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## **INFORMATION NOTE**

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From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds - Outcome of the European Parliament's first reading (Strasbourg, 5 to 8 February 2024)

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### **I. INTRODUCTION**

In accordance with the provisions of Article 294 of the TFEU and the Joint declaration on practical arrangements for the codecision procedure<sup>1</sup>, a number of informal contacts have taken place between the Council, the European Parliament and the Commission with a view to reaching an agreement on this file at first reading.

In this context, the Chair of the Committee on Economic and Monetary Affairs (ECON) Irene TINAGLI (S&D, IT) presented on behalf of ECON a compromise amendment (amendment number 2) to the abovementioned proposal for a Directive, for which Isabel BENJUMEA BENJUMEA (EPP, ES) had prepared a draft report. This amendment had been agreed during the informal contacts referred to above. No other amendments were tabled.

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<sup>1</sup> OJ C 145, 30.6.2007, p.5.

## II. VOTE

When it voted on 7 February 2024, the plenary adopted the compromise amendment (amendment number 2) to the abovementioned proposal for a Directive. The Commission's proposal as thus amended constitutes the Parliament's first-reading position which is contained in its legislative resolution as set out in the Annex hereto<sup>2</sup>.

The Parliament's position reflects what had been previously agreed between the institutions. The Council should therefore be in a position to approve the Parliament's position.

The act would then be adopted in the wording which corresponds to the Parliament's position.

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<sup>2</sup> The version of the Parliament's position in the legislative resolution has been marked up to indicate the changes made by the amendments to the Commission's proposal. Additions to the Commission's text are highlighted in *bold and italics*. The symbol "■" indicates deleted text.

**P9\_TA(2024)0064**

**Amendments to the Alternative Investment Fund Managers Directive (AIFMD) and to the Directive relating to undertakings for collective investment in transferable securities (UCITS)**

**European Parliament legislative resolution of 7 February 2024 on the proposal for a directive of the European Parliament and of the Council amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds (COM(2021)0721 – C9-0439/2021 – 2021/0376(COD))**

**(Ordinary legislative procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to Parliament and the Council (COM(2021)0721),
- having regard to Article 294(2) and Article 53(1) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C9-0439/2021),
- having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
- having regard to the provisional agreement approved by the committee responsible under Rule 74(4) of its Rules of Procedure and the undertaking given by the Council representative by letter of 9 November 2023 to approve Parliament's position, in accordance with Article 294(4) of the Treaty on the Functioning of the European Union,
- having regard to Rules 59 of its Rules of Procedure,
- having regard to the report of the Committee on Economic and Monetary Affairs (A9-0020/2023),

1. Adopts its position at first reading hereinafter set out;
2. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;
3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

**Position of the European Parliament adopted at first reading on 7 February 2024 with a view to the adoption of Directive (EU) 2024/... 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, the 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,

Acting in accordance with the ordinary legislative procedure<sup>1</sup>,

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<sup>1</sup> Position of the European Parliament of 7 February 2024.

Whereas:

- (1) In accordance with Directive 2011/61/EU of the European Parliament and of the Council<sup>2</sup>, the Commission has reviewed the application and the scope of that Directive and concluded that the objectives of integrating the Union market for alternative investment funds (AIFs), ensuring a high level of investor protection and protecting financial stability have, *for the most part*, been met. However, in *its* review the Commission also concluded that there is a need to harmonise *the* rules for the managers of alternative investment funds (AIFMs) managing AIFs *which originate loans, as well as a need* to clarify *the* standards applicable to AIFMs that delegate their functions to third parties, to ensure equal treatment of *entities providing custody services* ('custodians'), to improve cross-border access to depositary services, to optimise supervisory data collection and to facilitate the use of liquidity management tools across the Union. Therefore, amendments are necessary to address those *needs in order* to improve the functioning of Directive 2011/61/EU.

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<sup>2</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

- (2) A robust delegation regime, *the* equal treatment of custodians, *coherent* supervisory reporting, *in particular through the removal of duplications and redundant requirements*, and a harmonised approach to the use of *liquidity management tools* are equally necessary for the management of undertakings for collective investment in transferable securities (UCITS). Therefore, it is *also* appropriate to ■ amend Directive 2009/65/EC of the European Parliament and of the Council<sup>3</sup>, which lays down rules regarding the authorisation and operation of UCITS *and their management companies* in the areas of delegation, asset safekeeping, supervisory reporting and liquidity risk management.

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<sup>3</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

(3) *The Union market for AIFs reached EUR 6,8 trillion in net asset value at the end of 2022. Professional investors account for approximately 86 % of the net asset value of AIFs managed or marketed by authorised AIFMs and by sub-threshold AIFMs, i.e., the AIFMs referred to in Article 3(2) of Directive 2011/61/EU, in the Union. The Union market for AIFs provides over EUR 250 billion to Union businesses in private credit, and Union investors are responsible for 30 % of the global capital allocated to the whole industry. The size of the aggregated Union market for AIFs has continued to expand, increasing by over 15 % between 2020 and 2022, and AIFs accounted for one third of the fund industry of the European Economic Area at the end of 2020. Nonetheless, there is still room for the industry to grow by providing institutional investors with greater choice and enhancing the competitiveness of the capital markets union.*



- (4) To increase the efficiency of *the* activities *of AIFMs*, the list of ancillary services set out in Article 6(4) of Directive 2011/61/EU should be extended to include *the tasks carried out by an administrator in accordance with* Regulation (EU) 2016/1011 of the European Parliament and of the Council<sup>4</sup> (*‘administration of benchmarks’*) and credit servicing *activities in accordance with* Directive (EU) 2021/2167 of the European Parliament and of the Council<sup>5</sup>. *For the sake of completeness, it should be clarified that, when undertaking the tasks carried out by such an administrator or when providing credit servicing activities, the AIFM should be subject to Regulation (EU) 2016/1011 and Directive (EU) 2021/2167 respectively.*
- (5) *In order to enhance legal certainty, it should be clarified that the management of AIFs can also comprise the activities of originating loans on behalf of an AIF and of servicing securitisation special purpose entities.*

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<sup>4</sup> Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1).

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

- (6) *In order to enhance legal certainty for AIFMs and UCITS management companies regarding the services they can provide to third parties, it should be clarified that AIFMs and UCITS management companies are allowed to perform for the benefit of third parties the same functions and activities that they already perform in relation to the AIFs and UCITS they manage, provided that any potential conflict of interest created by the provision of that function or activity to third parties is appropriately managed. Such functions and activities include, for example, corporate services such as human resources and information technology (IT), as well as IT services for portfolio management and risk management. That possibility would also support the international competitiveness of EU AIFMs and UCITS management companies by enabling economies of scale and would help diversify revenue sources.*
- (7) To ensure legal *certainty*, it should be clarified that AIFMs providing ancillary services involving financial instruments are subject to the rules laid down in Directive 2014/65/EU of the European Parliament and of the Council<sup>6</sup>. With regard to **■ assets ■** which are not financial instruments, AIFMs should be required to comply with the requirements of Directive 2011/61/EU.

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<sup>6</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in **■** financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

- (8) To ensure the uniform application of the requirements laid down in Directive 2011/61/EU *regarding* the necessary human resources of AIFMs, *it is necessary to clarify* that, at the time of *the* application for authorisation, *an AIFM* should provide the competent authorities with information about the human and technical resources that *it* employs to carry out its functions and, where applicable, to supervise *its* delegates. At least two *natural persons who, on a full-time basis, either are employed by the AIFM or are executive members or members of the governing body of the AIFM, and who are domiciled, in the sense of having their habitual residence, in the Union, should be appointed* to conduct the business of the AIFM. *Regardless of that statutory minimum, more resources might be necessary depending on the size and complexity of the AIFM and the AIFs it manages.*

- (9) *Some Member States have requirements in national law or industry standards concerning the degree of independence of one or more members of the governing body of an AIFM or of the management body of a UCITS management company or of an investment company. It is appropriate to encourage AIFMs managing AIFs marketed to retail investors and UCITS management companies and investment companies to appoint as a member of their governing body or management body at least one independent or non-executive director, where possible under national law or under the industry standards of the home Member State of the AIFM, UCITS management company or investment company, in order to protect the interests of the AIFs and UCITS and of the investors in the AIFs that the AIFM manages or in the UCITS. In making that appointment, the AIFM, UCITS management company or investment company needs to ensure that that director is independent in character and in judgement and has sufficient expertise and experience to be able to assess whether the AIFM, UCITS management company or investment company is managing the AIFs or UCITS in the best interests of investors.*

**(10) *The marketing of AIFs is not always conducted by the AIFM directly but by one or several distributors either on behalf of the AIFM or on their own behalf. In particular, there could be cases where an independent financial advisor markets an AIF without the AIFM's knowledge. Most fund distributors are subject to regulatory requirements pursuant to Directive 2014/65/EU or Directive (EU) 2016/97 of the European Parliament and of the Council<sup>7</sup> which define the scope and extent of their responsibilities towards their own clients. Directive 2011/61/EU should therefore acknowledge the diversity of distribution arrangements and distinguish between, on the one hand, arrangements whereby a distributor acts on behalf of the AIFM, which should be considered to be delegation arrangements, and, on the other hand, arrangements whereby a distributor acts on its own behalf when it markets the AIF under Directive 2014/65/EU or through life-insurance based investment products in accordance with Directive (EU) 2016/97, in which case the provisions of Directive 2011/61/EU regarding delegation should not apply, irrespective of any distribution agreement between the AIFM and the distributor.***

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<sup>7</sup> ***Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ L 26, 2.2.2016, p. 19).***

- (11) *Delegation can allow for the efficient management of investment portfolios and for sourcing the necessary expertise in a particular geographic market or asset class. However, it is important that supervisors have updated information on the main elements of delegation arrangements. To develop a reliable overview of delegation activities in the Union, AIFMs should regularly provide competent authorities with information on delegation arrangements which involve the delegation of collective or discretionary portfolio management functions or of risk management functions. AIFMs should therefore, in respect of each AIF they manage, report information on the delegates, a list and description of the delegated activities, the amount and percentage of the assets of the managed AIFs that are subject to delegation arrangements concerning the portfolio management function, a description of how the AIFM oversees, monitors and controls the delegate, information on the sub-delegation arrangements and the date of commencement and expiry of the delegation and sub-delegation arrangements. For the sake of clarity, it should be specified that the data collected on the amount and percentage of the assets of the managed AIFs that are subject to delegation arrangements concerning the portfolio management function are for the purpose of providing a greater overview of the operation of delegation, and are not on their own an evidential indicator for determining the adequacy of substance or risk management arrangements, or the effectiveness of oversight or control arrangements at the level of the manager. Such information should be communicated to the competent authorities as part of the supervisory reporting regime governed by Directive 2011/61/EU.*
- (12) To ensure the uniform application of Directive 2011/61/EU, it should be clarified that the delegation rules laid down *therein* apply to all functions listed in Annex I to that Directive and to the *list of* ancillary services *set out* in Article 6(4) of that Directive.

