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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)

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

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

This legislative proposal puts forward amendments to the Alternative Investment Funds Manager Directive (AIFMD – Directive 2011/61/EU)[1] and, to the relevant extent, to the Directive relating to undertakings for collective investment in transferable securities ('UCITS') (UCITSD – Directive 2009/65/EC).[2]

The Commission reviewed the application of the scope of the AIFMD as mandated by Article 69 of the Directive. The Commission considered that a number of issues highlighted in the AIFMD review are equally relevant for the activities of UCITS. Consequently, this legislative proposal aims to address these issues by amending AIFMD and UCITSD to better align their requirements.

The AIFMD was adopted on 8 June 2011 as part of the policy response to the global financial crisis, which exposed weaknesses and vulnerabilities in certain fund activities that could amplify risks to the broader financial system.[3]

As a post-crisis regulatory initiative, the AIFMD seeks a coherent supervisory approach to the risks that the activities of Alternative Investments Funds ('AIFs') may generate or convey to the financial system. The Directive also aims to provide high-level investor protection while facilitating the integration of AIFs in the EU market.[4] Alternative Investment Funds Managers ('AIFMs') are required to effectively manage risks and ensure adequate transparency of the activities of AIFs they manage. In fulfilling these requirements, they are able to manage and market AIFs to professional investors across the Union with a single authorisation from their home supervisor.[5] The AIFMD has become a significant pillar of the Capital Markets Union ('CMU')[6] thanks to the ability of investment funds to offer access to market-based sources of financing and to enable investors to better allocate their savings over the chosen time horizon in accordance with their preferences.

The Commission's appraisal of the scope and functioning of the AIFMD legal framework concludes that the AIFMD standards for ensuring high levels of investor protection are mostly effective.[7] The rules on conflicts of interest, disclosure and transparency requirements are necessary to protect investors. Requirements on valuation, which is necessary for establishing each investor's share in a given AIF and for monitoring the AIF's performance, have increased discipline and structure in the asset valuation process. Finally, the depositary regime

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1 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 (AIFMD).

2 Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast), (OJ L 302 17.11.2009, p. 32).

3 Supra 1.

4 Recitals 2 - 4 and 94 of the AIFMD.

5 Article 32(1) of the AIFMD.

6 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).

7 Report from the Commission to the European Parliament and the Council assessing the application and the scope of Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers (COM/2020/232 final).

establishing the duties and liability of depositaries, including safekeeping AIF assets and overseeing AIF activities, safeguards investor interests. It also supports the orderly functioning of the investment funds market.

The financial stability and market integrity are key objectives of the AIFMD.[8] The AIFMD introduced tools to improve macro-prudential monitoring and supervision of financial stability risks. AIFMs are required to report to supervisors on the main AIF exposures, their liquidity profile and leverage. Supervisory reporting has supported effective macro-prudential supervision and it is helpful for market monitoring but the granularity of the reported data could be improved. The AIFMD created an effective supervisory cooperation network coordinated by the European Securities and Markets Authority ('ESMA'), which is contributing to the convergence of supervisory approaches to the AIF activities in the European Union.

The Commission's assessment indicates that the AIFMD is generally meeting its objectives and that the EU-wide harmonisation of regulatory standards has facilitated integration of the European collective investment fund market.[9] The investment fund sector has roughly tripled in size since 2008, from € 5.5 trillion assets to more than € 15 trillion assets, and its assets as a percentage of total financial sector assets have grown significantly.[10] It has interconnections with the broader financial sector, making it important to manage potential systemic risks appropriately.[11]

The AIFMD contains general rules on liquidity management, on the use of leverage and on the valuation for managing risks at fund level. However, these requirements are not specific enough to fully capture the specificities of managing direct lending activities by AIFs and to address the potential micro and macro risks. Regulatory fragmentation, where national frameworks are established to govern loan-origination by funds, leads to difficulties in identifying and reacting effectively to potential market wide effects that may result from the activities of such funds. Moreover, diverging national regulatory approaches undermine the establishment of an efficient internal market for loan-originating AIFs by promoting regulatory arbitrage and varying levels of investor protection.

Furthermore, the review highlighted that the market data submitted to the supervisory authorities has gaps or lacks the requisite detail thus impairing the authorities' ability to identify the build-up and spill over of risks to the broader financial system. The legislative proposal aims to improve the relevant data collection and remove inefficient reporting duplications that may exist under other pieces of the European and national legislation in line with the wider strategy on supervisory data, as announced in the Digital Finance Strategy.[12]

Liquidity Management Tools ('LMTs') allow the managers of open-ended funds, which include open-ended AIFs and all UCITS funds, to address redemption pressures under

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8 AIFMs are required to appoint a single depositary for each AIF they manage to safe-keep AIF assets, monitor cash flows and ensure the AIF's compliance with the relevant regulations and fund rules.

9 Supra 7.

10 Source: ECB SDW. In 2008, the assets of euro area investment funds were about 13% of total financial sector assets, compared to almost 20% in 2020 (source: ECB Macroprudential Bulletin April 2021).

11 See e.g. ESRB NBFI Monitor 2020, p. 59, 62-63 (source: https://www.esrb.europa.eu/pub/pdf/reports/nbfi_monitor/esrb.202010_eunon-bankfinancialintermediationriskmonitor2020~89c25e1973.en.pdf?588be9e8391cfb17584d2a283dfe0abe).

12 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Finance Strategy for the EU (COM/2020/591 final).

stressed market conditions and better protect investor interests. The European Systemic Risk Board ('ESRB') and ESMA recommend harmonisation of the rules on the use of LMTs. Currently, the AIFMD and UCITSD do not provide for a minimum harmonised set of LMTs.[13]

In addition, investor interests could be better served if the AIFMD rules were amended to increase efficiencies in the market of depositary services. The current AIFMD requirement that a depositary should be located in the same Member State as the appointing EU AIF is difficult to fulfil in smaller, more concentrated markets, where there are fewer service providers. Lack of competition leads to increased costs for fund managers and less efficient fund structures, which can affect investor returns. There is potential to increase efficiency gains in managing investment funds by diluting depositary market concentration in certain national markets while ensuring that service providers uphold European standards.

There is evidence that depositaries are sometimes prevented from performing their duties where the fund's assets are kept by a Central Securities Depositary ('CSD').[14] CSDs are not considered delegates of the depositary.[15] This legal situation does not guarantee in all cases a stable flow of information between the custodian of an AIF's or UCITS' asset and the depositary. Consequently, depositaries cannot fulfil their oversight duties effectively if there is no stable flow of information on the portfolio movements. This legal situation can undermine investor protection.

The delegation regime in the legal frameworks for AIFMs and UCITS allows for the efficient management of investment portfolios and for sourcing the necessary expertise in a particular geographic market or asset class. This model contributes to the success of the EU fund and manager labels. At the same time, the evaluation concludes, as supported by ESMA, that different national supervisory practices in fulfilling EU requirements for delegation of risk or portfolio management to third parties create inconsistencies that may reduce the overall level of investor protection.[16] Insufficient clarity of the applicable regulatory standards reduces legal certainty, increases divergence in supervisory outcomes and ultimately fails to ensure a uniform level of investor protection across the Union.

Additional measures would be necessary in order to implement the requirements of the Directive ensuring that AIFMs deploy the necessary human resources to perform retained tasks where some of their functions are delegated to third parties, and in order to transfer a large part of the implementing rules, as laid down in the Alternative Investment Fund Managers Regulation ('AIFMR') in this area, to the UCITS regulatory framework.[17] These measures would be set out in the Commission's implementing acts once the mandate to do so is granted by means of adopting this proposal for amending the directives.

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13 Additionally, the absence of a minimum set of LMTs may lead to differences between Member States from a market integration perspective.

14 As a part of the post-trade infrastructures, CSDs operate securities settlement systems, participate in controlling the integrity of an issue hindering the undue creation or reduction of issued securities and are involved in securing collateral for monetary policy operations as well as in securing collateral between credit institutions. CSDs also hold the securities of their participants.

