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### **COVER NOTE**

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From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
Subject:	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

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Delegations will find herewith the Presidency's final compromise text with a view to a general approach.

**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**

(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<sup>1</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

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

(1) In accordance with Article 69 of Directive 2011/61/EU of the European Parliament and of the Council<sup>2</sup>, 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 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<sup>3</sup>, which lays down rules regarding the authorisation and operation of UCITS, in the areas of delegation, asset safekeeping, supervisory reporting and liquidity risk management.

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<sup>2</sup> 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).

<sup>3</sup> 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).

(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 the tasks carried out by an administrator in accordance with Regulation (EU) 2016/1011 of the European Parliament and of the Council<sup>4</sup> ('administration of benchmarks') and credit servicing governed by Directive 2021/2167 of the European Parliament and of the Council.<sup>5</sup> For the sake of completeness, it should also be clarified that, when undertaking the tasks carried out by an administrator of benchmarks or when providing credit services, the AIFM should be subject to the abovementioned acts.

(3a) In order to enhance legal certainty for AIFMs and UCITS managers regarding the services they can provide to third parties, it should be clarified that AIFMs and UCITS managers are allowed to perform for the benefit of third parties the same activities and services that they already provide in relation to the AIFs and UCITS they manage, provided this does not create unmanageable conflicts of interest. This possibility would also support the international competitiveness of European AIFMs and UCITS management companies by enabling economies of scale and help diversify revenue sources.

(4) To ensure legal certainty 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<sup>6</sup>. With regard to other assets, which are not financial instruments, AIFMs should be required to comply with the requirements of Directive 2011/61/EU.

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<sup>4</sup> 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).

<sup>5</sup> Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU (OJ L 438, 8.12.2021, p. 1–37)

<sup>6</sup> 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).

(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 basis and be resident in the Union. Regardless of this statutory minimum, more resources may be necessary depending on the size and complexity of the AIF.

(6) 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.

(7) Marketing of funds 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 may 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 Directive 2014/65/EU or Directive 2016/97/EU, which define the scope and extent of their responsibilities towards their own clients. This Directive should therefore acknowledge the diversity of distribution arrangements and recognise the existing safeguards for the arrangements whereby a distributor acts on its own behalf when it markets the AIF under Directive 2014/65/EU or through life-insurance based investment products in accordance with Directive 2016/97/EU, in which case the provisions of this Directive regarding delegation should not apply irrespective of any distribution agreement between the AIFM and the distributor.

(8) To develop a reliable overview of delegation activities in the Union and to inform future supervisory actions, AIFMs should regularly provide competent authorities with information on delegation arrangements which involve the delegation of collective or discretionary portfolio management or risk management functions. AIFMs should therefore report information on the delegates, the list and description of the delegated activities, the amount and percentage of the assets of the managed AIFs that are subject to delegation arrangements concerning the portfolio management function, a description of how the AIFM oversees, monitors and controls the delegate, information on the sub-delegation arrangements and the date of commencement and expiry of the delegation and sub-delegation arrangements. For the sake of clarity, it should be specified that the data collected on the percentage of the assets of the managed AIFs that are subject to delegation arrangements concerning the portfolio management functions is for the purposes of providing a greater overview of the operation of delegation, and is not on its own an evidential indicator for determining the adequacy of substance or risk management, or the effectiveness of oversight or control arrangements at the level of the manager. Such information should be communicated to the competent authorities as part of the supervisory reporting governed by Article 24 of Directive 2011/61/EU.

(8a) Given that it is possible for an AIFM to employ leverage and, under certain conditions, to contribute to the build-up of systemic risk or disorderly markets, special requirements should be imposed on AIFMs employing leverage on a substantial basis. In order to achieve a uniform application of such requirements, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of specifying when leverage is to be considered to be employed on a substantial basis.

(9) 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').<sup>7</sup> 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. For the sake of clarity, it should be specified that the provisions laid down in this Directive that are applicable to AIFMs that manage loan-originating AIFs should not prevent Member states from setting forth national product frameworks that define certain categories of AIFs with more restrictive rules. These national rules should apply to the AIF established in the Member State that has decided to exercise the discretion to the extent that these rules are more restrictive than the general provisions laid down in this Directive.

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<sup>7</sup> 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).

(9a) AIFs granting loans to consumers are subject to the requirements of other instruments of Union law applicable to consumer lending, including Directive 2021/2167/EU on credit servicing and credit purchasing and Directive 2008/48/EC on credit agreements for consumers. These instruments of Union law lay down the basic protections of borrowers at the EU level. However, and based on overriding reasons of public interest, Member States should be able to prohibit loan-origination by AIFs to consumers.

(10) To support the professional management of AIFs and to mitigate risks to the financial stability, AIFMs that manage AIFs that engage in loan origination should have effective policies, procedures and processes for the granting of loans. They should also implement effective policies, procedures and processes for assessing credit risk and administering and monitoring their credit portfolio where they engage in loan originating activities or purchase loans from third parties. These policies, procedures and processes 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. In addition, they should be subject to a leverage limit to ensure the stability and integrity of the financial system. In line with this objective, the leverage limit should be the same for all loan-originating AIFs, be they marketed to retail investors or only to professional investors. This should not prevent Member States from imposing a stricter leverage limit at national level to AIFs marketed to retail investors.

(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 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 to avoid situations in which loans are originated with the sole purpose of selling them. Nevertheless, originate-to-distribute-loans should not be an investment strategy pursued by AIFs and AIFMs should therefore ensure that they only manage loan-originating AIFs whose investment strategy is not to originate loans with the objective to sell them.

(14) Long-term, illiquid loans held by AIFs may create liquidity mismatches if the authorised AIF's open-ended structure allows investors to redeem their fund units or shares on a frequent basis. It is therefore 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. However, a loan-originating AIF may offer redemption possibilities given its investment strategy and based on a liquidity management system that minimises liquidity mismatches and ensures investors fair treatment. It should therefore be possible for AIFMs to manage such AIFs provided that certain requirements are fulfilled, to be specified by regulatory technical standards. The regulatory technical standards should take into account the nature of the loan origination by the AIFM, especially if the AIFM provides only shareholder loans which can be regarded as equity-like and pose a lesser risk than loans to third parties.