- (13) *Investment funds providing loans can be a source of alternative financing for the real economy. Such funds can provide critical funding for Union small and medium-sized enterprises, for which traditional lending sources are more difficult to access. However, diverging national regulatory approaches can give rise to regulatory arbitrage and varying levels of investor protection, thereby hindering the establishment of an efficient internal market for loan origination by AIFs. Directive 2011/61/EU should recognise the right of AIFs to originate loans.* Common rules should also be laid down to establish an efficient internal market for *loan origination by* 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 and to facilitate access to finance by *Union* companies, a key objective of the capital markets union *as set out in the Commission’s communication of 24 September 2020 entitled ‘A Capital Markets Union for people and businesses - new action plan’*. However, given the fast-growing private credit market, it is necessary to address the potential *micro-prudential* and macro-prudential risks that loan *origination by* AIFs could pose and spread to the broader financial system. The rules applicable to AIFMs managing *AIFs which originate loans* should be harmonised in order to improve risk management across the financial market and increase transparency for investors. *For the sake of clarity, the provisions laid down in this Directive that are applicable to AIFMs that manage AIFs that originate loans should not prevent Member States from laying down national product frameworks that define certain categories of AIFs with more restrictive rules.*

- (14) *Loan origination is not always conducted directly by the AIF. There can be cases where an AIF grants a loan indirectly through a third party or special purpose vehicle that grants the loan for or on behalf of the AIF, or for or on behalf of the AIFM in respect of the AIF, prior to gaining exposure to the loan. In order to avoid circumvention of Directive 2011/61/EU, where that AIF or AIFM is involved in structuring the loan, or defining or pre-agreeing its characteristics, such cases should be considered to be loan-originating activities and should be subject to that Directive.*
- (15) *AIFs granting loans to consumers are subject to the requirements of other instruments of Union law applicable to consumer lending, including Directive 2008/48/EC of the European Parliament and of the Council<sup>8</sup> and Directive (EU) 2021/2167. Those instruments of Union law provide for the basic protection of borrowers at Union level. However, and for overriding reasons of public interest, Member States should be able to prohibit loan origination by AIFs to consumers in their territory.*

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<sup>8</sup> *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66).*



- (16) To support the professional management of AIFs and to mitigate risks to financial stability, AIFMs that manage AIFs that engage in *loan origination, regardless of whether those AIFs meet the definition of loan-originating AIFs*, should have effective policies, procedures and processes for the granting of loans. *They should also implement effective policies, procedures and processes for assessing credit risk and administering and monitoring their credit portfolio where the AIFs that they manage engage in loan origination, including where those AIFs gain exposure to loans through third parties. Those policies, procedures and processes should be proportionate to the extent of the loan origination and* should be reviewed regularly.
- (17) 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.

- (18) *To ensure the stability and integrity of the financial system and to introduce proportionate safeguards, loan-originating AIFs should be subject to a leverage limit that varies depending on whether they are of an open-ended or closed-ended type. The risk to financial stability is greater for open-ended AIFs, which can be subject to high levels of redemptions. In line with the objective of preserving financial stability, the leverage limit should not depend on whether a loan-originating AIF is marketed to professional and retail investors or only to professional investors. The commitment method provides a comprehensive and robust framework for calculating leverage in accordance with international standards, and in particular for taking into account the synthetic leverage created by derivatives. Those leverage limits should not prevent the competent authorities of the home Member State of the AIFM from imposing stricter leverage limits where it is deemed necessary in order to ensure the stability and integrity of the financial system.*
- (19) In order to limit conflicts of interest, AIFMs and their staff should not receive loans from *any* AIFs that they manage. Similarly, the AIF's depositary and *the depositary's delegate*, the AIFM's delegate and its staff, *and entities within the same group as the AIFM*, should be prohibited from receiving loans from the *AIF concerned*.

- (20) ■ To avert moral hazard and maintain the general credit quality of loans originated by AIFs, such loans should be subject to risk retention requirements *when transferred to third parties. With the same objective, AIFMs should be prohibited from managing an AIF that originates loans with the sole purpose of selling them to third parties ('originate-to-distribute strategy'), regardless of whether that AIF meets the definition of a loan-originating AIF. Loans should be granted for the sole purpose of investing the capital raised by the AIF in accordance with its investment strategy and regulatory constraints. However, the AIFM should be able to implement that investment strategy in the best interests of the AIF's investors. That means that derogations from the risk retention rules are necessary and should cover cases where the retention of part of the loan is not compatible with the implementation of the AIF's investment strategy or with the regulatory requirements, including product requirements, imposed on the AIF and its AIFM. Those cases include situations where retaining part of the loan would result in the AIF exceeding its investment or diversification limits or breaching regulatory requirements, such as restrictive measures adopted under Article 215 of the Treaty on the Functioning of the European Union (TFEU), or where the AIF is entering liquidation, or where the borrower's situation has changed, for example in the event of merger or of default of the borrower if the AIF's investment strategy is not to manage distressed assets, or where the AIF's asset allocation is changed, resulting in the AIF no longer pursuing exposure to a specific sector or to a specific asset class. An AIFM should, at the request of the competent authorities of its home Member State, justify its decision to make use of such a derogation from the risk retention rules, and should be required to comply on an ongoing basis with the overarching principle of a prohibition on originate-to-distribute strategies.*

- (21) Long-term, illiquid loans held by *an* AIF *could* create liquidity mismatches if the *AIF's* open-ended structure allows investors to redeem their **■** units or shares *frequently*. It is therefore necessary to mitigate *the* risks related to maturity transformation by imposing a closed-ended structure for *loan-originating AIFs*. *It should however be possible for loan-originating AIFs to operate as open-ended provided that certain requirements are fulfilled, including a liquidity management system that minimises liquidity mismatches, ensures the fair treatment of investors and is under the supervision of the competent authorities of the home Member State of the AIFM. In order to ensure consistent criteria for the determination by the competent authorities of whether a loan-originating AIF can maintain an open-ended structure, the European Supervisory Authority (European Securities and Markets Authority) (ESMA) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>9</sup> should develop draft regulatory technical standards to establish those criteria, taking due account of the nature, liquidity profile and exposures of loan-originating AIFs.*

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<sup>9</sup> *Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).*

- (22) It should be clarified that where an *AIF which originates loans, or an AIFM, in relation to the lending activities of AIFs that it manages*, is subject to the requirements laid down in Directive 2011/61/EU ■ and to the requirements laid down in Regulations (EU) No 345/2013<sup>10</sup>, (EU) No 346/2013<sup>11</sup> and (EU) 2015/760<sup>12</sup> of the European Parliament and of the Council, the specific product *requirements* laid down in **Chapter II** of Regulation (EU) No 345/2013, **Chapter II** of Regulation (EU) No 346/2013 *and* Regulation (EU) 2015/760 should take precedence over *the* more general rules set out in Directive 2011/61/EU.

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<sup>10</sup> Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1).

<sup>11</sup> Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18).

<sup>12</sup> Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98).

(23) *Due to the potentially illiquid and long-term nature of the assets of AIFs that originate loans, AIFMs might experience difficulty in complying with changes to regulatory requirements introduced during the lifecycle of the AIFs that they manage without affecting the trust and confidence of their investors. It is therefore necessary to apply transitional provisions to certain requirements for AIFs constituted before the adoption of this Directive. However, such AIFs and AIFMs should also be able to choose to be subject to those rules provided that the competent authorities of the home Member State of the AIFM are notified accordingly. In addition, the rules applicable to loan origination and to loan-originating AIFs, with the exception of leverage and investment limits and the obligation for loan-originating AIFs to operate as closed-ended, should only apply in respect of loans originated after the entry into force of this Directive.*

- (24) To support market monitoring by the supervisory authorities, information gathering and sharing through supervisory reporting *should* be improved. Duplicative reporting requirements that exist under Union and national *law*, in particular Regulations (EU) No 600/2014<sup>13</sup> and (EU) 2019/834<sup>14</sup> of the European Parliament and of the Council and Regulations (EU) No 1011/2012<sup>15</sup> and (EU) No 1073/2013<sup>16</sup> of the European Central Bank, could be eliminated to improve efficiency and reduce administrative burdens for AIFMs. The *European Supervisory Authority (European Banking Authority) (EBA) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council<sup>17</sup>, 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<sup>18</sup>, ESMA (known collectively as ‘European Supervisory Authorities’ or ‘ESAs’)* and the European Central Bank (ECB), with the support of **█** 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.

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<sup>13</sup> Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

<sup>14</sup> Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (OJ L 141, 28.5.2019, p. 42).

<sup>15</sup> Regulation (EU) No 1011/2012 of the European Central Bank of 17 October 2012 concerning statistics on holdings of securities (OJ L 305, 1.11.2012, p. 6).

<sup>16</sup> Regulation (EU) No 1073/2013 of the European Central Bank of 18 October 2013 concerning statistics on the assets and liabilities of investment funds (OJ L 297, 7.11.2013, p. 73).

<sup>17</sup> *Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).*

<sup>18</sup> *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).*

- (25) *To reduce duplicative reporting and related reporting burdens for AIFMs and to ensure an efficient reuse of data by authorities, data reported by AIFMs to competent authorities should be made available to other relevant competent authorities, the ESAs and the European Systemic Risk Board (ESRB), as set out in the Recommendation of the European Systemic Risk Board of 7 December 2017<sup>19</sup>, whenever necessary for the purpose of carrying out their duties, as well as to the members of the European System of Central Banks (ESCB) for statistical purposes only.*
- (26) In preparation for ■ future changes to the supervisory reporting obligations, the scope of the data that can be required from AIFMs should be widened by removing ■ limitations *on that scope* which focus on major trades and exposures or counterparties *and by adding other categories of data to be supplied to the competent authorities*. If ESMA determines that a full portfolio disclosure to supervisors on a periodic basis is warranted, the provisions of Directive 2011/61/EU should accommodate the necessary broadening of the reporting scope.

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<sup>19</sup> *Recommendation of the European Systemic Risk Board of 7 December 2017 on liquidity and leverage risks in investment funds (ESRB/2017/6) (OJ C 151, 30.4.2018, p. 1).*



- (27) In order to ensure **the** consistent harmonisation of ■ supervisory reporting obligations, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 ■ to set out the contents, forms and procedures to standardise the supervisory reporting process by AIFMs ■ , **thus replacing the reporting template laid down in the delegated act adopted pursuant to Article 24 of Directive 2011/61/EU, as well as the reporting frequency and timing. As regards information to be reported on delegation arrangements, the regulatory technical standards should remain limited to setting out the appropriate level of standardisation of the information to be reported. The regulatory** technical standards should **not add any elements that are not provided for in Directive 2011/61/EU.**

- (28) To standardise the supervisory reporting process, the Commission should **■** be empowered to adopt implementing technical standards developed by ESMA as regards the *format*, data standards *and methods and arrangements for* 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.
- (29) In order to ensure a more effective response to liquidity pressures in times of market stress and to better protect investors, rules should be laid down in Directive 2011/61/EU to implement the *Recommendation* of the ESRB of *7 December 2017*.

- (30) To enable *AIFMs* of open-ended AIFs established in any Member State to deal with redemption pressures under stressed market conditions, AIFMs should be required to *select and include in the AIF rules or instruments of incorporation* at least *two liquidity management tools* from the harmonised list set out in *Annex V, points 2 to 8, to Directive 2011/61/EU*. *By way of derogation, where an AIFM manages an AIF that is authorised as a money market fund in accordance with Regulation (EU) 2017/1131 of the European Parliament and of the Council<sup>20</sup>, the AIFM should be able to decide to select only one liquidity management tool from that list. Those liquidity management tools should be appropriate to the investment strategy, the liquidity profile and the redemption policy of the AIF. AIFMs should activate such liquidity management tools where necessary to safeguard the interests of the AIF's investors.* In addition, *AIFMs of open-ended AIFs should always have the possibility of temporarily suspending subscriptions, repurchases and redemptions or of activating side pockets, in exceptional circumstances and where justified having regard to the interests of the AIF's investors. Where an AIFM takes a decision to suspend subscriptions, repurchases and redemptions, it should without undue delay notify the competent authorities of its home Member State. Where an AIFM decides to activate or deactivate side pockets, it should notify the competent authorities of its home Member State within a reasonable timeframe prior to the activation or deactivation of that liquidity management tool. An AIFM should also notify the competent authorities of its home Member State where it activates or deactivates any other liquidity management tool in a manner that is not in the ordinary course of business as envisaged in the AIF rules or instruments of incorporation. That would allow supervisory authorities to better handle potential spill-overs of liquidity tensions into the wider market.*

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<sup>20</sup> *Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds (OJ L 169, 30.6.2017, p. 8).*

- (31) *In particular, and to strengthen investor protection, it should be specified that the use of redemption in kind is not suitable for retail investors and should therefore only be activated to meet redemption requests of professional investors. At the same time, risks of inequality of treatment between redeeming investors and other unit-holders or shareholders should be addressed.*
- (32) 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 *liquidity management tools*.
- (33) In order to ensure consistent harmonisation in the area of liquidity risk management by *AIFMs* of open-ended funds *and to facilitate market and supervisory convergence*, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 to specify the *characteristics of the liquidity management tools set out in Annex V to Directive 2011/61/EU, taking due account of the diversity of investment strategies and of underlying assets of AIFs*. Those regulatory technical standards should be adopted on the basis of a draft developed by ESMA *and should not restrict the ability of AIFMs to use any appropriate liquidity management tool for all asset classes, jurisdictions and market conditions. In order to ensure a uniform level of investor protection in the Union, ESMA should develop guidelines on the selection and calibration of liquidity management tools by AIFMs. Those guidelines should recognise that the primary responsibility for liquidity risk management remains with AIFMs.*

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- (34) Depositories play an important role *in* safeguarding the interests of investors and should be able to perform their duties regardless of the type of the custodian that safekeeps the AIFs' assets. Therefore, *where they provide custody services to AIFs*, it is necessary to include central securities depositories (CSDs) in the custody chain █ in order to ensure that, in all cases, there is a stable information flow between the custodian of an AIF's asset and the depository. To avoid *unnecessary work*, the depositories should not perform *ex ante* due diligence where they intend to delegate custody to CSDs.
- (35) In order to improve supervisory cooperation and effectiveness, the █ competent authorities *of the host Member State of an AIFM* should be able to address a reasoned request to the competent *authorities of the home Member State of that* AIFM to take supervisory action against it.