15 The last indent of Article 21(11) of the AIFMD.

16 ESMA letter to the European Commission of 18 August 2020 on AIFMD review (source: esma34-32-551_esma_letter_on_aifmd_review.pdf (europa.eu).

17 Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 (AIFMR) 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, including detailed supervisory reporting requirements by AIFs (OJ L 83, 22.3.2013, p. 1–95).

Changes are proposed to both AIFMD and UCITSD on delegation, liquidity risk management, data reporting for market monitoring purposes and regulatory treatment of custodians, whereas the AIFMD alone should be amended as regards activities of loan-originating investment funds and access to depositary services across borders.

- **Consistency with existing policy provisions in the policy area**

The proposals to amend the European investment fund legislation are in line with the Commission's plan for a CMU adopted on 24 September 2020. The aim of CMU is to enable capital to flow across the EU to the benefit of consumers, investors and companies, regardless of their location. The Covid-19 crisis has made it more urgent to deliver on CMU as market-based financing is essential for the European economy's recovery and the return to long-term growth. The proposed legislative changes would support fund market integration, therefore helping to achieve those objectives.

In an efficient and effectively supervised CMU, loan-originating funds are able to provide an alternative source of financing to Europe's corporates and SMEs opening up their access to a wider range of competitively priced funding options.[18] These funds have the potential to support directly job creation, economic growth, innovation, green transition and help recover from the Covid-19 pandemic. Loan-originating funds can also serve as a backstop or shock absorber when liquidity is constrained by continuing to provide loan financing when more traditional lenders have pulled back from the market. Therefore, the legislative proposals are aligned with the overall CMU strategy to continue building an internal market for financial services and making financing more accessible to European companies.

In addition, the proposed amendments to AIFMD and UCITSD aim to better protect investor interests by ensuring that the investment fund managers, which delegate their functions to third parties, adhere to the same high standards applicable across the Union.

Moreover, the AIFMD amending proposal contains measures regarding availability and use of LMTs during times of market stress. The possibility to activate LMTs can protect the value of investors' money, reduce liquidity pressure on the fund and mitigate against broader systemic risk implications in situations of market-wide stress. The supervisory reporting proposal contributes to establishing a common data space in the financial sector, which is part of the Digital Finance Strategy.[19] Data reported by AIFMs and UCITS would be part of an integrated data collection system that would deliver accurate, comparable, and timely data to European and national supervisory authorities, while minimising the aggregate reporting costs and burden for all parties.

In addition, the AIFMD review will have an impact on the AIFMs managing AIFs governed by the Regulation on European Long-term Investment Funds ('ELTIF') (ELTIFR – Regulation (EU) 2015/760).[20] ELTIFR is a European product regulation, which is reviewed in parallel with the AIFMD and a legislative proposal to amend ELTIFR is adopted on the same day as this proposal. AIFMs managing ELTIFs are likely to benefit from easier access to depositary services cross border, if those funds are located in smaller markets. Improving supervisory reporting requirements would also have a positive effect on the compliance burden of AIFMs managing ELTIFs in the longer run. Including CSDs in the custody chain would have a positive effect on investor interests with respect to the proportion of ELTIF' holdings, which could be held in custody by the CSDs.

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18 Supra 6.

19 Supra 12.

20 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).

Another point of interaction of the ELTIFR and the amended AIFMD will concern loan origination activities. The proposed Directive would impose some general principles on AIFMs active in credit markets. The proposed thresholds for lending by AIFs to financial institutions are aligned with the diversification threshold applicable to those ELTIFs that are only marketed to retail investors. Should there be a divergence between AIFMD and ELTIFR, the ELTIFR product rules would apply as *lex specialis*.

- **Consistency with other Union policies**

Creating an internal market for loan-originating funds is expected to increase the availability of alternative sources of financing to the real economy. The activities of such funds in the credit market are likely to facilitate the transition to the sustainable future by investing in the green economy, therefore supporting broader objectives of the European Green Deal.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Articles 53(1) TFEU (ex Article 47(2) EC) is the legal basis for Directives 2011/61/EU and 2009/65/EC. For the policy options chosen and the specific design of the rules, the appropriate legal base is Article 53(1) TFEU on the taking-up and pursuing of activities by self-employed persons. This is used to regulate financial intermediaries, their investment services and activities.

The proposed improvements to the AIFMD seek to promote sound processes for loan origination by AIFs and to further market integration in this segment, while ensuring that the risks to the financial stability are better monitored overall. Rules on availability and use of liquidity management tools by AIFMs and UCITS need to be harmonised to ensure that any response by fund managers of open-ended funds or by supervisors in market stress situations is more effective. Making access to cross-border provision of depositary services easier aims to further integration of the EU AIF market ensuring a high level of investor protection. The proposal seeks to achieve a coherent approach to delegation activities by European investment fund managers and supervisors.

Unilateral actions by Member States cannot fill in the AIFMD regulatory gaps and achieve these objectives individually. Therefore, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union.

- **Subsidiarity (for non-exclusive competence)**

The AIFMD and UCITSD were adopted in full respect of the principle of subsidiarity, pursuing the inherently transnational objectives to remove market fragmentation, address the risks to financial stability and ensure a high level of investor protection. The Directive was the instrument chosen to strike an appropriate balance between the EU-level and the national level.

The improvements to the AIFMD and UCITSD that are proposed complete this regulatory edifice with additional regulatory requirements and clarifications, aims to preserve the balance between harmonising key risk control measures and preserving Member State flexibility to implement the agreed regulatory standards.

- **Proportionality**

The proposed amendments respect the principle of proportionality, as set out in Article 5 of the Treaty on European Union (TEU), and do not go beyond what is necessary to achieve the

objectives of completing a single market for AIFs, while ensuring a coherent approach to macro-prudential oversight of the EU AIF market and high-level investor protection.

Where appropriate, new requirements imposed on AIFMs managing loan-originating AIFs are designed as general principles. Where the regulatory requirements are specific, they do not unnecessarily disrupt existing business models. As regards investor protection, the proposed additional disclosure requirements are in line with the best market practice that should be extended to all investors in the Union ensuring the same level of investor protection.

The proposals to enable cross-border access to the depositary services strikes the right balance between the AIF and investor needs averting the risks that might materialise if there was no comprehensive regulation of the depositary services at EU level. In addition, including CSDs into the custody chain is necessary to close the regulatory gap that undermines the ability of depositaries to perform their duties and is potentially detrimental to AIF and UCITS investors. A proposed measure is proportionate and takes into account the status of already licenced entities.

The clarifications proposed to the delegation regimes preserve the valuable features of these activities while ensuring that sufficient human resources are deployed to supervise that the delegate and core functions are retained by the manager of an AIF or UCITS.

Consequently, the legislative proposal is proportionate to the objectives pursued.

- **Choice of the instrument**

This proposal amends Directives 2011/61/EU and 2009/65/EC. Therefore, it is most appropriate to choose a Directive as an instrument for changing the existing rules.

The objective is to harmonise national rules that are increasing market fragmentation, creating inefficiencies in the AIF market and undermining the protection of AIF and UCITS investors. The proposal aims to harmonise and clarify regulatory standards that Member States will be able to transpose into their national laws, furthering internal market integration, improving market monitoring and ensuring the same level of investor protection across the Union. Therefore, a Directive introducing the necessary amendments to the existing Directives governing AIFM and UCITS activities is the most appropriate choice.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

The Commission conducted an evaluation of the AIFMD and concluded that the AIFMD has generally worked well and largely achieved its objectives of establishing an effective supervisory framework for AIFMs, ensuring high levels of investor protection and facilitating the creation of the EU AIF market. However, in order to take account of new developments in the market since the AIFMD's entry into force, it could benefit from improvements targeting those elements of the framework that were not sufficiently addressed at the inception of the Directive.