(15) It should be clarified that where a loan-originating AIFs or an AIFM, in relation to its managed AIF's lending activities, are subject to the requirements laid down in Directive 2011/61/EU and to the requirements laid down in Regulations (EU) 345/2013<sup>8</sup>, (EU) 346/2013<sup>9</sup> and (EU) 2015/760<sup>10</sup> 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.

(15a) Due to the potentially illiquid and long-term nature of the assets of loan-originating AIFs, AIFMs experience inherent difficulty in complying with changes to the fund rules and regulatory requirements introduced during the life-cycle of the loan-originating AIFs they manage without affecting the trust and confidence of their investors. It is therefore necessary to provide for transitional rules for loan-originating AIFs that have been constituted before the adoption of this Directive.

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<sup>8</sup> 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).

<sup>9</sup> 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).

<sup>10</sup> 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).

(16) To support market monitoring by the supervisory authorities the information gathering and sharing through supervisory reporting should 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<sup>11</sup>, Regulation (EU) 2019/834 of the European Parliament and of the Council<sup>12</sup>, Regulation (EU) No 1011/2012 of the European Central Bank<sup>13</sup> and Regulation (EU) No 1073/2013 of the European Central Bank<sup>14</sup>, 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.

(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. 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.

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<sup>11</sup> 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).

<sup>12</sup> 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).

<sup>13</sup> 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).

<sup>14</sup> 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).

(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<sup>15</sup> 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<sup>16</sup>. 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.

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<sup>15</sup> 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).

<sup>16</sup> 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).

(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).<sup>17</sup>

(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 determine an appropriate set of LMTs, including the selection of at least two LMTs from the harmonised list set out in the Annex, in addition to the possibility to suspend redemptions and activate side pockets, in exceptional circumstances and in the interest of their share or unit-holders. By way of derogation, the manager of an open-ended AIF should be able to select only one LMT from Annex V where that AIF is authorised as a money market fund. When an AIFM takes a decision to activate or deactivate the LMT, it should notify the supervisory authorities in parallel with the activation. When side pockets are activated the supervisory authorities should be notified, in a reasonable timeframe prior to this activation. While not giving competent authorities the power to approve the use of a liquidity management tool before it is activated, this notification requirement would allow supervisory authorities to better handle potential spill-overs of liquidity tensions into the wider market. This requirement should only apply to suspension of redemptions, redemption gates and side pockets since other LMTs have the potential for a frequent use during normal market conditions. However, competent authorities should remain able to request the notifications for these other LMTs, if they deem it appropriate, for example where the key parameters of these tools are modified or where redemption in kind is activated.

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<sup>17</sup> 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. In particular, and to strengthen investor protection, it should be specified that the use of redemption in kind is not suitable for retail investors and should therefore only be activated to meet redemption requests of professional investors, while addressing risks of inequality of treatment between redeeming investors and other unitholders or shareholders.

(23) In order to ensure consistent harmonisation in the area of liquidity risk management by the managers of open-ended funds, ESMA should issue guidelines to specify the process for choosing and using LMTs to facilitate market and supervisory convergence.

(24) *deleted*

(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 get a better understanding of the application of the provisions of this Directive, including in the area of appropriate oversight and control of the delegation arrangements, in all the Member States. To that end, it should draw on reporting obligations to competent authorities, and on the exercise in the area of delegation of its supervisory convergence powers, before the next review of this Directive takes place. ESMA's analysis of the data collected and of the results of the exercise of its supervisory convergence powers will feed in a report, to be provided before the start of the review, analysing market practices regarding delegation, substance rules, prevention of letter-box entities and compliance with related requirements of the Directive and informing of any additional measures that may be needed to support the effectiveness of the delegation regimes laid down in Directive 2011/61/EU.

(28a) Marketing of funds 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 may 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 Directive 2014/65/EU or Directive 2016/97/EU, which define the scope and extent of their responsibilities towards their own clients. This Directive should therefore acknowledge the diversity of distribution arrangements and recognise the existing safeguards for the arrangements whereby a distributor acts on its own behalf when it markets the UCITS under Directive 2014/65/EU or through life-insurance based investment products in accordance with Directive 2016/97/EU, in which case the provisions of this Directive regarding delegation should not apply irrespective of any distribution agreement between the management company and the distributor.

(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 could authorise competent authorities to permit AIFMs or AIFs to procure depositary services located in other Member States. To ensure that this possibility of authorising the appointment of a depositary in another Member State does not replicate a depositary passport, it should only be utilised when conditions defined in this directive are fulfilled and with prior approval of the competent authorities of the AIF. Since the authorisation to procure depositary services located in other Member States should not be automatically granted, even when the abovementioned conditions are fulfilled, the competent authorities should grant their prior approval based on a case-by-case assessment on the lack of relevant depositary services in the jurisdiction of the AIF, given the investment strategy of that AIF.

(30) Opening up the possibility to appoint a depositary in another Member State should be 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 AIF 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) Access to the internal market should be established in such way as to ensure a level playing field for all market participants, which requires putting in place requirements harmonizing such access. The requirements for third-country entities with access to the internal market should be aligned to the standards laid down in the common action undertaken by the EU Member States as regards non-cooperative jurisdictions for tax purposes and Directive (EU) 2015/849 of the European Parliament and of the Council. The requirements should also ensure appropriate and effective exchange of information in tax matters in line with international standards such as those laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital, to ensure an efficient exchange of information that allows competent authorities of the relevant Member States to carry out their duties in accordance with this Directive.

(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. Regardless of this statutory minimum, more resources may be necessary depending on the size and complexity of the management company.

