annex I to those conclusions.';

(b) paragraph 11 is amended as follows:

(i) in the second subparagraph, point (c) is replaced by the following:

'(c) the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it wants to delegate parts of its tasks, except where that third party is a central securities depository acting in the capacity of an issuer CSD as defined in ***the delegated act adopted on the basis of Articles 29(3) and 48(10) of Regulation (EU) No. 909/2014***, and keeps exercising all due skill, care and diligence in the periodic review and ongoing monitoring of any third party to whom it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it;

▌

(ii) the fifth subparagraph is replaced by the following:

'For the purposes of this paragraph, the provision of services by a central securities depository acting in the capacity of an issuer CSD as defined in ***the delegated act adopted on the basis of Articles 29(3) and 48(10) of Regulation (EU) No 909/2014*** shall not be considered a delegation of the depositary's custody functions. ***The provision of services by a central securities depository acting in the capacity of an investor CSD as defined in that delegated act shall be considered a delegation of the depositary's custody functions.***';

(c) paragraph 16 is replaced by the following:

'16. The depositary shall make available to its competent authorities, to the competent authorities of the AIF that has appointed it as a depositary and to the competent authorities of the AIFM that manages that AIF, ▌ all information that it has obtained while performing its duties and that may be necessary for the competent authorities of the AIF or the AIFM. If the competent authorities of the AIF or the AIFM are different from those of the depositary, the competent authorities of the depositary shall share the information received without delay with the competent authorities of the AIF and the AIFM, ***and the competent authorities of the AIF or the AIFM shall share without delay with the competent authorities of the depositary any information relevant for the exercise of those authorities' supervisory powers***.';

(9) Article 23 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) point (h) is replaced by the following:

'(h) a description of the AIF's liquidity risk management, including the redemption rights both in normal and in exceptional circumstances, disclosing the possibility and conditions for using liquidity management tools selected in accordance with Article 16(2b), and the existing redemption arrangements with investors.';

(ii) point (ia) is inserted:

'(ia) a list of fees and charges that will be applied in connection with the operation of the AIF

and that will be borne by the AIFM▌.';

(b) in paragraph 4, the following points (d), (e) and (f) are added:

'(d) ***portfolio composition of*** originated loan***s***;

(e) on ***an annual*** basis, all direct and indirect fees and charges that were directly or indirectly charged ▌to the AIF▌;

(f) on ***an annual*** basis, any parent company, subsidiary or special purpose entity established in relation to the AIF's investments by the AIFM▌.';

(10) Article 24 is amended as follows:

(a) paragraph 1 is replaced by the following:

'1. An AIFM shall regularly report to the competent authorities of its home Member State on the markets and instruments in which it trades on behalf of the AIFs it manages***, and on other relevant economic and accounting information set out in paragraph 2.***

It shall provide information on the instruments in which it is trading, on markets of which it is a member or where it actively trades, and on the exposures of each of the AIFs it manages.';

(b) in paragraph 2:

(i) point (d) is deleted;

(ii) the following points are added:

'(ea) the total amount of leverage of the net asset value employed by the AIF;

(eb) with respect to each AIF managed or marketed in the Union by an authorised AIFM, information regarding delegation arrangements concerning portfolio management or risk management functions and in particular:

(i) information on the entities to which such functions have been delegated, namely the name and relevant legal identifier of each delegate, its jurisdiction of establishment and, where relevant, its supervisory authority;

(ia) for each of the following, a description of the human and technical resources:

- employed by or committed to the AIFM for performing day-to-day portfolio or risk management tasks within the AIFM;

- employed by or committed to the delegate for performing those services on a delegated basis; and

- employed by or committed to the AIFM for monitoring and controlling the delegate;

(ii) information on the function delegated, the type of delegation (full or partial), and the date of the delegation agreement or contract;

(iii) where sub-delegation arrangements are in place, the same information in respect of the sub-delegates and the functions sub-delegated;

(iv) the date of conclusion and expiration of the delegation and sub-delegation arrangements;

(v) confirmation that the AIFM has implemented periodic due diligence measures to oversee, monitor and control the delegate, and kept records of issues identified and, where relevant, the measures adopted to address those issues.'

(c) in paragraph 5, second subparagraph is replaced by the following:'In exceptional circumstances and where required in order to ensure the stability and integrity of the financial system, or to promote long-term sustainable growth, ESMA after consulting the ESRB may request the competent authorities of the home Member State to impose additional reporting requirements.';

(d) paragraph 6 is replaced by the following:

'6. ESMA shall develop draft regulatory technical standards specifying the details to be reported according to paragraphs 1 and ***points (a) to (ea) of paragraph 2. Those draft regulatory technical standards shall also set out the appropriate level of standardisation of the information to be reported according to paragraph 2, point (eb). In order to reduce duplication and inconsistencies between reporting frameworks in the asset management sector and other sectors of the financial industry,*** ESMA shall take into account:

(i) other reporting requirements to which the AIFMs are subject;
(ii) international developments and standards agreed at Union or global level; and
(iii) the report issued in accordance with paragraph 2 of Article 69b.

ESMA shall submit those draft regulatory technical standards to the Commission by [Please insert date = 36 months after the entry into force of this Directive].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.';

(d) the following paragraph 7 is added:

'7. ESMA shall develop draft implementing technical standards specifying:

(a) the format and data standards for the reports referred to in paragraphs 1 and 2***, which shall include in particular relevant legal identifiers and international securities identification numbers (ISINs)***;

(b) the reporting frequency and timing;

(ba) methods and arrangements for submitting the reports referred to in paragraphs 1 and 2, including methods and arrangements to improve data standardisation and efficient sharing and use of data already reported in any Union reporting framework by any relevant competent authority, at Union or national level, taking into account the findings of the report issued in accordance with paragraph 2 of Article 69b;

(bb) the reporting template that includes a minimum set of indicators that would be relevant for AIFs to provide in exceptional circumstances referred to in paragraph 5.

When developing those draft implementing technical standards, ESMA shall take into account international developments and standards agreed at Union or global level and the findings of the report issued in accordance with Article 69b(2).

ESMA shall submit those draft implementing technical standards to the Commission by [Please insert date = 36 months after the entry into force of this Directive].

Power is delegated to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.';

(10a) in Article 25, the following paragraph is inserted:

'3a Limits to the level of leverage referred to in paragraph 3 shall be based on the leverage measures specified in accordance with Article 4(3) of this Directive.';

(10b) in Article 31, the following paragraph is added:

'6a. The provisions of this article shall not apply to AIFs constituted exclusively for the purpose of purchasing company shares and proposed to employees of these companies within the framework of employee savings schemes.'