- (36) To improve supervisory cooperation, ESMA should be able to request that a competent authority present a case before ESMA where that case has cross-border implications and ***might*** affect investor protection or financial stability. ESMA's analyses of such cases ***would*** give other competent authorities a better understanding of the discussed issues **■**, contribute to preventing similar instances in the future and protect the integrity of the market for AIFs.
- (37) To support supervisory convergence in the area of delegation, ESMA should ***receive more complete information on the application of this Directive, including in the area of appropriate oversight and control of delegation arrangements, in all Member States. To that end, it should draw on reporting obligations to competent authorities, and on the exercise in the area of delegation of its supervisory convergence powers, before the next reviews of Directives 2009/65/EC and 2011/61/EU take place. ESMA should provide a report that analyses market practices regarding delegation, and compliance with the rules on delegation, as well as substance requirements such as those relating to the human and technical resources that AIFMs, management companies and their delegates employ for the purpose of carrying out their functions.***

(38) *Regulation (EU) 2019/2088 of the European Parliament and of the Council<sup>21</sup> lays down harmonised rules for financial market participants and financial advisers on transparency with regard to the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes and the provision of sustainability-related information with regard to financial products. It is important to take a horizontal approach to transparency rules on sustainability for financial market participants and financial advisers. AIFs and UCITS can make an important contribution to the objectives of the capital markets union. The growth of the market for AIFs and UCITS also needs to be consistent with other objectives of the Union and should therefore be steered towards the promotion of sustainable growth. AIFMs and UCITS management companies should be able to demonstrate that they comply on an ongoing basis with their obligations under Regulation (EU) 2019/2088. Consequently, AIFMs and UCITS management companies should integrate environmental, social and governance (ESG) parameters into the governance and risk management rules used to support their investment decisions. AIFMs and UCITS management companies should also apply governance and risk management rules to their investment decisions and to their assessment of relevant risks, including environmental, social and governance risks. That is even more important where AIFMs and UCITS management companies make claims as to the sustainable investment policies of the AIFs and UCITS that they manage. Those investment decisions and risk assessments should be made in the best interests of the investors of the AIFs and UCITS. ESMA should update its guidelines on sound remuneration policies under Directives 2011/61/EU and 2009/65/EC as regards aligning incentives with ESG risks in remuneration policies.*

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<sup>21</sup> *Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (OJ L 317, 9.12.2019, p. 1).*

**(39) *The marketing of UCITS is not always conducted by the management company directly but by one or several distributors either on behalf of the management company or on their own behalf. In particular, there could be cases where an independent financial advisor markets a UCITS without the management company's knowledge. Most fund distributors are subject to regulatory requirements pursuant to Directive 2014/65/EU or (EU) 2016/97, which define the scope and extent of their responsibilities towards their own clients. Directive 2009/65/EC should therefore acknowledge the diversity of distribution arrangements and distinguish between, on the one hand, arrangements whereby a distributor acts on behalf of the management company, which should be considered to be delegation arrangements, and, on the other hand, arrangements whereby a distributor acts on its own behalf when it markets the UCITS under Directive 2014/65/EU or through life-insurance based investment products in accordance with Directive (EU) 2016/97, in which case the provisions of Directive 2009/65/EC regarding delegation should not apply, irrespective of any distribution agreement between the management company and the distributor.***



- (40) Some concentrated markets lack a competitive supply of depositary services. To address *that* shortage, *which* can lead to increased costs for AIFMs and a less efficient market for AIFs, *Member States* should be able to *permit their competent authorities to allow the appointment of a depositary established in another Member State. That possibility should only be used when the conditions laid down in this Directive are fulfilled and with the prior approval of the competent authorities of the AIF. Since the decision to allow the appointment of a depositary established in another Member State should not be automatic, even when those conditions are fulfilled, the competent authorities should take that decision only after carrying out a case-by-case assessment of the lack of relevant depositary services in the home Member State of the AIF having regard to the investment strategy of that AIF.*
- (41) *As part of its review of Directive 2011/61/EU, the Commission should carry out an assessment of the functioning of the derogation allowing the appointment of a depositary established in another Member State and of the potential benefits and risks, including the impact on investor protection, on financial stability, on supervisory efficiency and on the availability of market choices, of amending the scope of that derogation, in line with the objectives of the capital markets union.*

- (42) Opening up the possibility *of appointing* a depositary *established* 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 for which the depositary has been appointed and ■ the competent authorities *of the home Member State* of the AIFM that manages the AIF, if those competent authorities are located in a different Member State than that of the depositary.
- (43) In order to better protect investors, the information flow from AIFMs to AIF investors should be increased. To allow *AIF* investors to better track the *AIF*'s expenses, AIFMs should identify fees, *charges and expenses that are* borne by the AIFM *and* that are *subsequently* directly or indirectly allocated to the AIF or to any of its investments. *AIFMs should periodically report on all such fees, charges and expenses.* AIFMs should also be required to report to investors on the ■ composition of *the* originated *loan portfolio.*
- (44) To increase market transparency and ■ employ *effectively the* available AIF market data, ESMA should be permitted to disclose the market data at its disposal in an aggregate or summary form and ■ the confidentiality standard should *therefore* be relaxed to permit such data use.

- (45) The requirements for third-country entities with access to the internal market should be aligned to the standards laid down in Directive (EU) 2015/849 of the European Parliament and of the Council<sup>22</sup>. *They should also be aligned to the standards set out in the common action undertaken by the Member States as regards non-cooperative jurisdictions for tax purposes, reflected in the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes. In particular, non-EU AIFs, non-EU AIFMs that are active in individual Member States and depositaries established in a third country should not be located in a high-risk third country pursuant to Directive (EU) 2015/849, nor in a third country that is deemed non-cooperative in tax matters, subject in certain cases to a grace period where a country is later identified as a high-risk third country pursuant to that Directive or is added to the EU list of non-cooperative jurisdictions for tax purposes. The requirements should also ensure the appropriate and effective exchange of information in tax matters in line with international standards such as those laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital.*
- (46) Directive 2009/65/EC should ensure *that the conditions* for UCITS management companies *are comparable to those for AIFMs*, where there is no reason *to maintain* regulatory differences for UCITS and AIFMs. *That would be the case for the* delegation regime, *the* regulatory treatment of custodians, *the* supervisory reporting requirements, and the availability and use of *liquidity management tools*.

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<sup>22</sup> 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).

(47) To ensure the uniform application of the substance requirements for *UCITS* management companies ■, it should be clarified that at the time of *the* application for ■ authorisation, *a* management *company* should provide the competent authorities with information about the human and technical resources that *it employs* to carry out *its* functions and, where applicable, *to* supervise *its* delegates. At least two *natural persons who, on a full-time basis, either are employed by the management company or are executive members or members of the management body* of the management company, *and who are domiciled, in the sense of having their habitual residence, in the Union, should be appointed to conduct the business of the management company. Regardless of that statutory minimum, more resources might be necessary depending on the size and complexity of the management company and the UCITS it manages.*

■

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

(49) *Delegation can allow for the efficient management of investment portfolios and for sourcing the necessary expertise in a particular geographic market or asset class. However, it is important that supervisors have updated information on the main elements of delegation arrangements. To develop a reliable overview of delegation activities in the Union, management companies should regularly provide competent authorities with information on delegation arrangements which involve the delegation of collective or discretionary portfolio management functions or of risk management functions. Management companies should therefore, in respect of each UCITS they manage, report information on the delegates, a list and description of the delegated activities, the amount and percentage of the assets of the managed UCITS that are subject to delegation arrangements concerning the portfolio management function, a description of how the management company oversees, monitors and controls the delegate, information on the sub-delegation arrangements and the date of commencement and expiry of the delegation and sub-delegation arrangements. For the sake of clarity, it should be specified that the data collected on the amount and percentage of the assets of the managed UCITS that are subject to delegation arrangements concerning the portfolio management function are for the purpose of providing a greater overview of the operation of delegation, and are not on their own an evidential indicator for determining the adequacy of substance or risk management arrangements, or the effectiveness of oversight or control arrangements at the level of the manager. Such information should be communicated to the competent authorities as part of the supervisory reporting regime governed by Directive 2009/65/EC.*

- (50) *To ensure the uniform application of Directive 2009/65/EC, it should be clarified that the delegation rules laid down therein apply to all functions listed in Annex II to that Directive and to the list of ancillary services set out in Article 6(3) of that Directive.*
- (51) 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 *to be* 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 Interinstitutional Agreement of 13 April 2016 on Better Law-Making<sup>23</sup>. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.
- (52) This Directive *should* implement the *Recommendation of the ESRB of 7 December 2017* to harmonise *liquidity management tools* and their use by the managers of open-ended funds, which *include* UCITS, to enable a more effective response to liquidity pressures in times of market stress and better protection of investors.

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<sup>23</sup> OJ L 123, 12.5.2016, p. 1.

- (53) To enable UCITS established in any Member State to deal with redemption pressures under stressed market conditions, they should be required to *select and include in their rules or instruments of incorporation* at least *two liquidity management tools* from the harmonised list set out in *Annex IIA, points 2 to 8, to Directive 2009/65/EC*. *By way of derogation, a UCITS that is authorised as a money market fund in accordance with Regulation (EU) 2017/1131 should be able to decide to select only one liquidity management tool from that list. Those liquidity management tools should be appropriate to the investment strategy, the liquidity profile and the redemption policy of the UCITS. UCITS should activate such liquidity management tools where necessary to safeguard the interests of the UCITS' investors.* In addition, *UCITS should always have the possibility of temporarily suspending subscriptions, repurchases and redemptions or of activating side pockets, in exceptional circumstances and where justified having regard to the interests of the UCITS' investors. Where a UCITS takes a decision to suspend subscriptions, repurchases and redemptions, it should without undue delay notify the competent authorities of its home Member State. Where a UCITS decides to activate or deactivate side pockets, it should notify the competent authorities of its home Member State within a reasonable timeframe prior to the activation or deactivation of that liquidity management tool. The UCITS should also notify the competent authorities of its home Member State where it activates or deactivates any other liquidity management tool in a manner that is not in the ordinary course of business as envisaged in the fund rules or the instruments of incorporation of the UCITS. That would allow supervisory authorities to better handle potential spill-overs of liquidity tensions into the wider market.*

- (54) *In particular, and to strengthen investor protection, it should be specified that the use of redemption in kind is not suitable for retail investors and should therefore only be activated to meet redemption requests of professional investors. At the same time, risks of inequality of treatment between redeeming investors and other unit-holders should be addressed.*
- (55) 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 *the* use of *liquidity management tools*.