(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) To develop a reliable overview of delegation activities in the Union governed by Article 13 of Directive 2009/65/EC and to inform future supervisory actions, management companies should regularly provide to the competent authorities of the UCITS they manage information on the delegation arrangements which involve the delegation of collective or discretionary portfolio management or risk management functions. UCITS should therefore report information on the delegates, the list and description of the delegated activities, the amount and percentage of the assets of the managed UCITS that are subject to delegation arrangements concerning the portfolio management function, a description of how the management company oversees, monitors and controls the delegate, information on the sub-delegation arrangements and the date of commencement and expiry of the delegation and sub-delegation arrangements. For the sake of clarity, it should be specified that the data collected on the percentage of the assets of the managed UCITS that are subject to delegation arrangements concerning the portfolio management functions is for the purposes of providing a greater overview of the operation of delegation, and is not on its own an evidential indicator for determining the adequacy of substance or risk management, or the effectiveness of oversight or control arrangements at the level of the manager. Such information should be communicated as part of the regular reportings to be provided by AIFMs to their competent authorities.

(39) *deleted*

(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 principles laid down in the Inter-institutional Agreement of 13 April 2016 on Better Law-Making<sup>18</sup>. 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 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.

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<sup>18</sup> OJ L 123, 12.5.2016, p. 1.

(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 determine an appropriate set of LMTs, including the selection of at least two LMTs from the harmonised list set out in the Annex in addition to the possibility to suspend redemptions and activate side pockets, in exceptional circumstances and in the interest of their unit-holders. By way of derogation, the management company should be able to select only one LMT from Annex IIA where the UCITS is authorised as a money market fund. When a management company takes a decision to activate or deactivate the LMT, it should notify the supervisory authorities in parallel with the activation. When side pockets are activated the supervisory authorities should be notified in a reasonable timeframe prior to this activation. While not giving competent authorities the power to approve the use of a liquidity management tool before it is activated, this notification requirement would allow supervisory authorities to better handle potential spill-overs of liquidity tensions into the wider market. This requirement should only apply to suspension of redemptions, redemption gates and side pockets since other LMTs have the potential for a frequent use during normal market conditions. However, even though competent authorities should remain able to request the notifications for these other LMTs, if they deem it appropriate, for example where the key parameters of these tools are modified or where redemption in kind is activated.

(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. In particular, and to strengthen investor protection, it should be specified that the use of redemption in kind is not suitable for retail investors and should therefore only be activated to meet redemption requests of professional investors, while addressing risks of inequality of treatment between redeeming investors and other unitholders.

(44) *deleted*

(45) In order to ensure consistent harmonisation in the area of liquidity risk management by the managers of UCITS, ESMA should issue guidelines to specify the process for choosing and using LMTs to facilitate market and supervisory convergence.

(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. 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 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, the liquidity of their assets, the selection and activation of liquidity management tools and their risk profile. If ESMA determines that granular information on these topics is warranted, the provisions of Directive 2009/65/EC should accommodate the necessary broadening of the reporting scope.

(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<sup>19</sup> 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.

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<sup>19</sup> 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).

(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 get a better understanding of the application of the provisions of this Directive, including in the area of appropriate oversight and control of the delegation arrangements, in all the Member States. To that end, it should draw on reporting obligations to competent authorities and on the exercise in the area of delegation of its supervisory convergence powers before the next review of this Directive takes place. ESMA's analysis of the data collected and of the results of the exercise of its supervisory convergence powers will feed in a report, to be provided before the start of the review, analysing market practices regarding delegation, substance rules, prevention of letter-box entities and compliance with related requirements of the Directive and informing of any additional measures that may be needed to support the effectiveness of the delegation regimes laid down in Directive 2009/65/EU.

(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.

HAVE ADOPTED THIS DIRECTIVE:

## Article 1

### *Amendments to Directive 2011/61/EU*

Directive 2011/61/EU is amended as follows:

(1) Article 4(1) is amended as follows:

(a) the following points (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)’;

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

‘(ca) ‘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;’

(c) the following points (va), (vb) and (vc) are added:

‘(va) ‘loan origination’ means granting loan by an AIF as the original lender;

(vb) ‘shareholder loan’ means an advance on current account granted by an AIFs to an undertaking in which it holds directly or indirectly at least 5 % of the capital or voting rights and which cannot be sold to third-parties independently of the capital instruments held by the AIF in the same undertaking;

(vc) ‘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 2 is amended as follows:

(a) in paragraph 4, point (b), the following points (iv) is added:

‘(iv) any other ancillary service where the ancillary service represents a continuation of the services already undertaken by the AIFM in accordance with Annex I, and does not create conflicts of interest that could not be managed by additional rules;’

(b) in paragraph 4, point (c) and (d) are added:

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

(d) credit servicing in accordance with of Directive 2021/2167 of the European Parliament and of the Council. Without prejudice to other instruments of Union law, Member States may prohibit AIFs servicing credits granted to consumers within the meaning of Article 3(a) of Directive 2008/48/EC in their territory;’

(c) paragraph 5 is amended as follows:

(i) point (b) is deleted;

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

‘only the activities referred to in points 2, 3 or 4 of Annex I; or’

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

‘(e) administration of benchmarks which are used in their managed AIFs.’

(d) paragraph 6 is replaced by the following:

‘6. Article 9(2) of Directive 2019/2034/EU, Articles 15, 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 detailed 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 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 and a detailed description of the human and technical resources to be used by the AIFM for monitoring and controlling the delegate.

Member States shall require authorised AIFMs to keep the information provided to its competent authorities updated.’

(b) the following paragraph 8 is added:

‘8. Before the start of the review referred to in Article 69b, 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, based, *inter alia*, on the data reported to competent authorities in accordance with point (d) of Article 24(2) and on the exercise of its supervisory convergence powers.’;

(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 executive member or members of the governing body of the AIFM who are committed full-time to conduct the business of that AIFM and who are in the Union, meeting such conditions.’

(5) Article 15 is amended as follows:

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

‘(d) for loan originating activities, implement effective policies, procedures and processes for the granting of credit. Where they engage in loan originating activities or in purchasing loans from third parties, they shall also implement effective policies, procedures and processes 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.