(11) in Article 35(2), points (b) and (c) are replaced by the following:

'(b) the third country where the non-EU AIF is established is not identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849 ***at the time of the AIFM's application for authorisation in accordance with Article 7(1)***;

(c) the third country where the non-EU AIF is established has signed an agreement with the home Member State of the authorised AIFM and with each other Member State in which the units or shares of the non-EU AIF are intended to be marketed, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements, and the third country is not mentioned in Annex I to the Council conclusions ▌on the revised EU list on non-cooperative jurisdictions for tax purposes ***applicable at the time of the AIFM's application for authorisation in accordance with Article 7(1)***[32]***.***

If a third country where the non-EU AIF is established is added to Annex I to the relevant last updated version of the Council conclusions on the revised EU list on non-cooperative jurisdictions for tax purposed after the AIFM's application for authorisation in accordance with Article 7(1), closed-ended funds shall continue to be considered to meet that criterion for a period of two years.

For the purposes of this paragraph, a third country that has been continuously mentioned in Annex II to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes for a period of over three years shall be considered to be mentioned in Annex I to those conclusions.';

(12) Article 36(1) is amended as follows:

(a) point (c) is replaced by the following:

'(c) the third country where the non-EU AIF is established is not identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849 ***at the time of the AIFM's application for authorisation in accordance with Article 7(1)***.';

(b) the following point (d) is added:

'(d) the third country where the non-EU AIF is established has signed an agreement with the home Member State of the authorised AIFM and with each other Member State in which the units or shares of the non-EU AIF are intended to be marketed, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on

[32] OJ C 64, 27.2.2020, p. 8.

Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements, and that third country is not mentioned in Annex I to ***the relevant last updated version of*** the Council conclusions ▌on the revised EU list on non-cooperative jurisdictions for tax purposes ***applicable at the time of the AIFM's application for authorisation in accordance with Article 7(1).***

If the third country where the non-EU AIF is established is added to Annex I to the relevant last updated version of the Council conclusions on the revised EU list on non-cooperative jurisdictions for tax purposed after the time of the AIFM's application for authorisation in accordance with Article 7(1), closed-ended funds shall continue to be considered to meet that criterion for a period of two years.

For the purposes of this paragraph, a third country that has been continuously mentioned in Annex II to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes for a period of over three years shall be considered to be mentioned in Annex I to those conclusions.

(13) in Article 37(7), points (e) and (f) are replaced by the following:

'(e) the third country where the non-EU AIFM is established is not identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849 ***at the time of the AIFM's application for authorisation in accordance with paragraph 1 of this Article***;

(f) the third country where the non-EU AIFM is established has signed an agreement with the Member State of reference, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements and the third country is not mentioned in Annex I to the Council conclusions ▌on the revised EU list on non-cooperative jurisdictions for tax purposes ***applicable at the time of the AIFM's application for authorisation in accordance with paragraph 1 of this Article.***

If the third country where the non-EU AIF is established is added to Annex I to the relevant last updated version of the Council conclusions on the revised EU list on non-cooperative jurisdictions for tax purposes after the time of the AIFM's application for authorisation in accordance with paragraph 1 of this Article, closed-ended funds shall continue to be considered to meet that criterion for a period of two years.;

For the purposes of this paragraph, a third country that has been continuously mentioned in Annex II to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes for a period of over three years shall be considered to be mentioned in Annex I to those conclusions';

(14) the following Article 38a is inserted:

'Article 38a

Peer review of application of the delegation regime

1. ***By … [12 months before the date of the review referred to in Article 69b],*** ESMA shall▌ conduct a ***one-off comprehensive*** peer review analysis of the supervisory activities of the competent authorities in relation to the application of Article 20. That peer review analysis shall focus on the measures taken to prevent that AIFMs, which delegate performance of portfolio management or risk management to third parties located in third countries, become letter-box entities.

2. When conducting the peer review analysis, ESMA shall use transparent methods to ensure an objective assessment and comparison between the competent authorities reviewed.’;

(15) in Article 40(2), points (b) and (c) are replaced by the following:

‘(b) the third country where the non-EU AIF is established is not identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849 ***at the time of the AIFM’s application for authorisation in accordance with Article 39(1);***

(c) the third country where the non-EU AIF is established has signed an agreement with the Member State of reference and with each other Member State in which the units or shares of the non-EU AIF are intended to be marketed which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements, and the third country is not mentioned in Annex I to the ***the relevant last updated version of the*** Council conclusions ▌on the revised EU list on non-cooperative jurisdictions for tax purposes ***applicable at the time of the AIFM’s application for authorisation in accordance with Article 39(1).***

If the third-country where the non-EU AIF is established is added to Annex I to the relevant last updated version of the Council conclusions on the revised EU list on non-cooperative jurisdictions for tax purposed after the time of the AIFM’s application for authorisation in accordance with Article 39(1), closed-ended funds shall continue to be considered to meet that criterion for a period of two years.

For the purposes of this paragraph, a third country that has been continuously mentioned in Annex II to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes for a period of over three years shall be considered to be mentioned in Annex I to those conclusions.’;

(16) Article 42(1) is amended as follows:

(a) point (c) is replaced by the following:

‘(c) the third country where the non-EU AIFM or the non-EU AIF is established is not identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849 ***at the time the Member State allows the non-EU AIF to be marketed to professional investors in its territory***.’;

(b) the following point (d) is added:

‘(d) the third country where the non-EU AIF or non-EU AIFM is established has signed an agreement with the Member State in which the units or shares of the non-EU AIF are intended to be marketed, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements, and that third country is not mentioned in Annex I to ***the relevant last updated version of*** the Council conclusions ▌on the revised EU list on non-cooperative jurisdictions for tax purposes ***applicable at the time the Member State allows the non-EU AIF to be marketed to professional investors in its territory.***

If the third-country where the non-EU AIF is established is added to Annex I to the relevant last updated version of the Council conclusions on the revised EU list on non-cooperative jurisdictions for tax purposes after the time the Member State allows the non-EU AIF to be marketed to professional investors in its territory, closed-ended funds shall continue to be

considered to meet that criterion for a period of two years.

For the purposes of this paragraph, a third country that has been continuously mentioned in Annex II to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes for a period of over three years shall be considered to be mentioned in Annex I to those conclusions.';

(16a) in Article 43, the following paragraph (3a) is added:

'3a. This Article shall not apply to AIFs constituted exclusively for the purpose of purchasing company shares and proposed to employees of these companies within the framework of employee savings schemes.';

(17) in Article 46(2), point (j) is replaced by the following:

'(j) in the interest of investors▌, ***in exceptional circumstances and after consulting the AIFM, and if there are reasonable and balanced investor protection or financial stability risks that necessitate this requirement,*** require AIFMs to activate or deactivate a liquidity management tool referred to in point 1 or 2 of Annex V▌,whichever is more suitable considering the type of open-ended AIF or group of open-ended AIFs concerned▌.';

(18) Article 47 is amended as follows:

(a) paragraph 3 is replaced by the following:

'3. All the information exchanged under this Directive between ESMA, the competent authorities, EBA, the European Supervisory Authority (European Insurance and Occupational Pensions Authority) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council* and the ESRB shall be considered confidential, except:

(a) where ESMA or the competent authority or another authority or body concerned states at the time of communication that such information may be disclosed;

(b) where disclosure is necessary for legal proceedings;

(c) where the information disclosed is used in a summary or in an aggregate form in which individual financial market participants cannot be identified.

*Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).';

(b) in paragraph 4, the following point (d) is added:

'(d) require non-EU AIFMs that are marketing in the Union AIFs that they manage or EU AIFMs managing non-EU AIFs to activate or deactivate a liquidity management tool referred to in point 1 or 2 of Annex V or selected by the AIFM, whichever is more suitable considering the type of open-ended AIF concerned and the investor protection or financial stability risks that necessitate this requirement.';

(19) Article 50 is amended as follows:

(a) paragraph 5 is replaced by the following:

'5. Where the competent authorities of one Member State have ***clear and demonstrable*** grounds to suspect that acts contrary to this Directive are being or have been carried out by an

AIFM not subject to supervision of those competent authorities, ***or by an entity appointed as depositary by an AIFM,*** they shall notify ESMA and the competent authorities of the home and host Member States of the AIFM ***or those of the entity*** concerned thereof in as specific a manner as possible. The recipient authorities shall take appropriate action, shall inform ESMA and the notifying competent authorities of the outcome of that action and, to the extent possible, of significant interim developments. This paragraph shall be without prejudice to the competences of the notifying competent authority.';

(b) the following paragraphs 5a to 5g are inserted:

'5a.The competent authorities of the home Member State of an AIFM shall notify the competent authorities of the host Member State of the AIFM ***and*** ESMA ▌prior to exercising powers pursuant to Article 46(2), point (j), or Article 47(4), point (d). ***The competent authorities of the home Member State of the AIFM shall notify ESRB if there is any potential risk to the stability and integrity of the financial system.***

5b. The competent authority of the host Member State of an AIFM may request the competent authority of the home Member State of the AIFM to exercise powers laid down in Article 46(2), point (j) or Article 47(4), point (d), specifying the reasons for the request and notifying ESMA and, ***in the case of any potential risk to the stability and integrity of the financial system,*** the ESRB thereof.

5c. Where the competent authority of the home Member State of the AIFM does not agree with the request referred to in paragraph 5b, it shall inform the competent authority of the host Member State of the AIFM, ESMA and***, in case of any potential risk to the stability and integrity of the financial system,*** the ESRB thereof, stating its reasons.

5d. Based on the information received in accordance with paragraphs 5b and 5c, ESMA shall issue an opinion to the competent authorities of the home Member State of the AIFM on exercising powers laid down in Article 46(2), point (j) or Article 47(4), point (d). ***The opinion shall be communicated to the authority of the host Member State.***

5e. Where the competent authority does not act in accordance or does not intend to comply with ESMA's opinion referred to in paragraph 5d, it shall inform ESMA ***and the competent authority of the host Member State***, stating its reasons for the non-compliance or intention. ***In the event of a serious threat to investor protection, a threat to the orderly functioning and integrity of financial markets or a risk to the stability of the whole or part of the financial system in the Union, and unless such publication is in conflict with the legitimate interest of the share or unit-holders or of the public,*** ESMA may publish the fact that a competent authority does not comply or intend to comply with its advice***, together with*** ▌the reasons ***stated*** by the competent authority ▌***for the non-compliance or intention.*** ESMA shall give the competent authorities advance notice about such publication.

5f. The competent authority of the host Member State of an AIFM may***, where it has good reasons to suspect that acts contrary to this Directive are being or have been carried out by the AIFM,*** request the competent authority of the home Member State of the AIFM to exercise, without delay, powers laid down in Article 46(2), specifying the reasons for its request ***in as specific a manner as possible*** and notifying ESMA and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.

The competent authority of the home Member State of the AIFM shall, without ***undue*** delay, inform the competent authority of the host Member State of the AIFM, ESMA and, if there are potential risks to stability and integrity of the financial system, the ESRB of the powers exercised and its findings.

5fa. Where a Member State has exercised the option provided for in Article 21(5a) and where the competent authorities of the home Member State of an AIF have reasonable grounds to suspect that acts contrary to this Directive are being or have been carried out by a depositary not subject to supervision of those competent authorities, such competent authorities shall without delay notify ESMA and the competent authorities of the depositary concerned thereof in a manner as specific as possible. The recipient authorities shall take appropriate action and inform ESMA and the notifying competent authorities of the outcome of that action. This paragraph shall be without prejudice to the competences of the notifying competent authorities.

5g. ESMA may request the competent authority to submit explanations to ESMA ***in a reasonable time frame*** in relation to specific cases, which ***raise a serious threat to*** ▌ investor protection▌, ***threaten the orderly functioning and integrity of financial markets*** or pose risks to the ▌ ***stability of the whole or part of the*** financial ***system in the Union***.';

(c) the following paragraph 7 is added:

'7. ESMA shall develop draft regulatory technical standards indicating in which situations the competent authorities may exercise the powers set out in Article 46(2), point (j) and in which situations they may put forward the requests referred to in paragraphs 5b and 5f. When developing those standards, ESMA shall consider the potential implications of such supervisory intervention for ***reasonable and efficient*** investor protection and the financial stability in another Member State or in the Union. ***Those standards shall recognise that the primary responsibility for liquidity risk management remains with the AIFM and that intervention by the competent authorities is a last resort.***

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.';

(20) ▌ Article 61 ***is amended as follows:,***

(a) paragraph 5 is ***deleted***:

'5.▌

(b) the following paragraph is added:

'5a. AIFMs in so far as they manage AIFs that originate loans and that have been constituted before ... [date of entry into force of this amending Directive] may continue to manage such AIFs without complying with Article 16(2a) of this Directive until ... [5 years + date of entry into force of this amending Directive]. By way of derogation, loan-originating AIFs constituted before ... [date of entry into force of this amending Directive] and that do not raise additional capital after ... [5 years + date of entry into force of this amending Directive] shall be deemed to comply with the above-mentioned Articles'

(21) the following Article 69b is inserted:

' Article 69b

Review

1. By [Please insert date = 60 months after the entry into force of this Directive] and following the peer reviews by ESMA referred to in Article 38a and reports produced by ESMA in accordance with Article 7(9), the Commission shall initiate a review of the functioning of the rules laid down in this Directive and the experience acquired in applying them. That review shall include an assessment of the following aspects:

(a) the impact on financial stability of the availability and activation of liquidity management tools by AIFMs;

(b) the effectiveness of the AIFM authorisation requirements in Articles 7 and 8 and delegation regime laid down in Article 20 of this Directive with regard to preventing the creation of letter-box entities in the Union;

(c) the appropriateness of the requirements applicable to AIFMs managing loan-originating AIFs laid down in Article 15;

(d) the ***effectiveness and the impact on financial stability of the*** depositary passport.

(da) ***the appropriateness of the requirements applicable to AIFMs managing AIFs on behalf of a third party as laid down in Article 14(2a).***

1a. For the purposes of point (d) of paragraph 1, the Commission shall by ... [24 months after the entry into force of this amending Directive] carry out a comprehensive study on the potential benefits and risks of introducing an EU depositary passport.