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- (56) In order to ensure consistent harmonisation in the area of liquidity risk management by **UCITS and to facilitate market and supervisory convergence**, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 to specify the **characteristics of the liquidity management tools set out in Annex IIA to Directive 2009/65/EC, taking due account of the diversity of investment strategies and of underlying assets of UCITS**. Those regulatory technical standards should be adopted on the basis of a draft developed by ESMA **and should not restrict the ability of UCITS to use any appropriate liquidity management tool for all asset classes, jurisdictions and market conditions. In order to ensure a uniform level of investor protection in the Union, ESMA should develop guidelines on the selection and calibration of liquidity management tools by management companies. Those guidelines should recognise that the primary responsibility for liquidity risk management remains with UCITS**.

- (57) To support market monitoring by the supervisory authorities, information gathering and sharing through supervisory reporting should be improved by subjecting UCITS to supervisory reporting obligations. ***Duplicative reporting requirements that exist under Union and national law, in particular Regulations (EU) No 600/2014 and (EU) 2019/834 and Regulations (EU) No 1011/2012 and (EU) No 1073/2013, could be eliminated to improve efficiency and reduce administrative burdens for management companies. The ESAs and the ECB, with the support of competent authorities, where necessary, should assess the data needs of the different supervisory authorities, so as to ensure that the information to be reported under the supervisory reporting template for UCITS is sufficient.***
- (58) ***To reduce duplicative reporting and related reporting burdens for UCITS and to ensure an efficient reuse of data by authorities, data reported by UCITS to competent authorities should be made available to other relevant competent authorities, ESMA, the other ESAs and the ESRB, whenever necessary for the purpose of carrying out their duties, as well as to the members of the ESCB for statistical purposes only.***

- (59) In order to ensure **the** consistent harmonisation of supervisory reporting obligations, power should be delegated to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU in accordance with Articles 10 to 14 and Article 15 of Regulation (EU) No 1095/2010 to set out the **contents, forms and procedures to standardise the supervisory reporting process by management companies, as well as the reporting frequency and timing. As regards information to be reported on delegation arrangements, the regulatory technical standards should remain limited to setting out the appropriate level of standardisation of the information to be reported.** Those regulatory technical standards should be adopted on the basis of a draft developed by ESMA. **The regulatory technical standards should not add any elements that are not provided for in Directive 2009/65/EC.**
- (60) To standardise the supervisory reporting process the Commission should **■** be empowered to adopt implementing technical standards developed by ESMA as regards the **format**, data standards **and methods and arrangements for** reporting by management companies. 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.
- (61) 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 **where** they provide custody services to UCITS. To avoid **unnecessary work**, the depositaries should not perform *ex ante* due diligence where they intend to delegate custody to CSDs.

- █
- (62) In order to improve supervisory cooperation and effectiveness, the competent authorities of the *UCITS* 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 *that* UCITS.
- (63) To improve supervisory cooperation, ESMA should be able to request that a competent authority present a case before █ ESMA where that case has cross-border implications and *might* affect investor protection or financial stability. *ESMA's* analyses of such cases *would* give other competent authorities a better understanding of the discussed issues █, contribute to preventing similar instances in the future and protect the integrity of the UCITS *market*.
- (64) *Notwithstanding the secrecy rules applicable at present, information exchanges between competent authorities and tax authorities should be improved. Such exchanges should comply with national law, and, where the information originates in another Member State, it should only be disclosed with the express agreement of the competent authority which has disclosed it.*

(65) *Directives 2011/61/EU and 2009/65/EC require AIFMs and UCITS management companies to act with due skill, care and diligence in the best interests of the investment funds they manage and of their investors. Member States should therefore require AIFMs and UCITS management companies to act honestly and fairly as regards the fees and costs charged to investors. In 2020, ESMA developed a supervisory briefing to promote convergence on the supervision of costs in AIFs and UCITS and to develop a set of criteria to support competent authorities in assessing the notion of undue costs and in supervising the obligation to prevent undue costs from being charged to investors. Those criteria are intended to provide guidance to competent authorities, while promoting supervisory convergence in the context of the capital markets union. However, due to the lack of a clear definition of undue costs, at present, divergent market and supervisory practices exist as to what industry and supervisors perceive as undue costs, and evidence has shown a disparity in the costs charged in different Member States and in the costs charged to retail investors as compared to professional investors. The proposed amendments to Directives 2011/61/EU and 2009/65/EC, in the context of the Union’s retail investment strategy, intend to tackle that issue, by requiring fund managers to establish a sound pricing process, which should comprise the identification, analysis and review of costs charged, directly or indirectly, to investment funds or their unit-holders, and by introducing a requirement to compensate investors where undue costs have been charged. ESMA should submit a report to the European Parliament, the Council and the Commission assessing the level of, reasons for, and differences in, the costs charged to retail investors, including differences resulting from the nature of the AIFs and UCITS concerned, and analysing whether the criteria set out in its supervisory briefing are to be complemented with regard to the notion of undue costs. In order to support the competent authorities in the supervision of costs, and ESMA in its analysis of cost-related issues, the competent authorities should collect cost data to be shared with ESMA on a one-time basis. That data collection would increase ESMA’s expertise in the area of cost reporting with a view to providing the European Parliament, the Council, the Commission and the competent authorities with technical advice on the collection of cost data in the context of the Union’s retail investment strategy. On the basis of that report, ESMA should carry out activities under Article 29 of Regulation (EU) No 1095/2010 to help develop a common understanding of the notion of undue costs.*

(66) *The name of an AIF and of a UCITS is a distinctive element that influences investors' choices and gives a first impression of the fund's investment strategy and objectives. Although the name of an AIF and of a UCITS already forms part of the pre-contractual information provided to investors, it is useful to underline the importance of the name by specifically emphasising that it constitutes essential pre-contractual information in the key investor information and prospectus that should be provided to retail investors before they invest in that AIF and to investors before they invest in that UCITS. In accordance with Directive (EU) 2021/2261 of the European Parliament and of the Council<sup>24</sup>, as of 1 January 2023, UCITS marketed to retail investors are subject to the requirements of Regulation (EU) No 1286/2014 of the European Parliament and of the Council<sup>25</sup>. Since that date, the obligation of a UCITS management company or investment company to prepare a key investor information document has been replaced by the obligation to prepare a key information document in accordance with Regulation (EU) No 1286/2014. In addition, AIFMs managing AIFs that are marketed to retail investors are also subject to the requirements of that Regulation. Accordingly, where AIFs and UCITS are marketed to retail investors, AIFMs and UCITS are required to include in the key information document the name of the fund and to ensure that such information is accurate, fair and clear and does not convey a misleading or confusing message that would wrongly entice investors. It is therefore essential to emphasise that the name of an AIF or UCITS is considered as important as any other pre-contractual document and subject to equal standards of fairness and transparency. In order to ensure a high and uniform level of investor protection in the Union, ESMA should develop guidelines to specify situations where the name of an AIF or UCITS could be unfair, unclear or misleading to the investor. Sectoral legislation setting standards for fund names or marketing of funds takes precedence over those guidelines.*

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<sup>24</sup> *Directive (EU) 2021/2261 of the European Parliament and of the Council of 15 December 2021 amending Directive 2009/65/EC as regards the use of key information documents by management companies of undertakings for collective investment in transferable securities (UCITS) (OJ L 455, 20.12.2021, p. 15).*

<sup>25</sup> *Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJ L 352, 9.12.2014, p. 1).*

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

(68) *On 9 August 2022, the ECB delivered an opinion<sup>26</sup>,*

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HAVE ADOPTED THIS DIRECTIVE:

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<sup>26</sup> OJ C 379, 3.10.2022, p. 1.

Article 1  
Amendments to Directive 2011/61/EU

Directive 2011/61/EU is amended as follows:

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

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

*‘(ag) “professional investor” means an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to Directive 2014/65/EU of the European Parliament and of the Council\*;*

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*\* 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).’;*

*(b) the following points are 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\*;*



- (aq) *“capital of the AIF” means aggregate capital contributions and uncalled capital committed to an AIF, calculated on the basis of amounts investible after the deduction of all fees, charges and expenses that are directly or indirectly borne by investors;*
- (ar) *“loan origination” or “originating a loan” means the granting of a loan:*
- (i) *directly by an AIF as the original lender; or*
  - (ii) *indirectly through a third party or special purpose vehicle which originates a loan for or on behalf of the AIF, or for or on behalf of an AIFM in respect of the AIF, where the AIFM or AIF is involved in structuring the loan, or defining or pre-agreeing its characteristics, prior to gaining exposure to the loan;*
- (as) *“shareholder loan” means a loan which is granted by an AIF to an undertaking in which it holds directly or indirectly at least 5 % of the capital or voting rights, and which cannot be sold to third parties independently of the capital instruments held by the AIF in the same undertaking;*

- (at) ***“loan-originating AIF” means an AIF:***
- (i) ***whose investment strategy is mainly to originate loans; or***
  - (ii) ***whose originated loans have a notional value that represents at least 50 % of its net asset value;***
- (au) ***“leveraged AIF” means an AIF whose exposures are increased by the AIFM that manages it, whether through borrowing of cash or securities, leverage embedded in derivative positions or any other means.***

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\* 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, point (b), the following point is added:**

**‘(iv) any other function or activity which is already provided by the AIFM in relation to an AIF that it manages in accordance with this Article, or in relation to services that it provides in accordance with this paragraph, provided that any potential conflict of interest created by the provision of that function or activity to other parties is appropriately managed.’;**

**(b) in paragraph 4, the following points ■ are added:**

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

**(d) credit servicing activities in accordance with ■ Directive (EU) 2021/2167 of the European Parliament and of the Council\*.**

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**\* Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU (OJ L 438, 8.12.2021, p. 1).’;**

(c) *paragraph 5 is amended as follows:*

(i) *point (b) is deleted;*

(ii) *the following point is added:*

*‘(e) administration of benchmarks in accordance with Regulation (EU) 2016/1011 which are used in the AIFs that they manage.’;*

(d) paragraph 6 is replaced by the following:

‘6. ■ Article 15, Article 16 except for ■ paragraph 5, *first subparagraph*, 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), *of this Article, concerning one or more of the instruments listed in Annex I, Section C, to Directive 2014/65/EU*, are provided by AIFMs.’;

(3) Article 7 is amended as follows:

(a) paragraph 2 is replaced by the following:

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

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

- (i) a **■** description of the role, title and **■** level of seniority *of those persons*;
- (ii) a description of *the* reporting lines and responsibilities *of those persons within* and outside the AIFM;
- (iii) an overview of *the amount of time that each of those persons allocates* to each responsibility;
- (iv) a description of the *human and* technical **■** resources that support *the activities of those persons*;

- (aa) ***the legal name and relevant identifier of the AIFM;***
- (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 to VIII of ***this Directive, and with its obligations under Article 3(1), Article 6(1), point (a), and Article 13 of Regulation (EU) 2019/2088 of the European Parliament and of the Council\****, and a detailed description of the appropriate human and technical resources ***to*** be used by the AIFM to ***that*** effect;
- (d) information on ***the AIFM's*** remuneration policies and practices pursuant to Article 13;
- (e) information on arrangements made for the delegation and sub-delegation to third parties of functions ***in accordance with*** Article 20, ***comprising at least the following:***

- (i) for each delegate:**

  - *its legal name and relevant identifier,*
  - *its jurisdiction of establishment, and*
  - *where relevant, its supervisory authority;*
- (ii) a detailed description of the human and technical resources employed by the AIFM for:**