Member States may determine that the requirement set out in the first subparagraph of point (d) of paragraph 3 shall not apply to origination of shareholder loans, provided that these shareholder loans:

(i) do not exceed in aggregate 100 % of the AIF’s capital; or

(ii) are granted to portfolio undertakings which acquire and manage real estate or participations in real estate companies, and in which the AIF directly or indirectly holds 100 % of the capital or voting rights. This requirement shall apply on a look-through basis to underlying assets controlled directly or indirectly by the AIF or the AIFM acting on behalf of the AIF.’

b) the following paragraphs 4a to 4f are inserted between the paragraphs 4 and 5:

‘4a. An AIFM shall ensure that loans originated to any single borrower by the AIF it manages do 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) an AIF within the meaning of Article 4(1), point (a), of this Directive; or

(c) a UCITS within the meaning of Article 1(2) of Directive 2009/65/EC.’

For the purposes of determining the compliance with the restriction set out in the first subparagraph, the AIFM shall combine the loans originated by the AIF it manages and that AIF’s loan exposures gained through a special purpose vehicle which originates loans for or on behalf of the AIF or AIFM in respect of the AIF.

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<sup>20</sup>, (EU) 345/2013<sup>21</sup> and (EU) 346/2013<sup>22</sup>.

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<sup>20</sup> 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).

<sup>21</sup> 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).

<sup>22</sup> 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).

4aa. An AIFM shall ensure that the leverage of a loan-originating AIF it manages represents no more than 150 % of the net asset value of the AIF.

The leverage shall be expressed as the ratio between the exposure of an AIF, calculated according to the commitment method as defined by means of the delegated acts referred to in Article 4(3), and its net asset value.

Borrowing arrangements which are temporary in nature and are fully covered by contractual capital commitments from investors in the AIF shall not be considered to constitute leverage for the purposes of this paragraph.

The requirements set out in the first subparagraph shall apply to AIFs that gain exposure to a loan through a special purpose vehicle which originates a loan for or on behalf of the AIF or AIFM in respect of the AIF.

Member States may determine that the requirement set out in the first subparagraph shall not apply to AIFs the lending activities of which solely consists in originating shareholder loans, provided that these shareholder loans:

(i) do not exceed in aggregate 100 % of the AIF's capital; or

(ii) are granted to portfolio undertakings which acquire and manage real estate or participations in real estate companies, and in which the AIF directly or indirectly holds 100 % of the capital or voting rights. This requirement shall apply on a look-through basis to underlying assets controlled directly or indirectly by the AIF or the AIFM acting on behalf of the AIF.

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 or prospectus of the AIF. This date shall not exceed 24 months from the date the AIF first offers shares for subscription.

(b) cease to apply once the AIFM starts to sell assets in order to redeem investors' units or shares as part of the wind-down of the AIF;

(c) be temporarily suspended for up to 12 months where the AIFM 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. 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 year.

4d. The AIFM shall ensure that an AIF does not grant loans to the following entities:

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

(b) its depositary and delegates of its depositary;

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

(d) an entity within the same group as defined in Article 2(11) of Directive 2013/34/EU of the European Parliament and the Council, except where that entity is a financial undertaking that exclusively finances borrowers that are not mentioned in points (a) to (d) of this paragraph.

4da. Without prejudice to other instruments of Union law, Member State may prohibit AIFs granting loans to consumers within the meaning of Article 3(a) of Directive 2008/48/EC in their territory. This shall not affect marketing of AIFs engaged in consumer lending in the Union.

4e. An AIFM shall not manage an AIF whose investment strategy, as specified in the relevant AIF's rules, instrument of incorporation and prospectus, is to originate loans, or gain exposure to loans through a special purpose vehicle which originates a loan for or on behalf of the AIF or AIFM in respect of the AIF, with the sole purpose of transferring those loans or exposures to third parties ('originate-to-distribute').

4f. An AIFM shall ensure that the AIF it manages retains, for the period of two years from the signing date or until maturity whichever is shorter, 5% of the notional value of the loans it has originated, or purchased from a special purpose vehicle which originates a loan for or on behalf of the AIF or AIFM in respect of the AIF, and subsequently sold to third parties.

By way of derogation, the requirement set out in the first subparagraph does not apply where:

- (a) The AIF starts selling assets in order to redeem investors' units or shares as part of the wind-down of the AIF;
- (b) The borrower or any of its shareholders are subject to EU sanctions; or
- (c) The sale of the loan is necessary for the AIF not to be in breach of one of its investment or diversification rules and where this possible breach would materialise for reasons beyond the control of the AIF and of the AIFM that manages it, or as a result of the exercise of subscription or redemption rights.'

(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.

The requirements set out in the first subparagraph shall apply to AIFs that gain exposure to a loan through a special purpose vehicle which originates a loan for or on behalf of the AIF or AIFM in respect of the AIF.

2aa. By way of derogation from paragraph 2a, a loan originating AIF may be open-ended provided that its liquidity risk management system is compatible with its investment strategy and redemption policy.

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 one two appropriate liquidity management tools from the list set out in Annex V, points 2 to 4 7, for possible use in the interest of the AIF’s investors. By way of derogation, the 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 money market fund in accordance with Regulation (EU) 2017/1131.

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. This decision and relevant explanations shall be communicated to the competent authorities of the home Member State of the AIF.

Redemption in kind as referred to in Annex V, point 7, can only be activated to meet redemptions requested by professional investors and if the redemption in kind corresponds to a pro rata share of the assets held by the AIF.

By way of derogation from subparagraph 3, the redemption in kind may not correspond to a pro rata share of the assets held by the AIF if that AIF is solely marketed to professional investors or where the aim of that AIF's investment policy is to replicate the composition of a certain stock or debt securities index, and additionally if that AIF is an Exchange Traded Fund as defined in article 2(26) of MiFIR.

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 shares, or activate or deactivate other liquidity management tools selected from the list set out in Annex V, points 2 to 4, 7 and included in the fund rules or the instruments of incorporation of the AIF. In the interest of AIF investors, to ensure subscriptions and redemptions are processed at a fair price, the AIFM may also activate side pockets as referred to in point 8 of Annex V, in situations where the AIFM cannot ensure the fair and accurate valuation of some assets or where some assets have become non-tradable.