2. By [Please insert date = 24 months after the entry into force of this Directive], ESMA shall submit to the Commission a report for the development of an integrated supervisory data collection, which shall focus on how to:

(a) reduce areas of duplications and inconsistencies between the reporting frameworks in the asset management sector and other sectors of the financial industry;

(b) data standardisation and efficient sharing and use of data already reported within any Union reporting framework by any relevant competent authority, at Union or national level.

3. When preparing the report referred to in paragraph 2, ESMA shall work in close cooperation with the European Central Bank (ECB), the other European Supervisory Authorities and, where relevant, the national competent authorities.

4. Following the review referred to in paragraph 1, and after consulting ESMA, the Commission shall submit a report to the European Parliament and to the Council presenting the conclusions of that review.

The Commission shall gather information for that report without broadening reporting obligations, including for AIFMs, and by using information from all relevant and reliable sources, including Union institutions, national competent authorities or internationally recognised bodies and organisations.';

(22) Annex I is amended as set out in Annex I to this Directive;

(23) The text in Annex II to this Directive is added as Annex V.

Article 2

Amendments to Directive 2009/65/EC

Directive 2009/65/EC is amended as follows:

(1) in Article 2(1), the following point (u) is added:

'(u) central securities depository' means a central securities depository as defined in Article 2(1), point (1), of Regulation (EU) No 909/2014 of the European Parliament and of the

Council*.’

* Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1);’

(1a) in Article 5, paragraph 8 is replaced by the following:

‘(8) In order to ensure consistent harmonisation of this Article, 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 [1]▌ shall develop draft regulatory technical standards to specify the information to be provided to the competent authorities in the application for authorisation of a UCITS, including the programme of activity, and situations where the name of a UCITS could be materially deceptive or misleading to the investor.’;

(1b) in Article 6(3), the following point is inserted:

‘(ba) benchmark administration in accordance with Regulation (EU) 2016/1011.’

(2) Article 7(1) is amended as follows:

(a) points (b) and (c) are replaced by the following:

‘(b) the persons who effectively conduct the business of a management company are of sufficiently good repute and are sufficiently experienced also in relation to the type of UCITS managed by the management company, the names of those persons and of every person succeeding them in office being communicated forthwith to the competent authorities and the conduct of the business of a management company being decided by at least two persons who are either employed full-time ***or on a full-time equivalent basis*** by that management company or who are committed full-time to conduct the business of that management company and who are resident in the Union meeting such conditions;

(ba) the management company ensures that at least one member of its governing body is a non-executive director. The management company, in appointing a non-executive director of its governing body, shall determine whether such a member is independent in character and judgement and whether there are relationships or circumstances, which are likely to affect that member’s judgement. The management company shall take reasonable steps to ensure that any non-executive directors appointed to its governing body have sufficient expertise and experience to be able to make judgements on whether the management company is managing UCITS in the best interest of investors. Non-executive directors shall contribute to ensuring that the management company complies with the requirements regarding conflicts of interests and acting in the best interests of the UCITS and their investors, as specified in this Directive;

(c) the application for authorisation is accompanied by a programme of activity setting out, at least, the organisational structure of the management company, specifying technical and human resources that will be used to conduct the business of the management company, information about the persons effectively conducting the business of that management company, including:

(i) a detailed description of their role, title and level of seniority;

(ii) a description of their reporting lines and responsibilities inside and outside of the management company;

(iii) an overview of their time allocated to each responsibility;

(iiia) information on how the management company intends to comply with its obligations under this Directive, and with its obligations under Regulation (EU) 2019/2088 and a detailed description of the appropriate human and technical resources that will be used by the management company to this effect;'

(b) the following point (e) is added:

'(e) information is provided by the management company on arrangements made for the delegation to third parties of functions in accordance with Article 13, ***including***:

(i) the legal name and relevant legal identifier of the management company;
(ii) the legal name and relevant legal identifier of the UCITS and its investment strategy;
(iii) the legal name and relevant legal identifier of each delegate, its jurisdiction of establishment and, where relevant, its supervisory authority;
(iv) a brief description of the delegated risk management functions, including whether each such delegation amounts to a partial or full delegation;
(v) a brief description of the delegated portfolio management functions, by investment strategy and relevant geographies, including whether each such delegation amounts to a partial or full delegation;
(vi) a brief description of other functions listed in Annex II which the management company additionally performs; and
(vii) for each of the following, a detailed description of the human and technical resources:
- employed by or committed to the management company for performing day-to-day portfolio or risk management tasks within the management company;
- employed by or committed to the delegate for performing those services on a delegated basis; and
- employed by or committed to the management company for monitoring and controlling the delegate;
(viii) an explanation of the added value of the delegation to the investor.';

(2a) in Article 7, the following paragraph is inserted:

'1a. A management company shall report to the competent authority any material changes that may affect the scope of the authorisation by that authority and in particular any modification on the arrangements of the delegation and sub-delegation to third parties provided at the time of authorisation.';

(3) Article 13 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) the introductory phrase is replaced by the following:

'1. Management companies, which intend to delegate to third parties the task of carrying out, on their behalf, one or more of the functions listed in Annex II and the services referred to in Article 6(3), shall notify the competent authorities of their home Member State before the delegation arrangements become effective. The following conditions shall be met:';

(ii) point (b) is replaced by the following:

'(b) the mandate must not prevent the effectiveness of supervision over the management company, and, in particular, must not prevent the management company from acting, or the UCITS from being managed, in the best interests of its investors and clients.';

(iii) points (g), (h) and (i) are replaced by the following:

'(g) the mandate must not prevent the persons who conduct the business of the management company from giving further instructions to the undertaking to which functions or provision of services are delegated at any time or from withdrawing the mandate with immediate effect when this is in the interest of investors and clients.

(h) having regard to the nature of the functions and provision of services to be delegated, the undertaking to which functions or provision of services will be delegated must be qualified and capable of undertaking the functions or performing the services in question; and

(i) the UCITS' prospectuses must list the services and functions which the management company has been allowed to delegate in accordance with this Article;';

(iv) the following point (j) is added:

'(j) the management company must be able to justify its entire delegation structure on objective reasons.';

(b) paragraph 2 is replaced by the following:

'2. The liability of the management company or the depositary shall not be affected by delegation to third parties of any functions or of provision of services by the management company. The management company shall not delegate its functions or provision of services to the extent that, in essence, it can no longer be considered to be the manager of the UCITS and to the extent that it becomes a letter-box entity.

(ba) the following paragraphs are inserted:

'2a. By way of derogation from paragraphs 1 and 2, where the marketing function, as referred to in the third indent of Annex II, is performed by one or several distributors which are acting on their own behalf and which market the UCITS under Directive 2014/65/EU or through insurance-based investment products in accordance with Directive 2016/97/EU, such function shall not be considered to be a delegation that is subject to the requirements set out in paragraphs 1 and 2, irrespective of any distribution agreement between the management company and the distributor.