  - *performing day-to-day portfolio management or risk management tasks within the AIFM, and*
  - *monitoring the delegated activity;*
- (iii) in respect of each of the AIFs that the AIFM manages or intends to manage:**

  - *a brief description of the delegated portfolio management function, including whether such delegation amounts to a partial or full delegation, and*
  - *a brief description of the delegated risk management function, including whether such delegation amounts to a partial or full delegation;*

(iv) *a description of the periodic due diligence measures to be carried out by the AIFM to monitor the delegated activity.*

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\* *Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability- related disclosures in the financial services sector (OJ L 317, 9.12.2019, p. 1).’;*

(b) paragraph 5 is replaced by the following:

‘5. The competent authorities shall, on a quarterly basis, inform ESMA of authorisations granted or withdrawn in accordance with this Chapter, ***and of any changes to the list of AIFs managed or marketed in the Union by authorised AIFMs.***

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

**■**’;

(c) *paragraphs 6 and 7 are deleted;*



(d) *the following paragraph is added:*

‘8. *By ... [60 months from the date of entry into force of this amending Directive], ESMA shall provide the European Parliament, the Council and the Commission with a report analysing market practices regarding delegation and compliance with paragraphs 1 to 5 of this Article and with Article 20, based, inter alia, on the data reported to the competent authorities in accordance with Article 24(2), point (d), and on the exercise of ESMA’s supervisory convergence powers. That report shall also analyse compliance with the substance requirements of this Directive.’;*

(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 *are* communicated forthwith to the competent authorities of the home Member States of the AIFM and the conduct of the business of the AIFM *is* decided by at least two natural persons *meeting such conditions* who **■** either *are* employed full-time by that AIFM or *are executive members or members of the governing body of the AIFM* committed full-time to *conducting* the business of that AIFM, and who are *domiciled* in the Union;’;

(5) *in Article 12, the following paragraph is added:*

*‘4. For the purposes of paragraph 1, first subparagraph, point (f), ESMA shall by ... [18 months from the date of entry into force of this amending Directive] submit a report to the European Parliament, the Council and the Commission assessing the costs charged by AIFMs to the investors of the AIFs that they manage and explaining the reasons for the level of those costs and for any differences between them, including differences resulting from the nature of the AIFs concerned. As part of that assessment, ESMA shall analyse, within the framework of Article 29 of Regulation (EU) No 1095/2010, the appropriateness and effectiveness of the criteria set out in the ESMA convergence tools on the supervision of costs.*

*For the purposes of that report, and in accordance with Article 35 of Regulation (EU) No 1095/2010, the competent authorities shall provide ESMA on a one-time basis with data on costs including all fees, charges and expenses which are directly or indirectly borne by the investors, or by the AIFM in connection with the operations of the AIF, and that are to be directly or indirectly allocated to the AIF. The competent authorities shall make those data available to ESMA within their powers, which include the power to require AIFMs to provide information as laid down in Article 46(2) of this Directive.’;*

(6) *in Article 14, the following paragraph is inserted:*

*'2a. Where an AIFM manages or intends to manage an AIF at the initiative of a third party, including cases where that AIF uses the name of a third-party initiator or where an AIFM appoints a third-party initiator as a delegate pursuant to Article 20, the AIFM shall, taking account of any conflicts of interest, submit detailed explanations and evidence of its compliance with paragraphs 1 and 2 of this Article to the competent authorities of its home Member State. In particular, the AIFM shall specify the reasonable steps it has taken to prevent conflicts of interest arising from the relationship with the third party or, where those conflicts of interest cannot be prevented, how it identifies, manages, monitors and, where applicable, discloses those conflicts of interest in order to prevent them from adversely affecting the interests of the AIF and its investors.'*

(7) Article 15 is amended as follows:

(a) paragraph 3 *is amended as follows:*

(i) the following point is added:

‘(d) for loan-**originating** activities, implement effective policies, procedures and processes for the granting of loans.’;

(ii) *the following subparagraphs are added:*

*‘For the purposes of the first subparagraph, point (d), where AIFMs manage AIFs that engage in loan origination, including when those AIFs gain exposure to loans through third parties, they shall also implement effective policies, procedures and processes for assessing the credit risk and for administering and monitoring their credit portfolio, keep those policies, procedures and processes up to date and effective, and review them regularly and at least once a year.*

*Without prejudice to Article 12(1), point (b), the requirements set out in the first subparagraph, point (d), and in the second subparagraph of this paragraph shall not apply to the origination of shareholder loans where the notional value of such loans does not exceed in aggregate 150 % of the capital of the AIF.’;*

(b) the following paragraphs ■ are inserted ■ :

‘4a. An AIFM shall ensure that, *where an AIF it manages originates loans, the notional value of the loans* originated to any single borrower by *that* AIF ■ does not exceed *in aggregate* 20 % of the ■ capital *of the AIF* where the borrower is one of the following: ■

(a) a financial undertaking *as defined in* Article 13, *point* (25), of Directive 2009/138/EC *of the European Parliament and of the Council*\*;

(b) *an AIF; or*

(c) *a UCITS.*

The restriction set out in the first subparagraph *of this paragraph* shall be without prejudice to the thresholds, restrictions and conditions set out in Regulations (EU) No 345/2013\*\*, (EU) No 346/2013\*\*\* and (EU) 2015/760\*\*\*\* of the European Parliament and of the Council.

**4b. An AIFM shall ensure that the leverage of a loan-originating AIF it manages represents no more than:**

**(a) 175 %, where that AIF is open-ended;**

**(b) 300 %, where that AIF is closed-ended.**

**The leverage of a loan-originating AIF shall be expressed as the ratio between the exposure of that AIF, calculated according to the commitment method as defined in the delegated acts adopted pursuant to Article 4(3), and its net asset value.**

**Borrowing arrangements which are fully covered by contractual capital commitments from investors in the loan-originating AIF shall not be considered to constitute exposure for the purpose of calculating the ratio referred to in the second subparagraph.**

**In the event that a loan-originating AIF infringes the requirements laid down in this paragraph and the infringement is beyond the control of the AIFM that manages it, the AIFM shall, within an appropriate period, take such measures as are necessary to rectify the position, taking due account of the interests of the investors in the loan-originating AIF.**

*Without prejudice to the powers of the competent authorities referred to in Article 25(3), the requirements set out in the first subparagraph of this paragraph shall not apply to a loan-originating AIF whose lending activities consist solely of originating shareholder loans, provided that the notional value of those loans does not exceed in aggregate 150 % of the capital of the AIF.*

- 4c. The investment limit of 20 % laid down in paragraph 4a shall:
- (a) apply by the date specified in the *AIF* rules, instruments of incorporation or prospectus, which shall be no later than 24 months from the date of the first subscription for units or shares of the AIF;
  - (b) cease to apply once the *AIFM* starts to sell assets *of the AIF* in order to redeem ■ units or shares *as part* of the *liquidation* of the AIF; and
  - (c) be temporarily suspended *where the capital of the AIF is increased or reduced.*

*The suspension referred to in the first subparagraph, point (c), shall be limited in time to the period that is strictly necessary, taking due account of the interests of the investors in the AIF, and, in any case, shall last no longer than 12 months.*

- 4d.** The application date referred to in paragraph **4c**, first subparagraph, point (a), shall take account of the particular features and characteristics of the assets to be invested by the AIF **■** . In exceptional circumstances, the competent **authorities** of the AIFM, upon submission of a duly justified investment plan, may approve an extension of **that** time limit **of** no more than **12** additional **months**.
- 4e.** The **AIFM** shall **ensure that an AIF it manages does** not grant loans to the following entities:
- (a) **the** AIFM or the staff of **that** AIFM;
  - (b) **the AIF's** depositary **or the entities to which the depositary has delegated functions in respect of the AIF in accordance with Article 21;**
  - (c) **an** entity to which **the** AIFM has delegated functions in accordance with Article 20 **or the staff of that entity;**
  - (d) **an entity within the same group, as defined in Article 2, point (11), of Directive 2013/34/EU of the European Parliament and the Council\*\*\*\*\*, as the AIFM, except where that entity is a financial undertaking that exclusively finances borrowers that are not referred to in points (a), (b) and (c) of this paragraph.**



- 4f. Where an AIF originates loans, the proceeds of the loans, minus any allowable fees for their administration, shall be attributed to that AIF in full. All costs and expenses linked to the administration of the loans shall be disclosed in accordance with Article 23.*
- 4g. Without prejudice to other instruments of Union law, a Member State may prohibit AIFs that originate loans from granting loans to consumers as defined in Article 3, point (a), of Directive 2008/48/EC of the European Parliament and of the Council\*\*\*\*\* in its territory, and may prohibit AIFs from servicing credits granted to such consumers in its territory. Such prohibition shall not affect the marketing in the Union of AIFs granting loans to consumers or servicing credits granted to consumers.*
- 4h. Member States shall prohibit AIFMs from managing AIFs that engage in loan origination where the whole or part of the investment strategy of those AIFs is to originate loans with the sole purpose of transferring those loans or exposures to third parties.*

**4i.** An AIFM shall ensure that the AIF it manages retains **■** 5 % of the notional value of *each loan* that the AIF has originated and subsequently *transferred to third parties*. *That percentage of each loan shall be retained:*

- (a) until maturity, for loans whose maturity is a period of up to eight years, or for loans granted to consumers regardless of their maturity; and*
- (b) for a period of at least eight years for other loans.*

*By way of derogation from the first subparagraph, the requirement set out therein shall not apply where:*

- (a) the AIFM starts to sell assets of the AIF in order to redeem units or shares as part of the liquidation of the AIF;*
- (b) the disposal is necessary for the purposes of compliance with restrictive measures adopted under Article 215 TFEU, or with product requirements;*

*(c) the sale of the loan is necessary to enable the AIFM to implement the investment strategy of the AIF it manages in the best interests of the AIF's investors; or*

*(d) the sale of the loan is due to a deterioration in the risk associated with the loan, detected by the AIFM as part of its due diligence and risk management process referred to in Article 15(3), and the purchaser is informed of that deterioration when buying the loan.*

*Upon the request of the competent authorities of its home Member State, the AIFM shall demonstrate that it meets the conditions for the application of the relevant derogation set out in the second subparagraph.*

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\* Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

\*\* 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).

\*\*\* 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).

- \*\*\*\* 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).
- \*\*\*\*\* *Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).*
- \*\*\*\*\* *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66).’;*

(8) in Article 16, the following paragraphs ■ are inserted:

‘2a. An AIFM shall ensure that the *loan-originating* AIF it manages is closed-ended.

*By way of derogation from the first subparagraph, a loan-originating AIF may be open-ended provided that the AIFM that manages it is able to demonstrate to the competent authorities of the home Member State of the AIF that the AIF’s liquidity risk management system is compatible with its investment strategy and redemption policy.*

The requirement set out in the first subparagraph *of this paragraph* shall be without prejudice to the thresholds, restrictions *and* conditions set out in Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) 2015/760.