The temporary suspension and activation of side pockets referred to in the first subparagraph may only be provided for in exceptional cases where circumstances so require and where 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 when activating or deactivating suspension of redemptions and redemption gates referred to in points 1 and 2 of Annex V.

An AIFM shall notify the same competent authorities when activating or deactivating side pockets as referred to in point 8 of that Annex, in a reasonable timeframe prior to the activation or deactivation of this liquidity management tool.

Member States may require notifications from the AIFM to the competent authorities of the home Member State of the AIFM when the AIFM decides to activate redemption in kind, to extend the notice period or to increase the liquidity fee, the cap of the swing factor of the swing pricing or of the anti-dilution levy fee set out in the fund prospectus or increase the bid-ask spread in dual pricing for liquidity management purposes.

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 and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.

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.

2ee. ESMA shall develop draft regulatory technical standards to determine the requirements with which a loan-originating AIF must comply to maintain an open-ended structure. Such requirement should include elements on the selection and use of liquidity management tools, the availability of liquid assets and stress testing, as well as an appropriate redemption policy given the liquidity profile of the AIF, and shall take into account the risk profile and the nature of the loans.

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

2f. ESMA shall develop draft regulatory technical standards to specify the characteristics of the liquidity management tools set out in Annex V.

2g. ESMA shall develop guidelines determining criteria for the selection and use of appropriate liquidity management tools by the AIFMs for liquidity risk management, including appropriate disclosures to investors, taking into account the capability of such tools to reduce undue advantages for investors that redeem their investments first, and to mitigate financial stability risks. These guidelines shall include indications on the circumstances in which side pockets can be activated.

2h. Power is delegated to the Commission to supplement this Directive by adopting the regulatory technical standards referred to in paragraphs 2ee and 2f 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:

(i) 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:’;

(ii) 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, 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 or the provider of the services and to the extent that it becomes a letter-box entity.’;

(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 6a is added:

‘6a. By way of derogation from the paragraphs 1 to 6 of this Article, where the marketing function as referred in Annex I, paragraph 2(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 a delegation subject to the requirements laid down in the abovementioned paragraphs irrespective of any distribution agreement between the AIFM and the distributor’

(8) Article 21 is amended as follows:

(a) In paragraph 5 point (c) is inserted:

‘(c) 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 point (a) of Article 21(3) 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 which shall demonstrate the lack of the relevant depositary services, given the investment strategy of the AIF, for the appointment of a depositary in another Member State; and

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

- such market consists of fewer than 7 depositaries providing depositary services to EU AIFs (authorised under Article 4 (k) (i)) of this Directive) and managed by an EU AIFMs (authorised under Article 7(1)) and where no depositary has AIF assets under custody which exceed EUR 1 billion or the equivalent in any other currency. This threshold excludes depositaries acting under Article 36(1a) of this Directive and the own assets of the depositary;

- the aggregate amount in such market of assets under custody on behalf of EU AIFs (authorised under Article 4 (k) (i) of this Directive) and managed by an EU AIFMs (authorised under Article 7(1) of this Directive) does not exceed the amount of EUR 30 billion or the equivalent in any other currency. This threshold excludes depositaries acting under Article 36 (1a) of this Directive and the own assets of the depositary.

Even if the conditions laid down in points (i) and (ii) are fulfilled, the authorisation to allow the appointment of a depositary in another Member State shall be granted on a case-by-case assessment on the lack of relevant depositary services in the jurisdiction of the AIF, given the investment strategy of the AIF.

When allowing the appointment of a depositary in another Member States, the competent authorities shall notify ESMA.

This provision shall be without prejudice to the full application of Article 21, with the exception of point (a) of paragraph 5 of that Article on the place where the depositary is to be established.’

(b) 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;

(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 Council conclusions on the revised EU list on non-cooperative jurisdictions for tax purposes;’

(c) 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 investor CSD as defined in Article 1, point (f), of Commission Delegated Regulation (EU) 2017/392\*, 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;

\* Commission Delegated Regulation (EU) 2017/392 of 11 November 2016 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on authorisation, supervisory and operational requirements for central securities depositories (OJ L 65, 10.3.2017, p. 48)’;

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

‘For the purposes of this Article, the provision of services by a central securities depository acting in the capacity of an issuer CSD as defined in Article 1, point (e) of Commission Delegated Regulation (EU) 2017/392 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 depository 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.’;

(d) 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, on request, 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, i) the competent authorities of the depositary shall share the information received without delay with the competent authorities of the AIF and the AIFM, ii) the competent authorities of the AIF or the AIFM shall share without delay any information relevant for the exercise of the supervisory powers by the competent authorities of the depositary.’

(e) In paragraph 17, point (c) is amended as follows:

Point (ii) is replaced by the following:

‘(ii) the conditions subject to which the depositary is able to exercise its custody duties over financial instruments registered with a central securities depository; and’

(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, the existing redemption arrangements with investors and a disclosure of disclosing the possibility and conditions for using liquidity management tools selected in accordance with Article 16(2b).’

(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 AIF in respect of the AIFM or its affiliates.’

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

‘(d) originated loan portfolio;

(e) on an annual basis, all direct and indirect fees and charges that were directly or indirectly charged or allocated to the AIF or to any of its investments;

(f) on an annual basis, any parent company, subsidiary or special purpose entity established in relation to the AIF’s investments by the AIFM, the staff of the AIFM or the AIFM’s direct or indirect affiliates.’;

(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.

It shall, in respect of each AIF it manages, 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 and holdings of each AIF. It shall include the relevant identifiers to connect the data provided on assets, AIFs and AIFM to other supervisory or publicly available data sources.