Divergent national approaches make it difficult to provide services in another Member State and impede the development of the internal market for AIFs. Insufficient supply of depositary services and different national regulatory standards for loan-originating AIFs undermine the level playing field for AIFs. Moreover, different national rules on loan-originating AIFs and insufficient accessibility to market data for supervisors create difficulties for the supervisors to monitor the risk to financial stability and preserve market integrity. Similarly, the diverging

availability of liquidity management tools limit effectiveness of a possible response by fund managers of open-ended funds or by supervisors in market stress situations. Finally, differing understanding of delegation rules by supervisors undermines legal certainty for fund managers and the high level of investor protection, in particular where European entities delegate risk or portfolio management outside the European Union.

- **Stakeholder consultations**

On 22 October 2020, a public consultation on the AIFMD review was launched with 102 questions on various aspects of the AIFMD review. It closed on 29 January 2021 with 132 responses.

Just over half of the respondents to the public consultation did not have an opinion on whether there is a need to harmonise requirements for AIFMs managing loan-originating AIFs. This group included the largest industry associations. 23% of the respondents were of the view that no further rules are needed, while among public authorities, 7 out of 10 Member States replying to the public consultation, agreed that the requirements for AIFMs managing loan-originating AIFs needed to be harmonised at EU level. They considered that EU rules are necessary to level the playing field and address the risks that may arise because of this activity. The proposal strikes a good balance between what is necessary for preserving financial stability and for facilitating the development of the market of loan-originating AIFs in the Union.

Similarly, a majority of the public authorities responding to the public consultation supported the proposition to clarify AIFMD and UCITSD delegation rules. In contrast, the vast majority of the respondents from the industry considers the delegation rules sufficiently clear to prevent the creation of letter-box entities in the EU. Nevertheless, some respondents wanted further clarification as to whether a business practice falls within the scope of delegation, since the Member States have differed significantly in their interpretation. The proposal provides the necessary clarifications while preserving the benefits of the delegation regimes under the AIFMD and UCITSD.

There is broad support among private and public sector stakeholders for harmonising liquidity management tools at the EU level (28/40 overall, 8/9 public authorities, 15/23 industry). There is also support for improving cooperation among National Competent Authorities (NCAs) in case of activating LMTs (15/40 overall, 5/9 public authorities, 6/23 industry), in particular in situations with cross-border implications. They support the proposal broadening the availability of LMTs across the Union and empowering fund managers as well as supervisors to use LMTs in stressed market conditions.

The majority of the stakeholders (approximately 70%) and ESMA (in its opinion) support bringing CSDs into the custody chain. The proposal is proportionate as it does not require depositories to perform due diligence on the European CSDs.

On the issue of smaller depositary markets, public authorities from the Member States indicated in their response to the public consultation that they supported the retained option to empower NCAs to permit procuring depositary services across borders. The majority of the respondents did not support introducing the depositary passport citing the risk of a concentration of the depositary market, lower investor protection and supervisory challenges. The Commission, therefore, is proposing a measure to open access to depositary services across the border where it is needed until the time where positive regulatory developments are observed in this area.

The majority of stakeholders preferred an incremental approach to potential changes to the supervisory reporting requirements for AIFMs and UCITS. This approach is adopted in the

proposal, by mandating an in-depth feasibility study by the supervisors that include exploring potential synergies between the existing supervisory reporting requirements under different EU laws.

- **Collection and use of expertise**

In reviewing the AIFMD the Commission drew on the extensive preparatory work from an external contactor, which conducted a general survey and produced an evidence-based study on the effectiveness of the AIFMD.[21] The Commission also took into account takeaways from a virtual conference on the AIFMD review organised on 25 November 2020 and involving a Member of the European Parliament, national supervisors, ESRB, ESMA, representatives of the industry and investor interests. Furthermore, the Commission relied on data from Morningstar and on information presented in reports by ESMA, the Financial Stability Board (FSB) and the International Organization of Securities Commissions (IOSCO) in addition to publicly available reports, studies, surveys, position papers and other relevant documents drawn up by private and public stakeholders. The Commission considered input from workshops, bilateral meetings and consultation with Member States and industry stakeholders, including asset managers, product manufacturers, retail investors' representatives and investment funds active in alternatives investment. Finally, academic literature was reviewed, in particular literature on the effects of the AIFMD on the markets, financial stability and investor protection.

- **Impact assessment**

An impact assessment was carried out to prepare this legislative initiative.

On 16 July 2021, the Regulatory Scrutiny Board ('RSB') issued a positive opinion on the impact assessment (IA) submitted for the AIFMD review and requested further clarifications.

Comments made in the RSB opinion	Action taken to address the comments in IA
The report should provide clearer explanations of the magnitude and the specificities of the problems, in particular in relation to loan originating funds and limited supply of depositary services.	DG FISMA added more detailed explanations of the problems. The explanations concern in particular: - the potential systemic risks posed by the growth in loan originating segment of the AIF market, the issues related to the development of fragmented national regimes on loan origination across the Union; - the situation on the markets suffering from a limited supply of depositary services and the need for an intervention at the Union level.
The report does not sufficiently explore all available options in a coherent manner, in particular regarding the harmonisation for the requirements for loan originating funds.	DG FISMA explained in more detail the basis on which the preferred option and its distinct components were selected and the rationale behind the discarded options as well as the main differences between all options.
The impact analysis should discuss the respective effects of harmonisation and risk reduction measures,	DG FISMA added explanations regarding the effects of harmonisation, e.g. in relation to loan origination. It

[21] Report on the Operation of the Alternative Investment Fund Managers Directive (AIFMD) - Directive 2011/61/EU, (KPMG Report, December 2018).

as well as clarify the impact on the financing cost for SMEs.	also explained the potential impacts of the initiative on the market and availability/cost of financing for SMEs.
The report should further elaborate the areas with simplification potential and provide quantification/ data, where possible.	DG FISMA provided anecdotal evidence and, where available, additional data, e.g. in relation to savings for depositaries and for the users of the depositary services in the smaller markets. Where data was missing, DG FISMA included further monitoring metrics to ensure that additional data will become available, e.g. in relation to reporting.

It was considered whether to propose fewer measures for AIFMs managing loan-originating funds and leave the rest to the national discretion. Diverging national approaches to loan-originating funds, however, would risk not achieving the objective of supporting this sector's safe and sustainable development. Therefore, the retained option proposed a minimum number of safeguards for the funds activities and risk profiles.

The retained option will benefit small and medium-sized enterprises (SMEs)s, notably the harmonisation of requirements for AIFMs managing loan-originating AIFs. Apart from supporting greater efficiency in managing such AIFs, the retained option aims to enable AIFs to extend credit to businesses across the border. In some Member States AIFs are not allowed to originate loans, or this right is reserved for locally established funds. This review would further integrate the loan-originating fund market and create more business opportunities for those funds. As a result, this would open up alternative sources of financing for SMEs in particular where they are unable to secure credit from the banks.

On the issue of delegation, granting ESMA more powers was considered to ensure a more coherent enforcement of the relevant AIFMD and UCITS rules in the Union. However, at this point this option was considered to be in contrast with the principle of subsidiarity. It was concluded that ESMA should be provided with more information on delegation arrangements in the cases where risk or portfolio management is delegated outside the Union and make use of already available powers, such as conducting peer reviews. The retained option would seek to ensure a homogeneous level of investor protection across the Union.

It was considered to revise AIFMR supervisory reporting requirements without seeking synergies with other existing reporting frameworks was considered. Any change to the supervisory reporting obligations is bound to entail significant compliance costs. Therefore, it was considered more practical to propose legislative changes when there is more clarity what is needed to move closer to a common data space in the financial sector. The proposal contributes to this objective by involving the European Supervisory Authorities (ESAs) and the European Central Bank (ECB) in a study on the feasibility of merging the duplicative reporting requirements and expanding data coverage to enable better monitoring of markets. When supervisory reporting is improved, this would have a positive effect on monitoring and managing the risks to financial stability.

Similarly, for liquidity risk management different levels of intervention to ensure financial stability were considered. The chosen option is the least prescriptive. Fund managers of open-ended funds would be able to suspend the repurchase or redemption of the AIF or UCITS units or shares temporarily. They would also be required to choose at least one other liquidity management tool, without imposing which one, thus leaving fund managers with the final

decision, which they could activate should circumstances so require. This measure would support the financial system's stability.