2b. The management company shall ensure that the management of funds for which it is the management company complies with the requirements set out in this Directive. That obligation applies irrespective of the regulatory status or location of any delegate or subdelegate.';

(c) the following paragraphs 3, 4, 5 and 6 are added:

3. ▌

4. ▌

5. ***By … [24 months after the date of application of this amending Directive]*** ESMA shall provide the European Parliament, the Council and the Commission with ***a*** ▌ report ▌ analysing market practices regarding delegation to entities ▌ and compliance with Articles 7 and 13.

6. The Commission shall adopt, by means of delegated acts in accordance with Article 112a, measures specifying:

(a) the conditions for fulfilling the requirements set out in paragraph 1;

(b) the conditions under which the management company of UCITS shall be deemed to have delegated its functions to the extent that it becomes a letter-box entity and can no longer be considered to be the manager of the UCITS as set out in paragraph 2.';

(3a) Article 14 is amended as follows:

(a) in paragraph 1, point (a) is replaced by the following:

'(a) acts honestly and fairly in conducting its business activities in the best interests of the UCITS it manages and the integrity of the market in particular as regards fees and costs charged to investors;';

(b) the following paragraphs are inserted:

'2a. For the purposes of point (a) of paragraph 1, ESMA shall by ... [18 months after the entry into force of this amending Directive] submit a report to the European Parliament, the Council and the Commission:

- assessing the costs charged by management companies to investors in UCITS, and the reasons for cost levels and for differences between them;

- proposing criteria for assessing whether the level of such costs is appropriate, in particular when compared to the level of costs in other jurisdictions worldwide;

- proposing, if needed, options for action by competent authorities or by legislators in respect of inappropriate or undue levels of such costs.

The report shall assess the potential impact of each such option.

That report may be combined with the report required in accordance with Article 12(3a) [AIFMD].

Competent Authorities shall have the power to require, on a one time basis, information from UCITS management companies on costs insofar as that is needed for the purpose of that report. The competent authorities shall avoid duplication with existing reporting obligations.

Competent authorities shall provide data to ESMA to contribute to that report by ... [X months before the date specified in the first subparagraph].

2b. In the light of the report referred to in paragraph 2a, and without prejudice to other legislative or regulatory options including Commission proposals to revise this Directive or ESMA guidelines, ESMA may develop draft regulatory technical standards to specify:

(a) criteria for the assessment by competent authorities whether the level of costs charged by management companies to investors in UCITS is appropriate;

(b) actions that those authorities should take in respect of inappropriate or undue levels of such costs.

Power is conferred on the Commission to adopt the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.';

(c) the following paragraphs are added:

'3a. Where a management company intends to manage a UCITS on behalf of a third party, including but not limited to under a mandate in accordance with Article 6(3)(a) or under a delegation in accordance with Article 13, and where the third party is to have significant control over the UCITS' design, distribution and management, the management company shall employ heightened scrutiny of the potential for conflicts of interest. The management

company engaging in such a relationship shall submit to the competent authorities of its home Member State detailed explanations and evidence on their compliance with paragraphs 1 and 2. In particular, it shall specify how they prevent systematic conflicts of interest or any other material conflicts of interest arising from the relationship, how any existing or potential conflicts are effectively managed in the best interest of investors and how this is clearly and comprehensively disclosed to investors.

3b. In order to ensure uniform conditions of application of this Article, ESMA shall develop draft regulatory technical standards to specify:

(a) the types of relationship between the management company and a third party when the management company manages a UCITS on behalf of the third party and of conflicts of interest as referred to in paragraph 3a;

(b) criteria to be used by the relevant competent authorities to assess whether UCITS comply with their obligations under paragraph 3a.

Power is conferred on the Commission to adopt the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.';

(4) the following Article 18a is inserted:

'Article 18a

1. Member States shall ensure that at least the liquidity management tools set out in Annex IIA are available to UCITS.

2. After assessing the suitability in relation to the pursued investment strategy, the liquidity profile and the redemption policy, a management company shall select at least one appropriate liquidity management tool from the list set out in Annex IIA, points 2 to *7*, and include in the fund rules or the instruments of incorporation of the investment company for possible use in the interest of the UCITS' investors. ***Subject to Article 84, this shall not prevent a UCITS from using other tools from Annex IIA, points 2 to 8.*** The management company shall implement detailed policies and procedures for the activation and deactivation of any selected liquidity management tool and the operational and administrative arrangements for the use of such tool.

   By way of derogation from the first subparagraph, a management company may select only one liquidity management tool from Annex IIA, points 2 to 7, for a UCITS that it manages, if that UCITS is authorised as money market fund in accordance with Regulation (EU) 2017/1131.

3. ESMA shall develop ▌***guidelines*** to▌ specify ***best practice as regards*** the characteristics of the liquidity management tools set out in Annex IIA.

4. ***By ... [12 months after the entry into force of this amending Directive]*** ESMA shall develop draft regulatory technical standards on ***the disclosure to competent authorities and investors of information related to the selection and calibration of*** ▌liquidity management tools by the management companies for liquidity risk management ▌and for mitigating financial stability risks. ***Those standards shall recognise international standards for liquidity risk management for collective investment schemes from February 2018 and that the primary responsibility for liquidity risk management, including the selection and use of liquidity management tools, remains with the management company. They shall allow adequate time for adaptation before they apply, in particular for existing UCITS.***

5. Power is delegated to the Commission to adopt the regulatory technical standards referred to in paragraph▌ 4 in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.';

(5) the following Articles 20a and 20b are inserted:

'Article 20a

1. A management company shall regularly report to the competent authorities of its home Member State on the markets and instruments in which it trades on behalf of the UCITS it manages. ***It shall provide the information on the assets and liabilities of investment funds which the company reports to their national central banks under Regulation (EU) No 1073/2013 of the European Central Bank[33] as well as information on the instruments in which it is trading, on markets of which it is a member or where it actively trades, and on the exposures of each of the UCITS it manages.***

1a. A management company shall regularly report to the competent authorities of its home Member State the following information regarding delegation arrangements concerning portfolio management or risk management functions and in particular with respect to each UCITS managed or marketed in the Union:

(i) information on the entities to which such functions have been delegated, namely the name and relevant legal identifier of each delegate, its jurisdiction of establishment and, where relevant, its supervisory authority;

(ii) for each of the following, a description of the human and technical resources:

- employed by or committed to the management company for performing day-to-day portfolio or risk management tasks within the management company;

- employed by or committed to the delegate for performing those services on a delegated basis; and

- employed by or committed to the management company for monitoring and controlling the delegate;

(iii) information on the function delegated, the type of delegation (full or partial), and the date of the delegation agreement or contract;

(iv) where sub-delegation arrangements are in place, the same information in respect of the sub-delegates and the functions sub-delegated;

(v) the date of conclusion and expiration of the delegation and sub-delegation arrangements;

(vi) confirmation that the management company has implemented periodic due diligence measures to oversee, monitor and control the delegate, and kept records of issues identified and, where relevant, the measures adopted to address those issues.

1b. The ECB and national authorities shall grant ESMA access to data on assets and liabilities (fund inventories) of UCITS funds provided by fund managers pursuant to

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33 Regulation (EU) No 1073/2013 of the European Central Bank of 18 October 2013 concerning statistics on the assets and liabilities of investment funds (recast) (ECB/2013/38).