(b) sub-paragraph (c) of paragraph 2 is replaced by the following:

‘(c) the current risk profile of the AIF’

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

‘(d) information on delegation arrangements which involve the delegation of collective or discretionary portfolio management or risk management functions as follows:

(i) information on the delegates, specifying the delegates’ name and domicile, whether they have any close links with the AIFM and whether they are authorised or regulated entities for the purpose of asset management. The information shall include the relevant identifiers of the delegates to connect the information provided to other supervisory or publicly available data sources;

(ii) list and description of the activities concerning risk management and portfolio management functions which are delegated;

(iii) where the portfolio management function is delegated, the amount and percentage of the AIF’s assets which are subject to delegation arrangements concerning the portfolio management function;

(iv) number of full-time equivalent human resources employed by the AIFM to monitor the delegation arrangements;

(v) description of periodic due diligence measures carried out by the AIFM to maintain oversight on, monitor and control the delegate, including the date of performance of these measures, the issues identified and, where relevant, the measures and timeline adopted to address these issues;

(vi) where sub-delegation arrangements are in place, information required in points (i) to (iii) on the sub-delegates and the activities related to the portfolio and risk management functions that are sub-delegated;

(vii) the commencement and expiry dates of the delegation and sub-delegation arrangements.’

(ca) in paragraph 2, the following point (f) is added:

‘(f) the list of Member States in which the units or shares of the AIF are actually marketed by the AIFM or by a distributor which is acting on behalf of that AIFM.’

(d) paragraph 6 is replaced by the following:

‘6. ESMA shall develop draft regulatory technical standards specifying:

- (a) the details of the information to be reported according to paragraphs 1 and 2. ESMA shall take into account other reporting requirements to which the AIFMs are subject and the findings of the report issued in accordance with paragraph 2 of Article 69b; and
- (b) the reporting frequency and timing.

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 supplement this directive by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.’;

(e) 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;

(b) 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 within any Union reporting framework by any relevant competent authority, at Union or national level.

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 supplement this directive by adopting the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.’;

(f) the following paragraph 8 is added:

8. The Commission shall adopt delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58 to supplement this Directive by specifying when leverage is to be considered to be employed on a substantial basis for the purposes of paragraph 4.

(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;

(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 the revised EU list on non-cooperative jurisdictions for tax purposes.’;

(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.’;

(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 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 Council conclusions on the revised EU list on non-cooperative jurisdictions for tax purposes.’;

(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;

(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.’;

(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;

(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 Council conclusions on the revised EU list on non-cooperative jurisdictions for tax purposes.’;

(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.’;

(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 Council conclusions on the revised EU list on non-cooperative jurisdictions for tax purposes.’;

(18) In Article 47, 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).’;

(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 reasonable 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, they shall notify ESMA and the competent authorities of the home and host Member States of the AIFM 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 in parallel with exercising powers pursuant to Article 46(2), point (j) and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.

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), specifying the reasons for the request and notifying ESMA and, if there are potential risks 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 and, ESMA, stating its reasons and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.

5d. Based on the information received in accordance with paragraphs 5b and 5c, ESMA shall issue an opinion in a reasonable timeframe to the competent authorities of the home Member State of the AIFM on exercising powers laid down in Article 46(2), point (j).

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, stating its reasons for the non-compliance or intention. 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, unless such publication is in conflict with the legitimate interest of the share or unit-holders or of the public, or could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system of the Union. ESMA shall give the competent authorities advance notice about such publication.

5f. 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, without delay, powers laid down in Article 46(2), specifying the reasons for its request 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 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 States has exercised the option provided for in Article 21, paragraph 5, point (c), and where the competent authorities of the home Member State of an AIF or, in case where the AIF is not regulated, the competent authorities of the home Member State of an AIFM 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, shall 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 timeframe in relation to specific cases, which have cross-border implications, concern investor protection issues or pose risks to the financial stability.’;

(c) the following paragraph 7 is added:

‘7. ESMA shall develop guidelines providing indications indicating to the competent authorities in their exercise of the powers set out in Article 46(2), point (j), and indications on the situations that may lead to putting forward the requests referred to in paragraphs 5b and 5f. When developing those guidelines, 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.

(19a) Article 60 is replaced by the following:

‘Article 60

#### Disclosure of derogations

Where a Member State makes use of derogation or option provided by Articles 6, 9, 15(3 and 15(4aa), 21, 22, 28, 43 and Article 61(5), it shall inform the Commission thereof as well as of any subsequent changes. The Commission shall make the information public on a web-site or by other easily accessible means.’

(20) in Article 61, the following paragraph 6 is inserted:

‘6. AIFMs in so far as they manage AIFs that originate loans and that have been constituted before [date of adoption of this Directive] may continue to manage such AIFs without complying with point (d) of Article 15(3), paragraphs 4a to 4f of Article 15 and Article 16(2a) of this Directive until [5 years + date of adoption of this Directive]. By way of derogation, loan-originating AIFs constituted before [date of adoption of this Directive] and that do not raise additional capital 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 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;
- (c) the appropriateness of the requirements applicable to AIFMs managing loan-originating AIFs laid down in Article 15;
- (d) the functioning and appropriateness of the power of competent authorities to allow the appointment of a depositary in another Member State as set out in Article 21(5), point c, including the relevance of the quantitative criteria laid down in article 5(c), subparagraph ii.

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.’;

(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) Article 6 is amended as follows:

(a) paragraph 3 is amended as follows:

(i) in point (b), the following subparagraphs (iii) and (iv) are inserted:

‘(iii) reception and transmission of orders in relation to financial instruments.’

(iv) any other ancillary service where the ancillary service represents a continuation of the services already undertaken by the management company and does not create conflicts of interest that could not be managed by additional rules.’

(ii) the following points (c) is added:

‘(c) administration of benchmarks, in accordance with Regulation (EU) 2016/1011;’;

(iii) the last subparagraph is replaced by the following:

‘Management companies shall not be authorised under this Directive to provide only the services referred to in this paragraph. Management companies shall not be authorized to administer benchmarks which are used in their managed UCITS.’

(b) paragraph 4 is replaced by the following

‘4. Article 9(2) of Directive (EU) 2019/2034, 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 3, points (a) and (b), are provided by management companies.’