Introducing a depositary passport was considered as an option. However, this options was not deemed feasible given the absence of EU harmonisation of securities and insolvency laws. The retained option, therefore, proposes to permit cross-border access of depositary services where needed until further harmonisation at the Union level becomes feasible. The retained option would result in more efficient EU AIF market.

Finally, it was considered whether depositaries delegating custody of AIF or UCITS assets to CSDs should perform due diligence. It was decided that this would be excessive, given that authorised CSDs are already subject to stringent sectorial requirements and supervision. Therefore, the proposal focuses on including the CSDs into the custody chain without imposing superfluous due diligence requirements on depositaries.

- **Regulatory fitness and simplification**

The overall approach taken in the AIFMD review is to propose measures, which are strictly necessary in the interest of financial stability, market integration or investor protection, and address issues where there are clear stakeholder concerns.

The proposed amendment enabling depositary services to be sourced across the border is expected to generate savings for both depositaries and the users of the depositary services, including smaller AIFMs. The one-off fees for new licence and the annual licence fees for depositaries range respectively between € 6000 and € 9200 depending on the Member State and between € 4,400 – € 9,400 depending on the Member State. The increased competition between depositary service providers is likely to exert downward pressure on the service price.

The envisaged approach to supervisory data will simplify and streamline the current reporting obligations. It will entail savings in the longer run because it aims to reduce the number of public authorities, to which an AIFM reports overlapping data. The approach also ensures that one-off costs arising from the amendments are minimised as much as possible, by providing for proper up-front planning and a wholesale view to supervisory reporting across different pieces of EU legislation, taking into account developments in the digital environment.

- **Fundamental rights**

The proposal promotes rights enshrined in the Charter of Fundamental Rights (the 'Charter'). The main objective of this initiative is to facilitate the right to provide services in any Member State, as prescribed by Article 15(2) of the Charter, ensuring that there is no discrimination, even indirect, on grounds of nationality (further implementing Article 21(2) of the Charter).

4. BUDGETARY IMPLICATIONS

The proposal does not have a budgetary impact for the Commission.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

This Directive will be subject to evaluation 5 years after the date of its transposition. The Commission will rely on (i) feedback from the public consultation, (ii) discussions with ESMA and supervisors and (iii) the supervisory reporting data.

The Commission will ensure compliance and enforcement on an ongoing basis. ESMA will monitor application of the delegation requirements based on its new mandate to conduct targeted peer reviews in this area every year and to draft reports on the analysis of delegation notifications.

ESMA will also collect data that will be useful for monitoring developments in the loan-origination and depositary markets. ESMA will continue collecting and analysing data on the use of LMTs.

- **Detailed explanation of the specific provisions of the proposal**

Amendments to Directive 2011/61/EU

Article 4 is complemented with the definition of a 'central securities depository', in line with Regulation (EU) 909/2014[22].

Article 6(4) is amended to extend the list of ancillary services that AIFMs could provide in addition to collective investment management. It would include activities permitted by other Union laws, like administration of benchmarks or credit servicing.

Article 6(6) is amended to update the references to the rules laid down in Directive 2014/65/EU[23] that applies to AIFMs providing ancillary services.

Article 7(2) is amended to clarify that AIFMs should have appropriate technical and human resources envisaged when applying for an AIFM authorisation. Therefore, when applying for the authorisation, the human and technical resources, which will be used to carry out its functions and to supervise the delegates, must be described in detail.

Article 7(5) is supplemented to ensure that the missing information is collected at the EU level to map out delegation practices. Therefore, it is proposed that ESMA should receive notifications of delegation arrangements where more risk or portfolio management is delegated to third country entities than is retained.

Article 7(8) is inserted to ensure that ESMA receives consistent information on the delegation arrangements. Thus, it is proposed to empower ESMA to develop draft regulatory technical standards prescribing content, forms and procedures for the transmission of delegation notifications. To facilitate informed policy decision in this area, ESMA is required to present the EU co-legislators and the Commission (Article 7(9)) with regular reports analysing market practices regarding delegation, compliance with the requirements applicable to delegation under Directive 2011/61/EU and supervisory convergence in this area.

Article 8(1)(c) is amended to provide that an AIFM employs at least two persons full-time or engages two persons, who are not employed by the AIFM but nevertheless are committed to conduct that AIFM's business on a full-time basis and who would be resident in the Union, thus ensuring the minimum, stable substance within the AIFM.

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[22] 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).

[23] 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).

Article 15(3)(d) is inserted to require that AIFMs managing AIFs, which grant loans, implement effective policies, procedures and processes for the granting of loans. In doing so, they must assess credit risk, and administer and monitor their credit portfolios, which should be reviewed periodically.

Article 15(4a)(4b)(4c) is inserted to reduce the risk to the financial system by restricting lending to a single borrower, when this borrower is a financial institution.

Article 15(4d) is inserted to avert potential conflicts of interest by forbidding an AIF to lend to its AIFM or its staff, its depositary or its delegate.

Article 15(4e) is inserted to avoid moral hazard situations where the loans are originated to be immediately sold off on the secondary market. For this, it is proposed that AIFs be required to retain an economic interest of 5% of the notional value of the loans they have granted and sold off.

Article 16(2a) is inserted to avoid maturity mismatches that may create financial risks. It is, therefore, proposed to require that AIFs adopt a closed-ended structure where they engage in loan origination to a significant extent (60%).

To effectively address micro-prudential and macro-prudential risks, Article 16 is supplemented with paragraphs (2b) and (2c) to enable AIFMs managing open-ended AIFs to access the necessary tools for liquidity risk management in exceptional circumstances. In addition to being able to suspend redemptions, it is proposed that such AIFMs be required to choose at least one other LMT from the Annex V, which harmonises the minimum list that should be available anywhere in the Union. Article 16(2e) requires Member States to ensure this is the case in their jurisdictions. Paragraph (2d) is added requiring AIFMs to notify the competent authorities about activating or deactivating a LMT.

Article 16(2g) and (2h) seeks to ensure a coherent application of paragraphs (2b) and (2c) in the same Article. ESMA is, therefore, tasked with developing draft regulatory technical standards to provide definitions and specify the characteristics of the LMTs set out in the Annex and tasked with developing regulatory technical standards on selecting and using suitable LMTs by the AIFMs.

Point (j) in paragraph (2) of Article 46 is amended, empowering the competent authorities to require that an AIFM activates or deactivates a relevant LMT. This power is extended to cover non-EU AIFMs too by adding point (d) in paragraph (4) of Article 47. Proposed paragraphs (5a) to (5g) of Article 50 request that competent authorities notify other relevant authorities, ESMA and ESRB prior to requiring activation or deactivation of a liquidity management tool. The proposed paragraphs also lay down the principles of cooperation in such cases. Proposed paragraph (7) in Article 50 would empower ESMA to develop regulatory technical standards indicating when the competent authorities' intervention would be warranted.

Article 20(1) is amended to clarify that delegation arrangements apply to all functions listed in Annex I and to the ancillary services permitted under Article 6(4). The language referring to services and not only functions is introduced accordingly in point (f) of Article 20(1) and paragraphs 3, 4 and 6 of Article 20.

The last indent of Article 21(11) is amended to bring central securities depositories (CSDs) into the custody chain where they are providing competing custody services thus levelling the playing field among the custodians and ensuring that depositaries have access to the information needed to carry out their duties. It is proposed to relieve depositaries from the

requirement to perform *ex-ante* due diligence where the custodian is a CSD because it has been sufficiently vetted when seeking to be authorised as such.

To ensure better supervision, Article 21(16) is amended so that depositaries cooperate not only with their competent authorities but also with the competent authorities of the AIF that has appointed it as a depositary and with the competent authorities of the AIFM that manages the AIF.