- 2b. ***With a view to ensuring that it complies with paragraphs 1 and 2 of this Article***, an AIFM that manages an open-ended AIF shall select at least ***two*** appropriate liquidity management ***tools*** from ***those referred to*** in Annex V, points 2 to 8, ***after assessing the suitability of those tools in relation to the pursued investment strategy, the liquidity profile and the redemption policy of the AIF. The AIFM shall include those tools in the AIF rules or instruments of incorporation for possible use in the interest of the AIF's investors. It shall not be possible for that selection to include only the tools referred to in Annex V, points 5 and 6.***

***By way of derogation from the first subparagraph, an AIFM may decide to select only one liquidity management tool from those referred to in Annex V, points 2 to 8, for an AIF it manages if that AIF is authorised as a money market fund in accordance with Regulation (EU) 2017/1131 of the European Parliament and of the Council\*.***

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. ***The selection referred to in the first and second subparagraphs and the detailed policies and procedures for the activation and deactivation shall be communicated to the competent authorities of the home Member State of the AIFM.***

*Redemption in kind as referred to in Annex V, point 8, shall only be activated to meet redemptions requested by professional investors and if the redemption in kind corresponds to a pro rata share of the assets held by the AIF.*

*By way of derogation from the fourth subparagraph of this paragraph, the redemption in kind need not correspond to a pro rata share of the assets held by the AIF if that AIF is solely marketed to professional investors, or if the aim of that AIF's investment policy is to replicate the composition of a certain stock or debt securities index and that AIF is an exchange-traded fund as defined in Article 4(1), point (46), of Directive 2014/65/EU.*

- 2c. An AIFM that manages an open-ended AIF may, in the interest of AIF investors, temporarily suspend the subscription, repurchase and redemption of the AIF units or *shares as referred to in Annex V, point 1, or, where those tools are included in the AIF rules or* instruments of incorporation, *activate or deactivate other liquidity management tools selected from Annex V, points 2 to 8, in accordance with paragraph 2b of this Article.* The AIFM may also, *in the interest of the AIF investors, activate side pockets as referred to in Annex V, point 9.*

*An AIFM shall only use a suspension of subscriptions, repurchases and redemptions or side pockets as referred to in the first subparagraph* in exceptional cases where circumstances so require and where justified having regard to the interests of the AIF investors.

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

(a) *where the AIFM activates or deactivates the liquidity management tool referred to in Annex V, point 1;*

(b) *where the AIFM activates or deactivates any of the liquidity management tools referred to in Annex V, points 2 to 8, in a manner that is not in the ordinary course of business as envisaged in the AIF rules or instruments of incorporation.*

*An AIFM shall, within a reasonable timeframe before it activates or deactivates the liquidity management tool referred to in Annex V, point 9, notify the competent authorities of its home Member State of such activation or deactivation.*

The competent authorities of the home Member State of the AIFM shall *inform*, without delay, the competent authorities of a host Member State of the AIFM, ESMA *and, if there are potential risks to the stability and integrity of the financial system, the European Systemic Risk Board (ESRB) established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council\*\** of any notifications received in accordance with this paragraph. *ESMA shall have the power to share the information received pursuant to this paragraph with the competent authorities.*



- 2e. Member States shall ensure that at least the liquidity management tools set out in Annex V are available to AIFMs managing open-ended AIFs.
- 2f. *ESMA shall develop draft regulatory technical standards to determine the requirements with which loan-originating AIFs are to comply in order to maintain an open-ended structure. Those requirements shall include a sound liquidity management system, the availability of liquid assets and stress testing, as well as an appropriate redemption policy having regard to the liquidity profile of loan-originating AIFs. Those requirements shall also take due account of the underlying loan exposures, the average repayment time of the loans and the overall granularity and composition of the portfolios of loan-originating AIFs.*
- 2g. ESMA shall develop draft regulatory technical standards to specify the characteristics of the liquidity management tools set out in Annex V.

*When developing those draft regulatory technical standards, ESMA shall take account of the diversity of investment strategies and underlying assets of AIFs. Those standards shall not restrict the ability of AIFMs to use any appropriate liquidity management tool for all asset classes, jurisdictions and market conditions.*

- 2h. *By ... [12 months from the date of entry into force of this amending Directive], ESMA shall develop guidelines on the selection and calibration of liquidity management tools by AIFMs for liquidity risk management and for mitigating financial stability risks. Those guidelines shall recognise that the primary responsibility for liquidity risk management remains with AIFMs. They shall include indications as to the circumstances in which side pockets, as referred to in Annex V, point 9, can be activated. They shall allow adequate time for adaptation before they apply, in particular for existing AIFs.*
- 2i. *ESMA shall submit the draft regulatory technical standards referred to in paragraphs 2f and 2g of this Article to the Commission by ... [12 months from the date of entry into force of this amending Directive].*

*Power is delegated to the Commission to supplement this Directive by adopting the regulatory technical standards referred to in paragraphs 2f and 2g in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.*

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- \* *Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds (OJ L 169, 30.6.2017, p. 8).*
- \*\* *Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1).’;*

(9) Article 20 is amended as follows:

(a) *in* paragraph 1, *the first subparagraph* is amended as follows:

(i) the introductory *wording* is replaced by the following:

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

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

‘(f) the AIFM must be able to demonstrate that the delegate is qualified and capable of undertaking the functions and providing the services in question, that it was selected with all due care and that the AIFM is in a position to monitor effectively at any time the delegated activity, to give at any time further instructions to the delegate and to withdraw the delegation with immediate effect *where to do so* 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 *or services* to a third party, or by any further sub-delegation. ***The AIFM shall not delegate the functions or services 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 referred to in Article 6(4) and to the extent that it becomes a letter-box entity.***

***3a. The AIFM shall ensure that the performance of the functions referred to in Annex I and the provision of the services referred to in Article 6(4) comply with this Directive. That obligation shall apply irrespective of the regulatory status or location of any delegate or sub-delegate.’;***

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

‘The third party may sub-delegate any of the functions *or services* delegated to it provided that the following conditions are met:’;

**(d) paragraph 6 is replaced by the following:**

**‘6. Where the sub-delegate further delegates any of the functions or services delegated to it, the conditions set out in paragraph 4 shall apply mutatis mutandis.**

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

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**\* Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ L 26, 2.2.2016, p. 19).’;**

(10) Article 21 is amended as follows:

*(a) the following paragraph is inserted:*

*‘5a. By way of derogation from paragraph 5, point (a), the home Member State of an EU AIF may permit its competent authorities to allow an institution referred to in paragraph 3, first subparagraph, point (a), and established in another Member State to be appointed as a depositary provided that the following conditions are fulfilled:*

*(a) the competent authorities have received a reasoned request from the AIFM to allow the appointment of a depositary established in another Member State and that request demonstrates the lack of depositary services in the home Member State of the AIF that are able to meet effectively the needs of the AIF having regard to its investment strategy; and*

*(b) the aggregate amount in the national depositary market of the home Member State of the AIF of assets entrusted for safe-keeping, as referred to in paragraph 8 of this Article, on behalf of EU AIFs authorised or registered under the applicable national law in accordance with Article 4(1), point (k)(i), and managed by an EU AIFM does not exceed EUR 50 billion or the equivalent in any other currency.*

*Assets entrusted for safe-keeping by depositaries acting under Article 36(1), point (a), and the own assets of depositaries shall not be taken into account for the purpose of determining whether the condition laid down in the first subparagraph, point (b), of this paragraph is met.*

*Notwithstanding the conditions laid down in the first and second subparagraphs being met, the competent authorities shall allow the appointment of a depositary established in another Member State only after carrying out a case-by-case assessment of the lack of relevant depositary services in the home Member State of the AIF having regard to the investment strategy of the AIF.*

*Where the competent authorities allow the appointment of a depositary established in another Member State, they shall inform ESMA thereof.*

*This paragraph shall be without prejudice to the application of the other paragraphs of this Article, with the exception of paragraph 5, point (a).’;*

**(b)** paragraph 6 is *amended as follows*:

**(i)** *in the first subparagraph*, 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 *of the European Parliament and of the Council\**;



- (d) the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, insofar 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 *that* third country is not mentioned in Annex I to the Council conclusions **■** on the revised EU list *of* non-cooperative jurisdictions for tax purposes.

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\* *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).’;*

(ii) *the following subparagraph is inserted after the first subparagraph:*

*‘By way of derogation from the introductory wording of the first subparagraph, the conditions in points (c) and (d) of that subparagraph shall apply at the time of the depositary’s appointment. If a third country where a depositary is established is identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849, as referred to in the first subparagraph, point (c), or is added to Annex I to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes, as referred to in the first subparagraph, point (d), after the time of the appointment of the depositary, a new depositary shall be appointed within an appropriate period, taking due account of the interests of investors. That period shall be no longer than two years.’;*

(c) paragraph 11 is amended as follows:

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

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

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

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

(d) paragraph 16 is replaced by the following:

‘16. The depositary shall make available to its competent authorities, to the competent authorities of the AIF ■ and to the competent authorities of the AIFM ■ , on request, **any** information that it has obtained while performing its duties ■ .

***Where the competent authorities of the AIF or the AIFM are different from those of the depositary:***

- (a) the competent authorities of the ***depositary shall share without delay with*** the competent authorities of the AIF ***and*** the AIFM ***any information relevant for the exercise of those authorities’ supervisory powers; and***
- (b) the competent authorities of the ***AIF or the AIFM shall share*** without delay ***with the competent authorities of the depositary any information relevant for the exercise of those authorities’ supervisory powers.’;***

(e) ***in paragraph 17, point (c)(ii) is replaced by the following:***

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

(11) Article 23 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) *point (a) is replaced by the following:*

*‘(a) the name of the AIF, a description of the investment strategy and objectives of the AIF, information on where any master AIF is established and where the underlying funds are established if the AIF is a fund of funds, a description of the types of assets in which the AIF may invest, the techniques it may employ and all associated risks, any applicable investment restrictions, the circumstances in which the AIF may use leverage, the types and sources of leverage permitted and the associated risks, any restrictions on the use of leverage and any collateral and asset reuse arrangements, and the maximum level of leverage which the AIFM is entitled to employ on behalf of the AIF;’;*

(ii) 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, **of the existing redemption arrangements with investors, and of** the possibility **of**, and conditions for, using liquidity management tools selected in accordance with Article 16(2b) **■** ;’;*

(iii) *the following* point is inserted:

‘(ia) a list of fees, *charges and expenses that are borne by the AIFM* in connection with the operation of the AIF and that *are to be directly or indirectly allocated to the AIF;*’;

(b) in paragraph 4, the following points are added:

‘(d) *the composition of the* originated loan portfolio;

(e) on *an annual* basis, all █ fees, *charges and expenses* that were directly or indirectly *borne by investors;*

(f) on *an annual* basis, any parent undertaking, subsidiary or special purpose vehicle *utilised* in relation to the AIF’s investments by *or on behalf* of the AIFM █ .’;

(c) *the following paragraph is added:*

‘7. *In order to ensure the uniform application of the rules relating to the name of the AIF, ESMA shall by ... [24 months from the date of entry into force of this amending Directive] develop guidelines to specify the circumstances in which the name of an AIF is unfair, unclear or misleading. Those guidelines shall take into account relevant sectoral legislation. Sectoral legislation setting standards for fund names or marketing of funds takes precedence over those guidelines.*’;

(12) 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.