Regulation (EU) No 1073/2013.

1c. A management company shall, for each of the UCITS it manages, provide the following to the competent authorities of its home Member State:

(a) if relevant, information on tools used for managing the liquidity of the UCITS according to Article 84(2);

(b) the current risk profile of the UCITS and the risk management systems employed by the management company to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk;

(c) the results of stress tests performed.

2. ESMA shall develop draft regulatory technical standards specifying the details to be reported in accordance with paragraph***s*** 1***, 1a and 1c of this Article***. ESMA shall take into account other reporting requirements to which the management companies are subject and the report issued in accordance with Article 20b. ***Regulatory technical standards shall set out the appropriate level of standardisation of the information to be reported.***

ESMA shall submit those draft regulatory technical standards to the Commission by [Please insert date = 36 months after the entry into force of this Directive].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

2a. Where necessary for the effective monitoring of systemic risk, the competent authorities of the home Member State may require additional reporting to that described in paragraph 1, on a periodic or on an ad-hoc basis. The competent authorities shall inform ESMA about the additional reporting requirements.

In exceptional circumstances and where required in order to ensure the stability and integrity of the financial system, ESMA after consulting the ESRB may request the competent authorities of the home Member State to impose additional reporting requirements.

3. ESMA shall develop draft implementing technical standards specifying:

(a) the format and data standards for the reports referred to in ***paragraphs 1, 1a and 1c of this Article which shall include in particular relevant legal identifiers***;

(b) the reporting frequency and timing;

(ba) methods and arrangements for submitting the reports referred to in paragraphs 1 and 1a, including methods and arrangements to improve data standardisation and efficient sharing and use of data already reported within any Union reporting framework by any relevant competent authority, at Union or national level.

When developing those draft technical standards, ESMA shall take into account international developments and standards agreed at Union or global level and the findings of the report issued in accordance with Article 20b.

ESMA shall submit those draft implementing technical standards to the Commission by [Please insert date = 36 months after the entry into force of this Directive].

Power is delegated to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

3a. The competent authorities of the home Member State of the UCITS management company shall ensure that all information gathered in accordance with paragraphs 1, 1a, 1c and 2a in respect of all UCITS management companies that they supervise is made available to competent authorities of other relevant Member States, ESMA and the ESRB by means of the procedures set out in Article 101 on supervisory cooperation.

Article 20b

1. By [Please insert date = 24 months after the entry into force of this Directive], ESMA shall submit to the Commission a report for the development of an integrated supervisory data collection, which shall focus on how to:

   (a) reduce areas of duplications and inconsistencies between the reporting frameworks in the asset management sector and other sectors of the financial industry and

   (b) improve data standardisation and efficient sharing and use of data already reported within any Union reporting framework by any relevant competent authority, at Union or national level.

   (ba) improve the cost-benefit balance of the burden of information collection for the overall benefit of UCITS and of investors;

   In that report, ESMA shall also provide detailed comparison and best practices of data collection in the Union with world leading markets for retail investment funds and the impact of data collection on competitiveness.

2. When preparing the report referred to in paragraph 1, ESMA shall work in close cooperation with the European Central Bank (ECB), the other European Supervisory Authorities, and, where relevant, the national competent authorities.';

(6) Article 22a is amended as follows:

   (a) in paragraph 2, point (c) is replaced by the following:

'(c) the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it intends to delegate parts of its tasks, except where that third party is a central securities depository acting in the capacity of an issuer CSD as defined in ▌***the*** delegated ***act adopted on the basis of Articles 29(3) and 48(10) of*** Regulation (EU) ***No 909/2014*** and continues to exercise all due skill, care and diligence in the periodic review and ongoing monitoring of any third party to which it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it.;

   (b) paragraph 4 is replaced by the following:

'4. For the purposes of this paragraph, the provision of services by a central securities depository acting in the capacity of an issuer CSD as defined in ▌***the delegated act adopted on the basis of Articles 29(3) and 48(10) of Regulation (EU) No 909/2014*** shall not be considered a delegation of the depositary's custody functions.

For the purposes of this paragraph, the provision of services by a central securities depositary acting in the capacity of an investor CSD as defined in Article 1, point (f), of Commission

Delegated Regulation (EU) 2017/392 shall be considered a delegation of the depositary's custody functions.';

(7) in Article 29(1), point (b) is replaced by the following:

'(b) the directors of the investment company must be of sufficiently good repute and be sufficiently experienced also in relation to the type of business pursued by the investment company and, to that end: the names of the directors and of every person succeeding them in office must be communicated forthwith to the competent authorities; the conduct of an investment company's business must be decided by at least either two full-time employees or two ▌ persons committed full-time ***or on a full-time equivalent basis*** to conduct the business of that management company and resident in the Union' meeting such conditions; and 'directors' shall mean those persons who, under the law or the instruments of incorporation, represent the investment company, or who effectively determine the policy of the company;

(ba) the investment company must ensure that at least one member of its governing body is a non-executive director. The investment company, in appointing a non-executive director of its governing body, must determine whether such a member is independent in character and judgement and whether there are relationships or circumstances, which are likely to affect that member's judgement. The investment company must take reasonable steps to ensure that any non-executive directors appointed to its governing body have sufficient expertise and experience to be able to make judgements on whether the investment company is managing UCITS in the best interest of investors. Non-executive directors shall contribute to ensuring that the investment company complies with the requirements regarding conflicts of interests and is acting in the best interests of the UCITS and their investors, as specified in this Directive';

(7a) in Article 57, the following paragraph is added:

2a. Where the UCITS management company implements side pockets referred to in Article 84(2)(a) by means of assets segregation, the segregated assets can be excluded from the calculation of limits laid down in this Chapter.

(8) in Article 84, paragraphs 2 and 3 are replaced by the following:

'2. By way of derogation from paragraph 1:

(a) a UCITS may, in the interest of its unit-holders, temporarily suspend the repurchase or redemption of its units or activate other liquidity management tool selected in accordance with Article 18a(2). ***In the interest of its unit-holders and to ensure subscriptions and redemptions are processed at a fair price, a UCITS may also activate side pockets as referred to in Annex IIA, point 8, when the UCITS cannot ensure the fair and accurate valuation of some assets or where some assets have become non-tradable;***

(b) in the interest of the unit-holders or of the public, ***in exceptional circumstances and after consulting the UCITS,*** competent authorities of a UCITS home Member State may require a UCITS to activate a liquidity management tool referred to in points 1 or 2 of Annex IIA▌, whichever is more suitable considering the type of UCITS and the risks that necessitate taking this measure.

The temporary suspension referred to in point (a) of the first subparagraph shall be provided for only in exceptional cases where circumstances so require and where suspension is justified having regard to the interests of the unit-holders.