Article 23 is supplemented in paragraphs (1) and (4) to improve the transparency of AIFM activities for investors, with additional disclosures that AIFM must ensure, namely conditions for using LMTs and fees that will be borne by the AIFM or its affiliates and periodical reporting on all direct and indirect fees and charges that were directly or indirectly charged or allocated to the AIF or to any of its investments. AIFMs are also required to report to investors the portfolio composition of originated loans.

Article 24(1) is amended and point (d) in Article 24(2) is deleted thus removing limitations in paragraph (1) on the data that competent authorities should be able to receive from AIFMs on its managed AIFs. It is proposed that ESMA develops draft regulatory technical standards and draft implementing technical standards to replace the current supervisory reporting template laid down in Annex IV of the AIFMD supplementing AIFMR.

By inserting Article 38a, ESMA is required to regularly conduct a peer review of supervisory practices in applying rules on delegation with a particular focus on preventing the creation of letter-box entities. A new Article 69b would require the Commission to review the delegation regime laid down in Directive 2011/61/EU and its implementing measures with a view to proposing the necessary amendments to preclude the formation of letter-box entities. The possibility to introduce the depositary passport and the functioning of the rules for AIFMD managing loan-originating AIFs should also be evaluated.

Supervisory cooperation is strengthened by inserting paragraph (5a to 5g) in Article 50. The competent authority of a host Member State of the AIFM may request the competent authority of the home Member State of the AIFM to exercise its supervisory powers specifying reasons for its request and notifying ESMA and the ESRB, if there are risks to financial stability. Amendments to paragraph (5) in Article 50 lower the burden of proof for the competent authorities by requesting that the recipient authorities take appropriate action. Moreover, ESMA is empowered to request a competent authority to present before its standing committee a case, which may have cross-border implications or an impact on financial stability or investor protection. Moreover, Article 50(7) mandates ESMA to draft regulatory technical standards indicating in which situations the competent authorities may exercise the powers in relation to LMTs.

It is proposed to amend paragraph (5) of Article 61, permitting the competent authorities to allow depositary services to be procured in other Member States until the measures are taken following a review of the need to introduce a depositary passport.

It is proposed to amend Annex I by adding point (3) to recognise lending as a legitimate activity of AIFMs . This means AIFs could extend loans anywhere in the Union, including cross-border. Point (4) is added to Annex I to legitimise servicing of securitisation special purpose entities ('SSPEs') by AIFMs.

Amendments are proposed to Articles 21(6)(c), 35(2)(b), 36(1)(c), 37(7)(e), 40(2)(b) and 42(1)(c) updating the requirements for third country entities not to be established in the jurisdictions identified as high risk countries according to the latest European laws against money laundering.

Articles 36(1) and 42(1) are complemented with the respective points (d) and (d) providing that non-EU AIFs or non-EU AIFMs that are subject to national rules and that are active in individual Member States should satisfy the requirement that they are not located in a third country that is deemed un-cooperative in tax matters.

Amendments are proposed to Articles 21(6)(d), 35(2)(c), 37(7)(f) and 40(2)(c) to update the requirements for third country entities which would have access to the internal market only if they are established in third countries that are not listed on the EU list of non-cooperative jurisdictions for tax purposes.

Article 47(3) is amended enabling ESMA to disclose the market data at its disposal in an aggregate or summary form therefore relaxing the confidentiality standard.

A review clause is inserted - Article 69b - mandating the Commission to initiate review of the provisions relating to delegation, depository services and the use of LMTs. It also mandates ESMA to issue a report aimed to streamline supervisory reporting requirements for AIFMs and take it as a basis for developing draft regulatory technical standards for supervisory reporting under Article 24 of AIFMD.

Amendments to Directive 2009/65/EC

In Article 2(1) it is suggested to provide the definition of a 'central securities depository', in line with Regulation (EU) 909/2014.

In the last indent of Article 22a the fourth paragraph is amended to deem central securities depositories (CSDs) as delegates of the depositary where they are providing competing custody services. This levels the playing field among the custodians and ensure that depositaries have access to the information needed to carry out their duties.

Article 7(1)(b) is amended to provide that a UCITS management company employs at least two persons full-time or engages two persons, who are not employed by the UCITS management company but nevertheless are committed to conduct the business of that UCITS management company on a full-time basis and who would be resident in the Union, thus ensuring the minimum, stable substance within the UCITS management company.

Points (c) and (e) in Article 7(1) are proposed for amendment to clarify that the management companies should have appropriate technical and human resources to be used when applying for the authorisation. Therefore, when applying for the authorisation, the management company has to describe in detail the human and technical resources, which it will use to carry out its functions and to supervise the delegates.

Article 13(1) clarifies that the delegation arrangements apply to all the functions listed in Annex II and to the ancillary services permitted under Article 6(3). The language referring to services and not only functions is introduced accordingly in points (b), (g), (h) and (i) of Article 13(1).

To better align the Directives' 2011/61/EU and 2009/65/EC legal frameworks for delegation and so that the supervisory authorities can review the reasons for delegation it is proposed to require UCITS to justify its entire delegation structure based on objective reasons, by inserting point (j) in Article 13(1).

Article 13 is supplemented by paragraph (3) to ensure that the missing information is collected and analysed at the EU level to map out delegation practices. Therefore, it is proposed that ESMA should be notified of delegation arrangements where more risk or portfolio management is delegated to third-country entities than is retained.

To facilitate informed policy decision in this area, it is suggested that under the new Article 13(5) ESMA be required to present to the EU co-legislators and the European Commission regular reports analysing market practices on delegation and compliance with the requirements applicable to delegation under 2009/65/EC.

Article 13(3) is inserted to ensure that ESMA receives consistent information on the delegation arrangements. Thus, it is proposed that ESMA be empowered to develop draft regulatory technical standards prescribing content, forms and procedures for the transmission of delegation notifications.

A new Article 13(6) empowers the Commission to adopt a delegated act specifying further the conditions for delegation and the conditions under which the management company of UCITS is to be deemed a letter-box entity and therefore no longer considered the manager of the UCITS thus aligning the rules of Directives 2011/61/EU and 2009/65/EC in this area.

It is proposed to add Article 18a (1 and 2) so that, in addition to being able to suspend redemptions, UCITS management companies have to choose at least one other LMT from the Annex IIA, which harmonises the minimum list that should be available anywhere in the EU. The new Article 18a requires Member States to ensure this is the case in their jurisdictions. Annex IIA is proposed with the minimum list of such tools. To ensure the good information of investors, it is suggested to clarify in Schedule A of Annex I point 1.13 the procedures and conditions for the repurchase or redemption of units, and to clarify the circumstances in which repurchase or redemption may be suspended or other LMTs may be activated or deactivated.

Article 18a (3 to 5) seeks to ensure a coherent application of the preceding provisions. ESMA is, therefore, tasked with developing draft regulatory technical standards to provide definitions and specify the characteristics of the LMTs set out in the Annex.

A new Article 20a proposes to introduce for management companies a periodic supervisory reporting obligation on the markets and instruments in which they trades on behalf of the UCITS.

A new Article 20b proposes mandating ESMA, in cooperation with other ESAs and the ECB, to produce a feasibility report on seeking efficiencies in the supervisory reporting space. The report would inform about the potential design of a supervisory reporting template for the UCITS management companies, and ESMA is required to develop regulatory technical standards and draft implementing technical standards on the basis of its findings.

Article 22a(2) is amended to relieve depositaries from the requirement to perform *ex-ante* due diligence where the custodian is a CSD because it has been sufficiently vetted when seeking to be authorised as such.

To effectively address micro-prudential and macro-prudential risks, it is proposed a modification to Article 84(3) be amended to require UCITS management companies to notify the competent authorities about activating or deactivating a LMT. The amendment of point (b) in paragraph 2 of Article 84 empowers the competent authorities to step in and require UCITS management companies to activate or deactivate a relevant LMT. The proposed paragraphs (3a) to (3e) in Article 84 request that the competent authorities notify other relevant authorities, ESMA and ESRB prior to requiring activation or deactivation of a LMT and that they lay down the principles of cooperation in such cases. Proposed paragraph (3f) in Article 84 would empower ESMA to develop regulatory technical standards indicating when the competent authorities' intervention would be warranted.