*The AIFM shall, in respect of each AIF it manages, provide information on the instruments in which it is trading, on markets of which it is a member or where it actively trades, and on the exposures and assets of each AIF. That information shall include the identifiers that are necessary to connect the data provided on assets, AIFs and AIFMs to other supervisory or publicly available data sources.’;*

(b) paragraph 2 *is amended as follows:*

(i) *points (c) and (d) are replaced by the following:*

*‘(c) the current risk profile of the AIF, including the market risk, liquidity risk, counterparty risk, other risks including operational risk, and the total amount of leverage employed by the AIF;*

- (d) information regarding delegation arrangements concerning portfolio management or risk management functions as follows:**
- (i) information on the delegates, specifying their name and domicile or registered office or branch, whether they have any close links with the AIFM, whether they are authorised or regulated entities for the purposes of asset management, their supervisory authority, where relevant, and including the identifiers of the delegates that are necessary to connect the information provided to other supervisory or publicly available data sources;**
  - (ii) the number of full-time equivalent human resources employed by the AIFM for performing day-to-day portfolio management or risk management tasks within that AIFM;**
  - (iii) a list and description of the activities concerning portfolio management and risk management functions which are delegated;**



- (iv) where the portfolio management function is delegated, the amount and percentage of the AIF's assets which are subject to delegation arrangements concerning the portfolio management function;*
- (v) the number of full-time equivalent human resources employed by the AIFM to monitor the delegation arrangements;*
- (vi) the number and dates of the periodic due diligence reviews carried out by the AIFM to monitor the delegated activity, a list of issues identified and, where relevant, of the measures adopted to address those issues and the date by which those measures are to be implemented;*
- (vii) where sub-delegation arrangements are in place, the information required under points (i), (iii) and (iv) in respect of the sub-delegates and the activities related to the portfolio management and risk management functions that are sub-delegated;*
- (viii) the commencement and expiry dates of the delegation and sub-delegation arrangements.';*

*(ii) the following point is added:*

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

*(d) in paragraph 5, the second subparagraph is replaced by the following:*

*‘In exceptional circumstances, and where required in order to ensure the stability and integrity of the financial system or to promote long-term sustainable growth, ESMA after consulting the ESRB may request the competent authorities of the home Member State of the AIFM to impose additional reporting requirements.’;*

*(e) the following paragraphs are inserted:*

*‘5a. ESMA shall develop draft regulatory technical standards specifying:*

- (a) the details of the information to be reported in accordance with paragraph 1 and with paragraph 2, points (a), (b), (c), (e) and (f);*
- (b) the appropriate level of standardisation of the information to be reported in accordance with paragraph 2, point (d);*
- (c) the reporting frequency and timing.*

*When developing the draft regulatory technical standards referred to in the first subparagraph, point (b), ESMA shall not introduce reporting obligations in addition to those set out in paragraph 2, point (d).*

*When developing the draft regulatory technical standards referred to in the first subparagraph, points (a) and (b), ESMA shall take into consideration other reporting requirements to which the AIFMs are subject, international developments and standards, and the findings of the report issued in accordance with Article 69-a(2).*

ESMA shall submit those draft regulatory technical standards to the Commission by ... [36 months *from* the date of entry into force of this *amending* Directive].

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

- 5b.** 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 identifiers that are necessary to connect the data on assets, AIFMs and AIFs in the reports referred to in paragraphs 1 and 2 to other supervisory or publicly available data sources;*
  - (c) *the methods and arrangements for submitting the reports referred to in paragraphs 1 and 2 of this Article, including methods and arrangements to improve data standardisation and efficient sharing and use of data already reported in any Union reporting framework by any relevant competent authority, at Union or national level, taking into account the findings of the report issued in accordance with Article 69-a(2);*
  - (d) *the template, including the minimum additional reporting requirements, to be used by AIFMs in exceptional circumstances as referred to in paragraph 5, second subparagraph.*

ESMA shall submit those draft implementing technical standards to the Commission by ... [36 months **from** the date of entry into force of this **amending** Directive].

Power is **conferred on** 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.’;

**(f) paragraph 6 is replaced by the following:**

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

**(13) in Article 25, paragraph 2 is replaced by the following:**

**‘2. The competent authorities of the home Member State of the AIFM shall ensure that all information gathered under Article 24 in respect of all AIFMs that they supervise and the information gathered under Article 7 is made available to other relevant competent authorities, ESMA, 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\* (known collectively as ‘European Supervisory Authorities’ or ‘ESAs’) and the ESRB, whenever necessary for the purpose of carrying out their duties, by means of the procedures set out in Article 50.**

*The competent authorities of the home Member State of the AIFM shall ensure that all information gathered under Article 24 in respect of all AIFMs that they supervise is made available, for statistical purposes only, to the ESCB, by means of the procedures set out in Article 50.*

*The competent authorities of the home Member State of the AIFM shall, without delay, provide information by means of the procedures set out in Article 50, and bilaterally to the competent authorities of other Member States directly concerned, if an AIFM under their responsibility, or an AIF managed by that AIFM, could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions in other Member States, or to the stability of the financial system in another Member State.*

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- \* *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).’;*

**(14)** 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 *that* third country is not mentioned in Annex I to the Council conclusions **■** on the revised EU list *of* non-cooperative jurisdictions for tax purposes.’;

**(15)** in Article 36, paragraph 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;

(d) the third country where the non-EU AIF is established has signed an agreement with the home Member State of the authorised AIFM and with each other Member State in which the units or shares of the non-EU AIF are intended to be marketed which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements, and that third country is not mentioned in Annex I to the Council conclusions ■ on the revised EU list *of* non-cooperative jurisdictions for tax purposes.’;

**(16)** in Article 37, *paragraph 7 is amended as follows:*

**(a)** *in the first subparagraph,* 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 *that* third country is not mentioned in Annex I to the Council conclusions ■ on the revised EU list of non-cooperative jurisdictions for tax purposes.’;

(b) *the following subparagraph is added:*

*‘If the third country where the non-EU AIFM is established is identified as a high-risk third country pursuant to Article 9(2) of Directive (EU) 2015/849, as referred to in the first subparagraph, point (e), or is added to Annex I to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes, as referred to in the first subparagraph, point (f), after the time of authorisation of the non-EU AIFM, the non-EU AIFM shall, within an appropriate period, take such measures as are necessary to rectify the situation in respect of the AIFs that it manages, taking due account of the interests of investors. That period shall be no longer than two years.’;*

(17) in Article 40(2), *first subparagraph*, points (b) and (c) are replaced by the following:

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

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

(18) in Article 42(1), *first subparagraph*, 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;

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

**(19)** *in Article 43, the following paragraph is added:*

- ‘3.** *Member States shall ensure that an authorised EU AIFM is able to market units or shares of an EU AIF which invests predominantly in the shares of a particular company, to employees of that company or of its affiliated entities within the framework of employee savings schemes or employee participation schemes, on a domestic or cross-border basis.*

*Where such an AIF is marketed to employees on a cross-border basis, the Member State where the marketing takes place shall not impose any requirements in addition to those applicable in the home Member State of the AIF.’;*

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

‘(j) in the interest of investors, ***in exceptional circumstances and after consulting the AIFM***, require AIFMs to activate or deactivate ***the*** liquidity management tool referred to in ***Annex V, point 1, where there are risks to*** investor protection or financial stability that, ***on a reasonable and balanced view***, necessitate ***such activation or deactivation.***’;

(21) Article 47 is amended as follows:

(a) ***paragraph 2 is replaced by the following:***

***‘The obligation of professional secrecy shall apply to all persons who work or who have worked for ESMA, for the competent authorities or for any other person to whom ESMA has delegated tasks, including auditors and experts contracted by ESMA. Information covered by professional secrecy shall not be disclosed to another person or authority except where such disclosure is necessary for legal proceedings or for cases covered by taxation law.’;***

(b) paragraph 3 is replaced by the following:

‘3. All █ information exchanged under this Directive between █, the competent authorities, *the ESAs* and the ESRB shall be considered confidential, except *where*:

- (a) █ ESMA or the competent authority or another authority or body concerned states at the time of communication that such information may be disclosed;
- (b) █ disclosure is necessary for legal proceedings; *or*
- (c) █ the information disclosed is used in a summary or in an aggregate form in which individual financial market participants cannot be identified.

*Paragraph 2, and the first subparagraph of this paragraph, shall not preclude the exchange of information between competent authorities and tax authorities that are located in the same Member State. Where the information originates in another Member State, it shall only be disclosed in accordance with the first sentence of this subparagraph with the express agreement of the competent authorities which have disclosed it.’;*

(c) in paragraph 4, the following point ■ is added:

‘(d) *in the interest of investors, in exceptional circumstances and after consulting the AIFM, 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 the liquidity management tool referred to in Annex V, point 1, where there are risks to investor protection or financial stability that, on a reasonable and balanced view, necessitate such activation or deactivation.*’;

(22) 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 *the* 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 *competent* authorities shall take appropriate action *and* 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.

5a. *Where* the competent authorities of the home Member State of an AIFM *exercise powers pursuant to Article 46(2), point (j), they* shall notify the competent authorities of the host Member State of the AIFM, *ESMA and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.*

- 5b. The competent *authorities* of the host Member State of an AIFM may request the competent *authorities* of the home Member State of the AIFM to exercise powers *pursuant to* Article 46(2), point (j) **■** , specifying the reasons for the request and *informing* ESMA and, *if there are potential risks to the stability and integrity of the financial system*, the ESRB thereof.
- 5c. Where the competent *authorities* of the home Member State of the AIFM *do* not agree with the request referred to in paragraph 5b, *they* shall inform the competent *authorities* of the host Member State of the AIFM, *ESMA and, where the ESRB was informed of that request pursuant to paragraph 5b, the ESRB thereof, stating the reasons for the disagreement.*
- 5d. *On the basis of* the information received *pursuant to* paragraphs 5b and 5c, ESMA shall issue *without undue delay* an opinion to the competent authorities of the home Member State of the AIFM on *the exercise of* powers *pursuant to* Article 46(2), point (j). *ESMA shall communicate that opinion to the competent authorities of the host Member State of the AIFM.*



- 5e. Where the competent *authorities of the home Member State of the AIFM* do not act in accordance with ESMA's opinion referred to in paragraph 5d, or *do* not intend to comply with that opinion, *they* shall inform ESMA *and the competent authorities of the host Member State of the AIFM thereof*, stating *the* reasons for *their* non-compliance or intention *not to comply*. *In the event of a serious threat to investor protection, to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union, and unless such publication conflicts with the legitimate interests of the AIF's unit-holders or shareholders or of the public*, ESMA may publish the fact that *the* competent *authorities of the home Member State of the AIFM* do not comply or *do not* intend to comply with its *opinion, together with the reasons provided by those competent authorities for their non-compliance or intention not to comply*. *ESMA shall analyse whether the benefits of publication would outweigh the amplification of the threats to investor protection, to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union resulting from that publication and shall give the competent authorities of the home Member State of the AIFM advance notice of such publication.*

- 5f. The competent *authorities* of the host Member State of an AIFM may, *where they have reasonable grounds for doing so*, request the competent *authorities* of the home Member State of the AIFM to exercise, without delay, powers *pursuant to* Article 46(2), *other than point (j) of that paragraph*, specifying the reasons for *their* request *in as specific a manner as possible* and *informing* ESMA and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.

The competent *authorities* of the home Member State of the AIFM shall, without *undue* delay, inform the competent *authorities* 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 *of their* findings.

- 5g. *Where a Member State has exercised the derogation allowing the appointment of a depositary established in another Member State as set out in Article 21(5a), and where the competent authorities of the home Member State of an AIF or, where the AIF is not regulated, the competent authorities of the home Member State of the AIFM that manages the AIF, have reasonable grounds to suspect that acts contrary to this Directive are being or have been carried out by a depositary not subject to the supervision of those competent authorities, those competent authorities shall without delay notify ESMA and the competent authorities of the depositary concerned thereof in as specific a manner as possible. The recipient competent authorities shall take appropriate action and shall inform ESMA and the notifying competent authorities of the outcome of that action. This paragraph shall be without prejudice to the competences of the notifying competent authorities.*
- 5h. ESMA may request the competent *authorities* to submit, *without undue delay*, explanations to ESMA in relation to specific cases ■ which *raise a serious threat to investor protection, to the orderly functioning and integrity of financial markets* or to the *stability of the whole or part of the financial system in the Union.*';

(b) *in paragraph 6, the first subparagraph is replaced by the following:*

*‘In order to ensure the uniform application of this Directive concerning the exchange of information, ESMA may develop draft implementing technical standards to determine the procedures for the exchange of information between relevant competent authorities, the ESAs, the ESRB and members of the ESCB, subject to the applicable provisions of this Directive.’;*

(c) the following paragraph **■** is added:

*‘7. By ... [24 months from the date of entry into force of this amending Directive], ESMA shall develop **guidelines providing indications to guide** the competent authorities **in their** exercise of the powers set out in Article 46(2), point (j), **and indications as to the** situations **that might lead to** the requests referred to in paragraphs 5b and 5f **being put forward**. When developing those **guidelines**, ESMA shall consider the potential implications of such supervisory intervention for investor protection and **■** financial stability in another Member State or in the Union. **Those guidelines shall recognise that the primary responsibility for liquidity risk management remains with AIFMs.**’;*