(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 natural persons who are either employed full-time by that management company, or executive member or members of the governing body of the management company who are committed full-time to conduct the business of that management company and who are resident in the Union, meeting such conditions.

(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;’;

(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 and a detailed presentation of the human and technical resources to be used by the management company for monitoring and controlling the delegate.’;

(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 or 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 or the provider of the services and to the extent that it becomes a letter-box entity.’;

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

3. By way of derogation from the paragraphs 1 and 2 of this Article, where the marketing function as referred in Annex II is performed by one or several distributors, which are not 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 a delegation subject to the requirements laid down in the abovementioned paragraphs irrespective of any distribution agreement between the management company and the distributor’

4. Before the start of the review referred to in Article 110a, 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 13, based, inter alia, on the data reported to competent authorities in accordance with point (e) of Article 20a and on the exercise of its supervisory convergence powers.

5. 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 or the provider of the services as set out in paragraph 2.
- (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 two appropriate liquidity management tools 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. By way of derogation, a management company may select only one liquidity management tool from Annex IIA, points 2 to 7 for a UCITS it manages, if that UCITS is authorised as money market fund in accordance with Regulation (EU) 2017/1131.

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.

Redemption in kind as referred to in Annex IIA, point 7, can only be activated to meet redemptions requested by professional investors and if the redemption in kind corresponds to a pro rata share of the assets held by the UCITS.

By way of derogation from subparagraph 3, the redemption in kind may not correspond to a pro rata share of the assets held by the UCITS if that UCITS is solely marketed to professional investors or where the aim of that UCITS's investment policy is to replicate the composition of a certain stock or debt securities index, as referred to in Article 53, and additionally if that UCITS is an Exchange Traded Fund as defined in article 2(26) of MiFIR.

3. ESMA shall develop draft regulatory technical standards to define and specify the characteristics of the liquidity management tools set out in Annex IIA.

4. ESMA shall develop guidelines determining criteria for the selection and use of suitable liquidity management tools by the management companies for liquidity risk management, including appropriate disclosures to investors, taking into account the capability of such tools to reduce undue advantages for investors that redeem their investments first, and to mitigate financial stability risks. These guidelines shall include indications on the circumstances in which side pockets can be activated.

5. Power is delegated to the Commission to supplement this Directive by adopting the regulatory technical standards referred to in paragraphs 3 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 the home Member State of the UCITS on the markets and instruments in which it trades on behalf of the UCITS it manages.

It shall, in respect of each UCITS it manages, 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 and holdings of each UCITS. It shall include the relevant identifiers to connect the data provided on assets, UCITS and the management company to other supervisory or publicly available data sources.

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

(a) any new arrangements for managing the liquidity of the UCITS, including the selection and activation of liquidity management tools;

(b) the current risk profile of the UCITS.

(c) the results of the stress tests performed in accordance with Article 51(1).

(d) information on delegation arrangements which involve the delegation of collective or discretionary portfolio management or risk management functions. The information provided shall cover the following:

(i) information on the delegates, specifying the delegates' name and domicile, whether they have any close links with the AIFM and whether they are authorised or regulated entities for the purpose of asset management. The information shall include the relevant identifiers of the delegates to connect the information provided to other supervisory or publicly available data sources;

(ii) list and description of the activities concerning risk management and portfolio management functions which are delegated;

(iii) where the portfolio management function is delegated, the amount and percentage of the AIF's assets which are subject to delegation arrangements concerning the portfolio management function;

(iv) number of full-time equivalent human resources employed by the AIFM to monitor the delegation arrangements;

(v) description of periodic due diligence measures carried out by the AIFM to maintain oversight on, monitor and control the delegate, including the date of performance of these measures, the issues identified and, where relevant, the measures and timeline adopted to address these issues;

(vi) where sub-delegation arrangements are in place, information required in points (i) to (iii) on the sub-delegates and the activities related to the portfolio and risk management functions that are sub-delegated;

(vii) the commencement and expiry date of the delegation and sub-delegation arrangements.

(f) the list of Member States in which the units of the UCITS are actually marketed by its management company or by a distributor which is acting on behalf of that management company.

1b. The competent authorities of the home Member State of the UCITS shall ensure that all information gathered under the first paragraph in respect of all UCITS that they supervise and the information gathered under Article 7 is made available, without delay, to competent authorities of other relevant Member States, ESMA and the ESRB by means of the procedures set out in Articles 102 to 105 on cooperation agreements and exchange of information. They shall, without delay, also provide information by means of those procedures, and bilaterally to the competent authorities of other Member States directly concerned, if a management company under their responsibility, or UCITS managed by that management company could potentially constitute an important source of counterparty risk to a credit institution, other systemically relevant institutions in other Member States, or the stability of the financial system in another Member State.

2. ESMA shall develop draft regulatory technical standards specifying:

(a) the details of the information to be reported in accordance with paragraph 1 and 1a. ESMA shall take into account other reporting requirements to which the management companies are subject and the findings of the report issued in accordance with Article 20b; and

(b) the reporting frequency and timing.

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 supplement this directive by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

3. ESMA shall develop draft implementing technical standards specifying:

(a) the format and data standards for the reports referred to in paragraph 1 and 1a;

(b) 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.

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 supplement this directive by adopting the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

#### 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.

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 investor CSD as defined in Article 1, point (f) of Commission Delegated Regulation (EU) 2017/392\*, 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.

\* Commission Delegated Regulation (EU) 2017/392 of 11 November 2016 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on authorisation, supervisory and operational requirements for central securities depositories (OJ L 65, 10.3.2017, p. 48)’;

(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 Article 1, point (e), of Commission Delegated Regulation (EU) 2017/392 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 depository 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 to be 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; 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. The conduct of an investment company’s business must be decided by at least two natural persons who are either employed full-time or executive member or members of the governing body of the management company committed full-time to conduct the business of that management company and who are in the Union, meeting such conditions.’;

(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 or deactivate another 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, in situations where 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, competent authorities of a UCITS home Member State may require the suspension of redemptions and subscriptions as referred to in point 1 of Annex IIA.