Article 84(5) proposes empowering ESMA to develop draft regulatory technical standards on selecting and using suitable LMTs by UCITS.

Article 98 is complemented with paragraphs (3) and (4) to strengthen supervisory cooperation. The competent authority of the UCITS host Member State may request the competent authority of the UCITS home Member State to exercise its supervisory powers specifying reasons for its request and notifying ESMA and the ESRB if there are risks to financial stability. Moreover, ESMA is empowered to request a competent authority to present before ESMA a case, which may have cross-border implications or an impact on financial stability or investor protection.

A new Article 101a is proposed to require ESMA to conduct, on a regular basis, a peer review of supervisory practices in applying rules on delegation with a particular focus on preventing the creation of letter-box entities. A new Article 110a would require the Commission to review the delegation regime laid down in this Directive and its implementing measures with a view to proposing the necessary amendments to preclude the formation of letter-box entities.

Articles on transposition and entry into force

Article 3 of the proposal states that Member States have 24 months after the entry into force of the amending Directive to adopt and publish the laws, regulations and administrative provisions necessary to comply with that Directive. Member States shall communicate transposition measures to the Commission.

It is proposed that the amending Directive enters into force on the 20th day following its publication in the Official Journal of the European Union.

2021/0376 (COD)

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[24],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) In accordance with Article 69 of Directive 2011/61/EU of the European Parliament and of the Council[25], 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[26], which lays down rules regarding the

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24 OJ C , , p. .

25 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).

26 Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

authorisation and operation of UCITS, in the areas of delegation, asset safekeeping, supervisory reporting and liquidity risk management.

(3) To increase the efficiency of AIFM activities, the list of authorised ancillary services set out in Article 6(4) of Directive 2011/61/EU should be extended to include benchmark administration governed by Regulation (EU) 2016/1011 of the European Parliament and of the Council[27] and credit servicing governed by Directive 2021/…./EU of the European Parliament and of the Council.[28]

(4) To ensure legal certainly it should be clarified that AIFMs providing ancillary services involving financial instruments are subject to the rules laid down in Directive 2014/65/EU of the European Parliament and of the Council[29]. With regard to other assets, which are not financial instruments, AIFMs should be required to comply with the requirements of Directive 2011/61/EU.

(5) To ensure the uniform application of the requirements laid down in Articles 7 and 8 of Directive 2011/61/EU for the necessary human resources of AIFMs, it should be clarified that at the time of application for an authorisation, AIFMs should provide the competent authorities with information about the human and technical resources that the AIFM will employ to carry out its functions and, where applicable, to supervise delegates. At least two senior managers should be employed or conduct the business of the AIFM on a full-time basis and be resident in the Union.

(6) To develop a reliable overview of delegation activities in the Union governed by Article 20 of Directive 2011/61/EU and to inform future policy decisions or supervisory actions, competent authorities should provide the European Securities and Markets Authority ('ESMA') with delegation notifications where an AIFM delegates more portfolio management, or risk management functions of the AIF, than it manages itself to entities located in third countries.

(7) In order to ensure consistent harmonisation of the notification process in the area of delegation, 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[30] to specify the contents, forms and procedures to standardise the notification process of the AIFMs' delegation arrangements. The notification form should contain data fields indicating the activities making up the risk and portfolio management functions in order to determine whether an AIFM has delegated more of such functions than it has retained. Those regulatory technical standards should be adopted on the basis of a draft developed by ESMA.

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27 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).

28 OJ C , , p. .

29 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).

30 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).

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

(9) 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').[31] However, given the fast-growing private credit market, it is necessary to address the potential micro risks and macro prudential risks that loan originating AIFs could pose and spread to the broader financial system. The rules applicable to AIFMs managing loan-originating funds should be harmonised in order to improve risk management across the financial market and increase transparency for investors.

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

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

(12) In order to limit conflicts of interest, AIFMs and their staff should not receive loans from loan-originating AIFs that they manage. Similarly, the AIF's depositary and its staff or the AIFM's delegate and its staff 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.

(14) Long-term, illiquid loans held by AIF may create liquidity mismatches if the AIFs 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.

(15) It should be clarified that where an AIFM is subject to the requirements laid down in Directive 2011/61/EU in relation to its managed AIF's lending activities and to the requirements laid down in Regulations (EU) 345/2013[32], (EU) 346/2013[33] and (EU)

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31 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).

32 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).

33 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).

2015/760[34] of the European Parliament and of the Council, the specific product rules laid down in Article 3 of Regulations (EU) 345/2013 and Article 3 of Regulation (EU) 346/2013, Chapter II of Regulation (EU) 2015/760, should override more general rules set out in Directive 2011/61/EU.

(16) To support market monitoring by the supervisory authorities the information gathering and sharing through supervisory reporting could be improved. Duplicative reporting requirements that exist under Union and national legislation, in particular Regulation (EU) No 600/2014 of the European Parliament and of the Council[35], Regulation (EU) 2019/834 of the European Parliament and of the Council[36], Regulation (EU) No 1011/2012 of the European Central Bank[37] and Regulation (EU) No 1073/2013 of the European Central Bank[38], 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.

(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[39] 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[40]. Those

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34 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).

35 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).

36 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).

37 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).

38 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).

39 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).

40 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

regulatory and implementing technical standards should be adopted on the basis of a draft developed by ESMA.

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

(20) In order to ensure a more effective response to liquidity pressures in times of market stress and to protect investors better, rules should be laid down in Directive 2011/61/EU to implement the recommendations of the European Systemic Risk Board (ESRB).[41]

(21) To enable managers of open-ended AIFs based in any Member State to deal with redemption pressures under stressed market conditions, they should be required to choose at least one LMT from the harmonised list set out in the Annex, in addition to the possibility to suspend redemptions. When an AIFM takes a decision to activate or deactivate the LMT, it should notify the supervisory authorities. This would allow supervisory authorities to better handle potential spill-overs of liquidity tensions into the wider market.

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

(23) In order to ensure consistent harmonisation in the area of liquidity risk management by the managers of open-ended funds, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 of the Treaty on the Functioning of the European Union (TFEU) in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[42] to specify the process for choosing and using LMTs to facilitate market and supervisory convergence. Those regulatory technical standards should be adopted on the basis of a draft developed by ESMA.

(24) To ensure investor protection and to address financial stability risks, the competent authorities should be able to request that a manager of an open-ended fund activate or deactivate the appropriate LMT.

(25) Depositaries play an important role for safeguarding the interests of investors and should be able to perform their duties regardless of the type of the custodian that safe keeps the funds' assets. Therefore, it is necessary to include central securities depositories (CSDs) in the custody chain when they provide custody services to AIFs in order to ensure that, in all cases, there is a stable information flow between the custodian of an AIF's asset and the depositary. To avoid superfluous efforts, the

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operating conditions, depositaries, leverage, transparency and supervision (OJ L 83, 22.3.2013, p. 1–95).

41 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.

42 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).

depositaries should not perform ex-ante due diligence where they intend to delegate custody to CSDs.

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

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

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

(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, competent authorities should be able to permit AIFMs or AIFs to procure depositary services located in other Member States while the Commission assesses, in the context of its review of Directive 2011/61/EU, whether it would be appropriate to propose measures to achieve a more integrated market.

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

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

(33) The requirements for third-country entities with access to the internal market should be aligned to the standards laid down in the Council conclusions of 2020 on the revised EU list on non-cooperative jurisdictions for tax purposes[43] and Directive (EU)

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

2015/849 of the European Parliament and of the Council.[44] In addition, non-EU AIFs or non-EU AIFMs that are subject to national rules and that are active in individual Member States should satisfy the requirement that they are not located in a third country that is deemed un-cooperative in tax matters.

(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.

(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 policy decisions or supervisory actions, competent authorities should provide ESMA with delegation notifications where a UCITS management company delegates more portfolio management or risk management functions, than it manages itself, to entities located in third countries.