3. The UCITS shall▌, without delay, ***notify*** the competent authorities of ▌***its*** home Member State and the competent authorities of all Member States in which it markets its units, ***in any of the following circumstances:***

- ***when, in situations of liquidity stress, a UCITS activates or deactivates one of the liquidity management tools listed in points 1 to 2 of Annex IIa***

- ***when activating or deactivating side pockets as referred to in point 8 of Annex IIa,***

- ***when activating or deactivating any other liquidity management tool in a manner that is not in the ordinary course of business as envisaged in the fund documentation.***

The competent authorities of the home Member State of the UCITS shall inform, without delay, ESMA ▌about any notification received in accordance with this paragraph. ***The competent authorities of the home Member State of the UCITS shall inform ESRB if there is any potential risk to stability and integrity of financial system.***

ESMA shall have the power to share the information received in accordance with this paragraph with competent authorities.

3a.The competent authorities of the UCITS home Member State shall notify the competent authorities of all Member States in which the UCITS markets its units, ESMA ▌prior to exercising powers pursuant to paragraph 2, point (b). ***The competent authorities of the home Member State of the UCITS shall inform ESRB if there is any potential risk to stability and integrity of financial system.***

3b. The competent authority of the Member States in which a UCITS markets its units may request the competent authority of the UCITS home Member State to exercise powers laid down in paragraph 2, point (b), specifying the reasons for the request and notifying ESMA and***, in case of any potential risk to the stability and integrity of the financial system,*** the ESRB thereof.

3c. Where the competent authority of the UCITS home Member State does not agree with the request referred to in paragraph 3b, it shall inform the requesting competent authority, ESMA and***, in case of any potential risk to the stability and integrity of the financial system,*** the ESRB thereof, stating the reasons for the disagreement.

3d. On the basis of the information received in accordance with paragraphs 3b and 3c, ESMA shall issue an opinion to the competent authorities of the UCITS home Member State on exercising powers laid down in paragraph 2, point (b).

3e. Where the competent authority does not act in accordance or does not intend to comply with ESMA's opinion referred to in paragraph 3d, it shall inform ESMA, stating the reasons for the non-compliance or intention. ***In the event of a serious threat to investor protection, a threat to the orderly functioning and integrity of financial markets or a risk to the stability of the whole or part of the financial system in the Union, and unless such publication is in conflict with the legitimate interest of the share or unit-holders or of the public,*** ESMA may publish the fact that a competent authority does not comply or intend to comply with its advice ***together with*** the reasons ***stated*** by the competent authority ***for the non-compliance or intention***. ESMA shall give the competent authorities advance notice about such publication.'

3f. ESMA shall develop draft regulatory technical standards indicating in which situations the competent authorities may exercise the powers set out in paragraph 2, point (b). When developing those standards, ESMA shall consider the potential implications of such supervisory

intervention for investor protection and the financial stability in another Member State or in the Union. ***Those standards shall recognise that the primary responsibility for liquidity risk management remains with the UCITS and that intervention by the competent authorities is a last resort.***

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.';

(9) in Article 98, the following paragraphs are added:

'3. The competent authority of the UCITS host Member State may, ***where it has good reasons to suspect that acts contrary to this Directive are being or have been carried out by the UCITS,*** request the competent authority of the UCITS home Member State to exercise, without delay, powers laid down in paragraph 2 specifying the reasons for its request ***in as specific a manner as possible*** and notifying ESMA and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.

The competent authority of the UCITS home Member State shall, without ***undue*** delay, inform the competent authority of the UCITS host Member State, ESMA and, if there are potential risks to the stability and integrity of the financial system, the ESRB of the powers exercised and its findings.'

4. ESMA may request the competent authority to submit, ***within a reasonable timeframe,*** explanations to ESMA in relation to specific cases, which ***pose a serious threat to*** investor protection***, threaten the orderly functioning and integrity of financial markets*** or pose risks to the ***stability of the whole or part of of*** financial ***system***.';

(9a) in Article 101(1), the first subparagraph is replaced by the following:

'1. The competent authorities of the Member States shall cooperate with each other and with ESMA and the ESRB whenever necessary for the purpose of carrying out their duties under this Directive or of exercising their powers under this Directive or under national law.';

(10) the following Article is inserted:

'Article 101a

1. ***By … [12 months before the date of the review referred to in Article 110a]*** ESMA shall ▌conduct a ***one-off comprehensive*** peer review analysis of the supervisory activities of the competent authorities in relation to the application of Article 13. That peer review analysis shall focus on the measures taken to prevent that management companies, which delegate performance of portfolio management or risk management to third parties located in third countries, become letter-box entities.

2. When conducting the peer review analysis, ESMA shall use transparent methods to ensure an objective assessment and comparison between the competent authorities reviewed.';

(11) the following Article 110a is inserted:

'Article 110a

By [Please insert date = ***40*** months after the entry into force of this Directive] and following the peer ***review*** and analysis referred to in Article 101a and the report produced by ESMA in accordance with Article 13(4), the Commission shall initiate a review of the delegation regime laid down in Article 13 with regard to preventing the creation of letter-box entities in the Union.';

(12) Article 112a is amended as follows:

(a) in paragraph 1, the following subparagraph is added:

‘The power to adopt the delegated acts referred to in Article 13 shall be conferred on the Commission for a period of four years from [Please insert the date of entry into force of this Directive.]’;

(b) in paragraph 3, the first sentence is replaced by the following:

‘The delegation of power referred to in Articles 12, 13, 14, 18a, 20a, 26b, 43, 50a, 51, 60, 61, 62, 64, 75, 78, 81, 95 and 111 may be revoked at any time by the European Parliament or by the Council. A decision to revoke 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.’;

(c) in paragraph 5, the first sentence is replaced by the following:

‘A delegated act adopted pursuant to Articles 12, 13, 14, 18a, 20a, 26b, 43, 50a, 51, 60, 61, 62, 64, 75, 78, 81, 95 and 111 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three 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 three months at the initiative of the European Parliament or of the Council.’;

(13) Annex I is amended as set out in Annex III to this Directive;

(14) The text in Annex IV to this Directive is added as Annex IIA.

Article 3

Transposition

1. Member States shall adopt and publish, by [Please insert date = 24 months after the entry into force of this Directive] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

2. They shall apply those provisions from […].

3. When Member States adopt those provisions, they shall contain reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

4. Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by this Directive.

Article 4

Entry into force

This Directive shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

Article 5

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*

ANNEX I

In Annex I of Directive 2011/61/EU, the following points are added:

‘***(ca) management of joint ventures and of mandates in respect of immovable property***

3. Originating loans.

4. Servicing securitisation special purpose entities.’

ANNEX II

In Directive 2011/61/EU, the following is added:

‘ANNEX V

LIQUIDITY MANAGEMENT TOOLS AVAILABLE TO AIFMs MANAGING OPEN-ENDED AIFs

(1) Suspension of redemptions and subscriptions: suspension of redemptions and subscriptions implies that investors are temporarily unable to redeem or purchase fund’s ***units or*** shares.

(2) Redemption gates: a redemption gate is a temporary restriction of the right of shareholders to redeem their ***units or*** shares. This restriction ***is*** partial, so that investors can only redeem a certain portion of their ***units or*** shares.