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

3. The UCITS shall notify, without delay, the competent authorities of its home Member State when activating or deactivating suspension of redemptions and redemption gates as referred to in points 1 and 2 of Annex IIA.

The UCITS shall notify the same competent authorities when activating or deactivating side pockets as referred to in point 8 of that Annex, in a reasonable timeframe prior to the activation or deactivation of this liquidity management tool.

Member States may require UCITS to notify the competent authorities of its home Member State when the UCITS decides to activate redemption in kind, extend the notice period or increase the liquidity fee, the cap of the swing factor of the swing pricing or of the the anti-dilution levy fee set out in the fund prospectus or increase the bid-ask spread in dual pricing for liquidity management purposes.

The competent authorities of the home Member State of the UCITS shall inform, without delay, the competent authorities of a host Member State of the UCITS and, ESMA about any notification received in accordance with this paragraph and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.

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 and ESMA in parallel with exercising powers pursuant to paragraph 2, point (b) and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.

3b. The competent authority of the Member States in which a UCITS markets its units or the competent authority of the management company 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, if there are potential risks 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 and ESMA, stating the reasons for the disagreement and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.

3d. On the basis of the information received in accordance with paragraphs 3b and 3c, ESMA shall issue an opinion in a reasonable timeframe 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. ESMA may publish the fact that a competent authority does not comply or intend to comply with its advice, including the reasons stated by the competent authority for the non-compliance or intention, unless such publication is in conflict with the legitimate interest of the unit-holders or of the public, or could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system of the Union. ESMA shall give the competent authorities advance notice about such publication.

3f. ESMA shall develop guidelines providing indications to guide the competent authorities in their exercise of the powers set out in paragraph 2, point (b). When developing those guidelines, 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.

(9) in Article 98, the following paragraphs 3 and 4 are added:

‘3. The competent authority of the UCITS host Member State may 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 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 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 explanations to ESMA in relation to specific cases, which have cross-border implications, concern investor protection issues or pose risks to the financial stability.’;

(11) the following Article 110a is inserted:

By [Please insert date = 60 months after the entry into force of this Directive] and following 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.’;

(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*

## ANNEXES

to the

**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**

Proposal for a Directive of the European Parliament and of the Council

{SEC(2021) 570 final} - {SWD(2021) 340 final} - {SWD(2021) 341 final}

## ANNEX I

In Annex I, the following points 3 and 4 are added:

‘3. Originating loans on behalf of the AIF.

4. Servicing securitisation special purpose entities.’

## **ANNEX II**

### **‘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 shares or units.
- (2) Redemption gates: a redemption gate is a temporary restriction of the right of shareholders to redeem their shares or units. This restriction is partial, so that investors can only redeem a certain portion of their shares or units.
- (3) Notice periods: a notice period refers to the period of advance notice that investors must give to fund managers when redeeming their shares. The use of notice periods as a liquidity management tool entails extending the period of advance notice to provide the fund manager with the possibility of addressing redemption requests within a longer time frame.
- (4) Liquidity fees on redemption: a pre-determined fee, expressed in percentage of the investment, is paid to the fund by investors when redeeming their fund’s shares. It reflects the cost of achieving liquidity and ensures that investors who remain in the fund are not unfairly disadvantaged when other investors redeem their units or shares during the period. Liquidity management can entail the increase of the redemption fee;
- (5) Swing and/or dual pricing: these pricing mechanisms can be used to minimise the impact of fund redemptions and subscriptions to the value of the investment portfolio.

Swing pricing refers to the adjustment of the single net asset value of the shares or units in an investment fund by the application to this price of a pre-determined factor ('swing factor') so that it reflects the cost of fund transactions resulting from investor activity. Liquidity management can entail the increase of the swing factor, within a pre-determined limit.

Dual pricing refers to the calculation of two prices at each valuation point: the offer price, at which an investor can buy units or shares in a fund, and the bid price, at which investors can sell their units or shares in a fund. These prices are calculated based on the net asset value per unit or share, added or reduced by a pre-determined amount covering the liquidity costs of each subscription or redemption.

(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 price of the fund's shares or units. The levy is 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 assets held by the fund, instead of cash, to the redeeming unit or shareholders.

(8) Side pockets: side pockets allow the fund to segregate, in exceptional circumstances, certain investments whose economic or legal features have changed significantly or become uncertain from other investments of the investment fund.'

### ANNEX III

In Annex I, 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

### ‘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 shares or units.
- (2) Redemption gates: a redemption gate is a temporary restriction of the right of shareholders 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. The use of notice periods as a liquidity management tool entails extending the period of advance notice to provide the fund manager with the possibility of addressing redemption requests within a longer time frame.
- (4) Liquidity fees on redemption: a pre-determined fee, expressed in percentage of the investment, is paid to the fund by investors when redeeming their fund’s units. It reflects the cost of achieving liquidity and ensures that investors who remain in the fund are not unfairly disadvantaged when other investors redeem their units during the period. Liquidity management can entail the increase of the redemption fee.
- (5) Swing and/or dual pricing: these mechanisms can be used to minimise the impact of redemptions and subscriptions to the value of the investment portfolio.

Swing pricing refers to the adjustment of the single net asset value of the units in an investment fund by the application to this price of a pre-determined factor ('swing factor') so that it reflects the cost of fund transactions resulting from investor activity. Liquidity management can entail the increase of the swing factor, within a pre-determined limit.

Dual pricing refers to the calculation of two prices at each valuation point: the offer price, at which an investor can buy units in a fund, and the bid price, at which investors can sell their units in a fund. These prices are calculated based on the net asset value per unit, added or reduced by a pre-determined amount covering the liquidity costs of each subscription or redemption.

(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 price of the fund's units. The levy is 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 assets held by the fund, instead of cash, to the redeeming unitholders.

(8) Side pockets: side pockets allow the fund to segregate, in exceptional circumstances, certain investments whose economic or legal features have changed significantly or become uncertain from other investments of the investment fund. The segregation cannot lead a UCITS to transform itself into a non-UCITS, pursuant to article 1(5) of the UCITS Directive.'