(39) In order to ensure consistent harmonisation of the notification process in the area of delegation, 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[45] to specify the contents, forms and procedures to standardise the notification process of UCITS delegation arrangements. The notification form should contain data fields indicating the activities making up the risk and portfolio management functions in order to determine whether a UCITS management company has delegated more of

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

[45] 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).

such functions than it has retained. Those regulatory technical standards should be adopted based on a draft developed by ESMA.

(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[46]. 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[47] recommendations to harmonise LMTs and their use by the managers of open-ended funds, which includes UCITS, to enable a more effective response to liquidity pressures in times of market stress and better protection of investors.

(42) To enable UCITS management companies based in any Member State to deal with redemption pressures under stressed market conditions, they should be required to choose at least one LMT from the harmonised list set out in the Annex in addition to the possibility to suspend redemptions. When a management company takes a decision to activate or deactivate the LMT, it should notify the supervisory authorities. This would allow supervisory authorities to better handle potential spill-overs of liquidity tensions into the wider market.

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

(44) To ensure investor protection and to address financial stability risks, the competent authorities should be able to request that a UCITS management company activates or deactivates the appropriate LMT.

(45) In order to ensure consistent harmonisation in the area of liquidity risk management by the managers of UCITS, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 of the Treaty on the Functioning of the European Union (TFEU) in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[48] to specify the process for choosing and using LMTs to facilitate market and supervisory convergence. Those regulatory technical standards should be adopted on the basis of a draft developed by ESMA.

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46 OJ L 123, 12.5.2016, p. 1.

47 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.

48 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).

(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.

(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[49] to set out the contents, forms and procedures to standardise the supervisory reporting process by UCITS. Those regulatory technical standards should be adopted on the basis of a draft developed by ESMA.

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

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

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

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

(52) Furthermore, to improve supervisory cooperation, ESMA should be able to request that a competent authority presents a case before the ESMA, where that case has cross-border implications and may affect investor protection or financial stability. ESMA

[49] 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).

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) in Article 4(1), the following point (ap) is added:

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

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

(2) Article 6 is amended as follows:

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

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

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

(b) paragraph 6 is replaced by the following:

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

(3) Article 7 is amended as follows:

(a) paragraph 2 is replaced by the following:

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

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

(i) a 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.';

(b) paragraph 5 is replaced by the following:

'5. The competent authorities shall, on a quarterly basis, inform ESMA of authorisations granted or withdrawn in accordance with this Chapter.

ESMA shall keep a central public register identifying each AIFM authorised under this Directive, a list of the AIFs managed and/or marketed in the Union by such AIFMs and the competent authority for each such AIFM. The register shall be made available in electronic format.

Where an AIFM delegates more portfolio management or risk management functions to entities located in third countries than it retains, the competent authorities shall, on an annual basis, notify ESMA of all such delegations ('delegation notifications').

The delegation notifications shall include the following:

(a) information on the AIFM and the AIF concerned;

(b) information on the delegate, specifying the delegate's domicile and whether it is a regulated entity or not;

(c) a description of the delegated portfolio management and risk management functions;

(d) a description of the retained portfolio management and risk management functions;

(e) any other information necessary to analyse the delegation arrangements;

(f) a description of the competent authorities' supervisory activities, including desk-based reviews and on-site inspections and the results of such activities;

(g) any details on the cooperation between the competent authority of the AIFM and the supervisory authority of the delegate.'

(c) the following paragraphs 8 and 9 are added:

'8. ESMA shall develop draft regulatory technical standards to determine the content of the delegation notifications and the standard forms, templates and procedures for the transmission of the delegation notifications in a language customary to the sphere of finance. The standard

forms and templates shall include information fields covering all information referred to in paragraph 5, fourth subparagraph.

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

9. ESMA shall provide the European Parliament, the Council and the Commission with regular reports, at least every two years, analysing market practices regarding delegation to entities located in third countries and compliance with Articles 7 and 20.';

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

'(c) the persons who effectively conduct the business of the AIFM are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the AIF managed by the AIFM, the names of those persons and of every person succeeding them in the office being communicated forthwith to the competent authorities of the home Member States of the AIFM and the conduct of the business of the AIFM being decided by at least two natural persons who are either employed full-time by that AIFM or who are committed full-time to conduct the business of that AIFM and who are resident 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 granting activities, implement effective policies, procedures and processes for the granting of credit, for assessing the credit risk and for administering and monitoring their credit portfolio, keep those policies, procedures and processes up to date and effective and review them regularly and at least once a year.';

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

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

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

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

The restriction set out in the first subparagraph shall be without prejudice to the thresholds, restrictions and conditions set out in Regulations (EU) 2015/760[50], (EU) 345/2013[51] and (EU) 346/2013[52].

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

[50] 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).

[51] 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).

[52] 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).

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

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

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

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

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

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

(b) its depositary;

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

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

The requirement set out in the first subparagraph does not apply to the loans that the AIF has purchased on the secondary market.';

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

'2a. An AIFM shall ensure that the AIF it manages is closed-ended if the notional value of its originated loans exceeds 60 % of its net asset value.

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

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 appropriate liquidity management tool from the list set out in Annex V, points 2 to 4, for possible use in the interest of the AIF's investors. 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.

2c. An AIFM that manages an open-ended AIF may, in the interest of AIF investors, temporarily suspend the repurchase or redemption of the AIF units or activate other liquidity management tools selected from the list set out in Annex V, points 2 to 4, and included in the fund rules or the instruments of incorporation of the AIFM.

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

2d. An AIFM shall, without delay, notify the competent authorities of its home Member State when activating or deactivating a liquidity management tool mentioned in 2b.

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, ESMA and ESRB of any notifications received in accordance with this paragraph.

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

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

2g. ESMA shall develop draft regulatory technical standards on criteria for the selection and use of suitable 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.

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

(7) Article 20 is amended as follows:

(a) paragraph 1 is amended as follows:

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

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

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

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

(b) paragraph 3 is replaced by the following:

'3. The AIFM's liability towards its clients, the AIF and its investors shall not be affected by the fact that the AIFM has delegated functions to a third party, or by any further sub-delegation, 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:';

(8) Article 21 is amended as follows:

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

'(c) the third country where the depositary is established is not identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849;';

(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 of 2020 on the revised EU list on non-cooperative jurisdictions for tax purposes[53];';

(b) paragraph 11 is amended as follows:

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

'(c) the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it wants to delegate parts of its tasks, except where that third party is a central securities depository acting in the capacity of an issuer CSD as defined in Article 1, point (e), 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 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. ';

(c) paragraph 16 is replaced by the following:

'16. The depositary shall make available to its competent authorities, to the competent authorities of the AIF that has appointed it as a depositary and to the competent authorities of the AIFM that manages that AIF, 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, the competent authorities of the depositary shall share the information received without delay with the competent authorities of the AIF and the AIFM.';

(9) Article 23 is amended as follows:

(a) paragraph 1 is amended as follows:

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

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

(ii) point (ia) is inserted:

'(ia) a list of fees and charges that will be applied in connection with the operation of the AIF and that will be borne by the AIFM or its affiliates.';

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

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

‘(d) originated loan portfolio;

(e) on a quarterly 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 a quarterly 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 provide information on the instruments in which it is trading, on markets of which it is a member or where it actively trades, and on the exposures of each of the AIFs it manages.’;

(b) in paragraph 2, point (d) is deleted;

(c) paragraph 6 is replaced by the following:

‘6. ESMA shall develop draft regulatory technical standards specifying the details to be reported according to paragraphs 1 and 2. ESMA shall take into account other reporting requirements to which the AIFMs are subject and the report issued in accordance with paragraph 2 of Article 69b.

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

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

(d) the following paragraph 7 is added:

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

(a) the format and data standards for the reports referred to in paragraphs 1 and 2;

(b) the reporting frequency and timing.