(3) Notice periods: a notice period refers to the period of advance notice that investors must give to fund managers when redeeming their ***units or*** shares.

(4) Redemption fees: a redemption fee is a ***pre-determined*** fee charged to investors when redeeming their fund’s ***units or*** shares.

(5) Swing pricing: swing pricing can be used to adjust the price of ***units or*** shares in an investment fund so that it reflects the cost of fund transactions resulting from investor activity.

(6) Anti-dilution levy: an anti-dilution levy is a charge applied to individual transacting investors, payable to the fund, to protect remaining investors from bearing the costs associated with purchases or sales of assets because of large inflows or outflows. An anti-dilution levy does not involve any adjustment to the value of the fund’s shares. ***The levy shall be calculated taking into consideration ongoing liquidity costs and market conditions.***

(7) Redemptions in kind: redemptions-in-kind allow the fund manager to meet a redemption request by transferring securities held by the fund, instead of cash, to the redeeming shareholders.

(8) Side pockets: side pockets allow illiquid investments to be separated from remaining liquid investments of the investment fund.’

ANNEX III

In Annex I of Directive 2009/65/EC, Schedule A, the table, point 1.13 is replaced by the following:

1.13. Procedures and conditions for repurchase or redemption of units, and circumstances in which repurchase or redemption may be suspended or other liquidity management tools may be activated.		1.13. Procedures and conditions for repurchase or redemption of units, and circumstances in which repurchase or redemption may be suspended or other liquidity management tools may be activated. In the case of investment companies having different investment compartments, information on how a unit-holder may pass from one compartment into another and the charges applicable in such cases.

ANNEX IV

In Directive 2009/65/EC, the following is inserted:

‘ANNEX IIA

LIQUIDITY MANAGEMENT *TOOLS* AVAILABLE TO UCITS

(1) Suspension of redemptions and subscriptions: suspension of redemptions and subscriptions implies that investors are temporarily unable to redeem or purchase fund’s ***units***.

(2) Redemption gates: a redemption gate is a temporary restriction of the right of ***unitholders*** to redeem their ***units*** . This restriction ***is*** partial, so that investors can only redeem a certain portion of their ***units***.

(3) Notice periods: a notice period refers to the period of advance notice that investors must give to fund managers when redeeming their ***units***.

(4) Redemption fees: a redemption fee is a fee ***pre-determined*** to investors when redeeming their fund’s ***units***.

(5) Swing pricing: swing pricing can be used to adjust the price of ***units*** in an investment fund so that it reflects the cost of fund transactions resulting from investor activity.

(6) Anti-dilution levy: an anti-dilution levy is a charge applied to individual transacting investors, payable to the fund, to protect remaining investors from bearing the costs associated with purchases or sales of assets because of large inflows or outflows. An anti-dilution levy does not involve any adjustment to the value of the fund’s ***units***.

(7) Redemptions in kind: redemptions-in-kind allow the fund manager to meet a redemption request by transferring securities held by the fund, instead of cash, to the redeeming ***unitholders***.

(8) Side pockets: side pockets allow illiquid investments to be separated from remaining liquid investments of the investment fund.’

PROCEDURE – COMMITTEE RESPONSIBLE

Title	Amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds
References	COM(2021)0721 – C9-0439/2021 – 2021/0376(COD)
Date submitted to Parliament	25.11.2021
Committee responsible Date announced in plenary	ECON 14.2.2022
Committees asked for opinions Date announced in plenary	JURI 14.2.2022
Not delivering opinions Date of decision	JURI 28.2.2022
Rapporteurs Date appointed	Isabel Benjumea Benjumea 2.12.2021
Discussed in committee	14.6.2022 31.8.2022
Date adopted	24.1.2023
Result of final vote	+: 54 –: 3 0: 0
Members present for the final vote	Rasmus Andresen, Anna-Michelle Asimakopoulou, Marek Belka, Isabel Benjumea Benjumea, Stefan Berger, Gilles Boyer, Engin Eroglu, Markus Ferber, Jonás Fernández, Giuseppe Ferrandino, Frances Fitzgerald, José Manuel García-Margallo y Marfil, Valentino Grant, Claude Gruffat, José Gusmão, Eero Heinäluoma, Michiel Hoogeveen, Danuta Maria Hübner, Stasys Jakeliūnas, France Jamet, Othmar Karas, Billy Kelleher, Georgios Kyrtsos, Philippe Lamberts, Aušra Maldeikienė, Pedro Marques, Csaba Molnár, Denis Nesci, Dimitrios Papadimoulis, Piernicola Pedicini, Sirpa Pietikäinen, Eva Maria Poptcheva, Evelyn Regner, Dorien Rookmaker, Joachim Schuster, Ralf Seekatz, Paul Tang, Irene Tinagli, Ernest Urtasun, Inese Vaidere, Johan Van Overtveldt, Stéphanie Yon-Courtin, Marco Zanni
Substitutes present for the final vote	Herbert Dorfmann, Gianna Gancia, Eider Gardiazabal Rubial, Valérie Hayer, Eugen Jurzyca, Chris MacManus, Ville Niinistö, Erik Poulsen, René Repasi
Substitutes under Rule 209(7) present for the final vote	Susanna Ceccardi, Andor Deli, José Manuel Fernandes, Pierre Larrouturou, Alessandro Panza
Date tabled	2.2.2023

FINAL VOTE BY ROLL CALL IN COMMITTEE RESPONSIBLE

54	+
ECR	Michiel Hoogeveen, Eugen Jurzyca, Denis Nesci, Dorien Rookmaker, Johan Van Overtveldt
ID	Susanna Ceccardi, Gianna Gancia, Valentino Grant, France Jamet, Alessandro Panza, Marco Zanni
NI	Andor Deli
PPE	Anna-Michelle Asimakopoulou, Isabel Benjumea Benjumea, Stefan Berger, Herbert Dorfmann, Markus Ferber, José Manuel Fernandes, Frances Fitzgerald, José Manuel García-Margallo y Marfil, Danuta Maria Hübner, Othmar Karas, Aušra Maldeikienė, Sirpa Pietikäinen, Ralf Seekatz, Inese Vaidere
Renew	Gilles Boyer, Engin Eroglu, Giuseppe Ferrandino, Valérie Hayer, Billy Kelleher, Georgios Kyrtsos, Eva Maria Poptcheva, Erik Poulsen, Stéphanie Yon-Courtin
S&D	Marek Belka, Jonás Fernández, Eider Gardiazabal Rubial, Eero Heinäluoma, Pierre Larrouturou, Pedro Marques, Csaba Molnár, Evelyn Regner, René Repasi, Joachim Schuster, Paul Tang, Irene Tinagli
Verts/ALE	Rasmus Andresen, Claude Gruffat, Stasys Jakeliūnas, Philippe Lamberts, Ville Niinistö, Piernicola Pedicini, Ernest Urtasun

3	-
The Left	José Gusmão, Chris MacManus, Dimitrios Papadimoulis

0	0

Key to symbols:
+ : in favour
- : against
0 : abstention