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

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

(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 of 2020 on the revised EU list on non-cooperative jurisdictions for tax purposes[54].';

(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 of 2020 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 of 2020 on the revised EU list on non-cooperative jurisdictions for tax purposes.';

(14) the following Article 38a is inserted:

'Article 38a

Peer review of application of the delegation regime

1. ESMA shall, on a regular basis and at least every two years, conduct a peer review analysis of the supervisory activities of the competent authorities in relation to the application of Article 20. That peer review analysis shall focus on the measures taken to prevent that AIFMs, which delegate performance of portfolio management or risk management to third parties located in third countries, become letter-box entities.

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

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

'(b) the third country where the non-EU AIF is established is not identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849;

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

(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 of 2020 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 of 2020 on the revised EU list on non-cooperative jurisdictions for tax purposes.';

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

'(j) in the interest of investors or of the public, require AIFMs to activate or deactivate a liquidity management tool referred to in point 1 or 2 of Annex V or selected by the AIFM in accordance with Article 16(2b), whichever is more suitable considering the type of open-ended AIF or group of open-ended AIFs concerned and investor protection or financial stability risks that necessitate this requirement.';

(18) Article 47 is amended as follows:

(a) paragraph 3 is replaced by the following:

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

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

(b) where disclosure is necessary for legal proceedings;

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

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

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

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

(19) Article 50 is amended as follows:

(a) paragraph 5 is replaced by the following:

‘5. Where the competent authorities of one Member State have 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, ESMA and the ESRB prior to exercising powers pursuant to Article 46(2), point (j), or Article 47(4), point (d).

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

5c. Where the competent authority of the home Member State of the AIFM does not agree with the request referred to in paragraph 5b, it shall inform the competent authority of the host Member State of the AIFM, ESMA and the ESRB thereof, stating its reasons.

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

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. ESMA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority in this regard. 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.

5g. 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.';

(c) the following paragraph 7 is added:

'7. ESMA shall develop draft regulatory technical standards indicating in which situations the competent authorities may exercise the powers set out in Article 46(2), point (j) and in which situations they may put forward the requests referred to in paragraphs 5b and 5f. When developing those standards, ESMA shall consider the potential implications of such supervisory intervention for investor protection and the financial stability in another Member State or in the Union.

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

(20) in Article 61, paragraph 5 is replaced by the following:

'5. 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 may allow institutions referred to in point (a) of Article 21(3) and established in another Member State to be appointed as a depositary. 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.';

(21) the following Article 69b is inserted:

' Article 69b

Review

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

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

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

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

   (d) the appropriateness of complementing this Directive with a depositary passport.

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

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

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

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

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

(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);'

(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 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 and the services referred to in Article 6(3), shall notify the competent authorities of their home Member State before the delegation arrangements become effective. The following conditions shall be met:';

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

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

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

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

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

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

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

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

(b) paragraph 2 is replaced by the following:

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

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

'3. Where a management company delegates more portfolio management or risk management functions to entities located in third countries than it retains, the competent authorities shall, on an annual basis, notify ESMA of all such delegations ('delegation notifications').

The delegation notifications shall include the following:

(a) information on the UCITS and its management company concerned;

(b) information on the delegate, specifying the delegate's domicile and whether it is a regulated entity or not;

(c) a description of the delegated portfolio management and risk management functions;

(d) a description of the retained portfolio management and risk management functions;

(e) any other information necessary to analyse the delegation arrangements;

(f) a description of the competent authorities' supervisory activities, including desk-based reviews and on-site inspections and the results of such activities;

(g) any details on the cooperation between the competent authority and the supervisory authority of the delegate.

4. ESMA shall develop draft regulatory technical standards to determine the content of the delegation notifications and the standard forms, templates and procedures for the transmission of the delegation notifications in a language customary to the sphere of finance. The standard forms and templates shall include information fields covering all information referred to in paragraph 3.

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

5. ESMA shall provide the European Parliament, the Council and the Commission with regular reports, at least every two years, analysing market practices regarding delegation to entities located in third countries and compliance with Articles 7 and 13.

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

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

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

(4) the following Article 18a is inserted:

'Article 18a

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

2. After assessing the suitability in relation to the pursued investment strategy, the liquidity profile and the redemption policy, a management company shall select at least one appropriate liquidity management tool from the list set out in Annex IIA, points 2 to 4, 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. 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.

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 draft regulatory technical standards on 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.

5. Power is delegated to the Commission to adopt the regulatory technical standards referred to in paragraphs 3 and 4 in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.';

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

'Article 20a

1. A management company shall regularly report to the competent authorities of its home Member State on the markets and instruments in which it trades on behalf of the UCITS it manages.

2. ESMA shall develop draft regulatory technical standards specifying the details to be reported in accordance with paragraph 1. ESMA shall take into account other reporting requirements to which the management companies are subject and the report issued in accordance with Article 20b.

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

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

3. ESMA shall develop draft implementing technical standards specifying:

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

(b) the reporting frequency and timing.

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

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

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:

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

(c) 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 issuer CSD as defined in Article 1, point (e) 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. ';

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

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

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

'2. By way of derogation from paragraph 1:

(a) a UCITS may, in the interest of its unit-holders, temporarily suspend the repurchase or redemption of its units or activate other liquidity management tool selected in accordance with Article 18a(2);

(b) in the interest of the unit-holders or of the public, competent authorities of a UCITS home Member State may require a UCITS to activate a liquidity management tool referred to in points 1 or 2 of Annex IIA or selected and notified by the UCITS in accordance with Article 18a(2), whichever is more suitable considering the type of UCITS and the risks that necessitate taking this measure.

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

3. The UCITS shall notify, without delay, the competent authorities of their home Member State and the competent authorities of all Member States in which it markets its units, when activating or deactivating a liquidity management tool referred to in paragraph 2, point (a).

The competent authorities of the home Member State of the UCITS shall inform, without delay, ESMA and the ESRB about any notification received in accordance with this paragraph.

3a.The competent authorities of the UCITS home Member State shall notify the competent authorities of all Member States in which the UCITS markets its units, ESMA and the ESRB prior to exercising powers pursuant to paragraph 2, point (b).

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

3c. Where the competent authority of the UCITS home Member State does not agree with the request referred to in paragraph 3b, it shall inform the requesting competent authority, ESMA and the ESRB thereof, stating the reasons for the disagreement.

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

3e. Where the competent authority does not act in accordance or does not intend to comply with ESMA's opinion referred to in paragraph 3d, it shall inform ESMA, stating the reasons for the non-compliance or intention. ESMA may publish the fact that a competent authority does not comply or intend to comply with its advice. ESMA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority in this regards. ESMA shall give the competent authorities advance notice about such publication.'

3f. ESMA shall develop draft regulatory technical standards indicating in which situations the competent authorities may exercise the powers set out in paragraph 2, point (b). When developing those standards, ESMA shall consider the potential implications of such supervisory intervention for investor protection and the financial stability in another Member State or in the Union.

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

(9) in Article 98, the following paragraphs 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.';

(10) the following Article 101a is inserted:

' Article 101a

1. ESMA shall, on a regular basis and at least every two years, conduct a peer review analysis of the supervisory activities of the competent authorities in relation to the application of Article 13. That peer review analysis shall focus on the measures taken to prevent that management companies, which delegate performance of portfolio management or risk management to third parties located in third countries, become letter-box entities.

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

(11) the following Article 110a is inserted:

' Article 110a

By [Please insert date = 30 months after the entry into force of this Directive] and following the peer reviews and analysis referred to in Article 101a and the report produced by ESMA in accordance with Article 13(4), the Commission shall initiate a review of the delegation regime laid down in Article 13 with regard to preventing the creation of letter-box entities in the Union.';

(12) Article 112a is amended as follows:

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

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

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

'The delegation of power referred to in Articles 12, 13, 14, 18a, 20a, 26b, 43, 50a, 51, 60, 61, 62, 64, 75, 78, 81, 95 and 111 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.';

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

'A delegated act adopted pursuant to Articles 12, 13, 14, 18a, 20a, 26b, 43, 50a, 51, 60, 61, 62, 64, 75, 78, 81, 95 and 111 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.';

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

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

Article 3

Transposition

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

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

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

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

Article 4

Entry into force

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

Article 5

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

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