(23) *Article 60 is replaced by the following:*

*‘Article 60*

*Disclosure of derogations*

*Where a Member State makes use of a derogation or option provided by Article 6 or 9, Article 15(4g) or Article 21, 22, 28 or 43, it shall inform the Commission thereof as well as of any subsequent changes. The Commission shall make the information public on a website or by other easily accessible means.’;*

(24) **█** *Article 61 is amended as follows:*

(a) *paragraph 5 is deleted;*

(b) *the following paragraph is added:*

*‘6. AIFMs managing AIFs that originate loans and that were constituted before ... [the date of entry into force of this amending Directive] shall be deemed to comply with Article 15(4a) to (4d) and Article 16(2a) until ... [five years from the date of entry into force of this amending Directive].*

*Until ... [five years from the date of entry into force of this amending Directive], where the notional value of the loans originated by an AIF to any single borrower, or the leverage of an AIF, is above the limits referred to in Article 15(4a) and (4b) respectively, AIFMs managing those AIFs shall not increase that value or that leverage. Where the notional value of the loans originated by an AIF to any single borrower, or the leverage of an AIF, is below the limits referred to in Article 15(4a) and (4b) respectively, AIFMs managing those AIFs shall not increase that value or that leverage above those limits.*

*AIFMs managing AIFs that originate loans, that were constituted before ... [the date of entry into force of this amending Directive] and that do not raise additional capital after ... [the date of entry into force of this amending Directive] shall be deemed to comply with Article 15(4a) to (4d) and Article 16(2a) in respect of those AIFs.*

*Notwithstanding the first, second and third subparagraphs of this paragraph, an AIFM managing AIFs that originate loans and that were constituted before ... [the date of entry into force of this amending Directive] may choose to be subject to Article 15(4a) to (4d) and Article 16(2a), provided that the competent authorities of the home Member State of the AIFM are notified thereof.*

*Where AIFs originate loans before ... [the date of entry into force of this amending Directive], AIFMs may continue to manage such AIFs without complying with Article 15(3), point (d), and Article 15(4e), (4f), (4g), (4h) and (4i) in respect of those loans.’;*

(25) the following article is inserted:

*‘Article 69-a*

*Other review*

1. By ... [60 months **from** the date of entry into force of **this amending** Directive] and following the **report** produced by ESMA in accordance with Article 7(8), 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 **as regards the** delegation regime laid down in Article 20 of this Directive, **in particular** with regard to preventing the creation of letter-box entities in the Union;

- (c) the appropriateness of the requirements applicable to AIFMs managing *AIFs which originate loans* laid down in Article 15 *and Article 16(2a) and (2f)*;
- (d) the *functioning of the derogation allowing the appointment of a depositary established in another Member State as set out in Article 21(5a) and the potential benefits and risks, including the impact on investor protection, on financial stability, on supervisory efficiency and on the availability of market choices, of amending the scope of that derogation, in line with the objectives of the capital markets union*;
- (e) *the appropriateness of the requirements applicable to AIFMs managing an AIF at the initiative of a third party as laid down in Article 14(2a) and the need for additional safeguards to prevent circumvention of those requirements, and, in particular, whether the provisions of this Directive on conflicts of interest are effective and appropriate in order to identify, manage, monitor and, where applicable, disclose conflicts of interest arising from the relationship between the AIFM and the third-party initiator*;
- (f) *the appropriateness and impact on investor protection of the appointment of at least one non-executive or independent director to the governing body of the AIFM, where it manages AIFs marketed to retail investors*.



2. By ... [24 months **from** the date of entry into force of **this amending** Directive], ESMA shall submit to the Commission a report **regarding** the development of the **integrated collection of** supervisory data ■ , which shall focus on how to:
  - (a) reduce areas of **duplication** and inconsistencies between the reporting frameworks in the asset-management sector and other sectors of the financial industry; **and**
  - (b) **improve** data standardisation and efficient sharing and use of data already reported within any Union reporting framework by any relevant competent authority, at Union or national level.
3. When preparing the report referred to in paragraph 2, ESMA shall work in close cooperation with the European Central Bank ■ , the other **ESAs** and the 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.?’;

(26) Annex I is amended **in accordance with** Annex I to this Directive;

(27) the text **set out** 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 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\*.

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\* 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) *paragraph 3 is amended as follows:*

(i) *in the first subparagraph, point (b), the following points are added:*

‘(iii) *reception and transmission of orders in relation to financial instruments;*

*(iv) any other function or activity which is already provided by the management company in relation to a UCITS that it manages in accordance with this Article, or in relation to services that it provides in accordance with this paragraph, provided that any potential conflict of interest created by the provision of that function or activity to other parties is appropriately managed.’;*

*(ii) in the first subparagraph, the following point is added:*

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

*(iii) the second subparagraph is replaced by the following:*

*‘Management companies shall not be authorised under this Directive to provide only the services referred to in this paragraph. Management companies shall not be authorised to provide the services referred to in the first subparagraph, point (c), which are used in the UCITS that they manage.’;*

*(b) paragraph 4 is replaced by the following:*

*‘4. Article 15, Article 16 except for paragraph 5, first subparagraph, and Articles 23, 24 and 25 of Directive 2014/65/EU shall apply where the services referred to in paragraph 3, points (a) and (b), of this Article are provided by management companies.’;*

(3) Article 7 ■ is amended as follows:

(a) *in paragraph 1, the first subparagraph is amended as follows:*

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

- ‘(b) the persons who effectively conduct the business of *the* 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 *are* communicated forthwith to the competent authorities and the conduct of the business of a management company *is* decided by at least two natural persons *meeting such conditions* who either *are* employed full-time by that management company *or are executive members or members of the management body of the management company* committed full-time to *conducting* the business of that management company, and who are *domiciled* in the Union ■ ;
- (c) the application for authorisation is accompanied by a programme of activity setting out, at least, the organisational structure of the management company, *and* specifying *the human and* technical resources that will be used to conduct the business of the management company *and* information about the persons effectively conducting the business of that management company, including:

- (i) a **■** description of *the* role, title and level of seniority *of those persons*;
- (ii) a description of *the* reporting lines and responsibilities *of those persons within* and outside the management company;
- (iii) an overview of *the amount of time that each of those persons allocates* to each responsibility;
- (iv) *information on how the management company intends to comply with its obligations under this Directive, and with its obligations under Article 3(1), Article 6(1), point (a), and Article 13(1) of Regulation (EU) 2019/2088 of the European Parliament and of the Council\*, and a detailed description of the appropriate human and technical resources to be used by the management company to that effect.*

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\* *Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability- related disclosures in the financial services sector (OJ L 317, 9.12.2019, p. 1).’;*

(ii) the following point is added:

- ‘(e) information is provided by the management company on arrangements made for the delegation *and sub-delegation* to third parties of functions in accordance with Article 13, *comprising at least the following*:

- (i) the legal name and relevant identifier of the management company;*
- (ii) for each delegate:*
  - its legal name and relevant identifier,*
  - its jurisdiction of establishment, and*
  - where relevant, its supervisory authority;*
- (iii) a detailed description of the human and technical resources employed by the management company for:*
  - performing day-to-day portfolio management or risk management tasks within the management company, and*
  - monitoring the delegated activity;*
- (iv) in respect of each of the UCITS it manages or intends to manage:*
  - a brief description of the delegated portfolio management function, including whether such delegation amounts to a partial or full delegation, and*
  - a brief description of the delegated risk management function, including whether such delegation amounts to a partial or full delegation;*

(v) *a description of the periodic due diligence measures to be carried out by the management company to monitor the delegated activity.*’;

(b) *the following paragraph is added:*

*‘7. Member States shall require that management companies, before implementation, notify the competent authorities of their home Member State of any material changes to the conditions for initial authorisation, in particular material changes to the information provided in accordance with this Article.’;*

(4) Article 13 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) the introductory **wording** is replaced by the following:

‘Management companies which intend to delegate to third parties the task of carrying out, on their behalf, one or more of the functions **referred to** in Annex II **or of** 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 *of* 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 *where to do so* 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 *are to* be delegated must be qualified and capable of undertaking the functions or performing the services in question;



- (i) the UCITS' prospectuses must list the services and functions which the management company has been allowed to delegate in accordance with this Article; *and*
  - (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 *the fact that the management company has delegated* functions or **■** services *to a third party*. The management company shall not delegate *the* functions or **■** services to the extent that, in essence, it can no longer be considered to be the manager of the UCITS *or the provider of the services referred to in Article 6(3)* and to the extent that it becomes a letter-box entity.

3. *By way of derogation from paragraphs 1 and 2 of this Article, where the marketing function referred to in Annex II, third indent, is performed by one or several distributors which are acting on their own behalf and which market the UCITS under Directive 2014/65/EU or through insurance-based investment products in accordance with Directive (EU) 2016/97 of the European Parliament and of the Council\*, such function shall not be considered to be a delegation subject to the requirements of paragraphs 1 and 2 of this Article irrespective of any distribution agreement between the management company and the distributor.*
  
4. *The management company shall ensure that the performance of the functions referred to in Annex II and the provision of the services referred to in Article 6(3) comply with this Directive. That obligation shall apply irrespective of the regulatory status or location of any delegate or sub-delegate.*

5. The Commission shall adopt, by means of delegated acts in accordance with Article 112a, measures specifying:
- (a) the conditions for fulfilling the requirements set out in paragraph 1;
  - (b) the conditions under which the management company *is to* be deemed to have delegated its functions to the extent that it becomes a letter-box entity and can no longer be considered to be the manager of the UCITS *or the provider of the services referred to in Article 6(3)*, as set out in paragraph 2. ■
6. *By ... [60 months from the date of entry into force of this amending directive], ESMA shall provide the European Parliament, the Council and the Commission with a report analysing market practices regarding delegation and compliance with Article 7 and with paragraphs 1 to 5 of this Article, based, inter alia, on the data reported to the competent authorities in accordance with Article 20a(2), point (d), and on the exercise of ESMA's supervisory convergence powers. That report shall also analyse compliance with the substance requirements of this Directive.*

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\* *Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ L 26, 2.2.2016, p. 19).<sup>2</sup>*;

(5) *Article 14 is amended as follows:*

(a) *the following paragraph is inserted:*

*‘2a. Where a management company manages or intends to manage a UCITS at the initiative of a third party, including cases where that UCITS uses the name of a third-party initiator or where a management company appoints a third-party initiator as a delegate pursuant to Article 13, the management company shall, taking account of any conflicts of interest, submit detailed explanations and evidence of its compliance with paragraph 1, point (d), of this Article to the competent authorities of its home Member State. In particular, the management company shall specify the reasonable steps it has taken to prevent conflicts of interest arising from the relationship with the third party or, where those conflicts of interest cannot be prevented, how it identifies, manages, monitors and, where applicable, discloses, those conflicts of interest in order to prevent them from adversely affecting the interests of the UCITS and its investors.’;*

**(b) the following paragraph is added:**

**‘4. For the purposes of paragraph 1, point (a), ESMA shall by ... [18 months from the entry into force of this amending Directive] submit a report to the European Parliament, the Council and the Commission assessing the costs charged by UCITS and management companies to the investors and explaining the reasons for the level of those costs and for any differences between them, including differences resulting from the nature of the UCITS concerned. As part of that assessment, ESMA shall analyse, within the framework of Article 29 of Regulation (EU) No 1095/2010, the appropriateness and effectiveness of the criteria set out in the ESMA convergence tools on the supervision of costs.**

**For the purposes of that report, and in accordance with Article 35 of Regulation (EU) No 1095/2010, the competent authorities shall provide ESMA on a one-time basis with data on costs including all fees, charges and expenses which are directly or indirectly borne by the investors, or by the management company in connection with the operations of the UCITS, and that are to be directly or indirectly allocated to the UCITS. The competent authorities shall make those data available to ESMA within their powers, which include the power to require management companies to provide information as laid down in Article 98(2) of this Directive.’;**

(6) the following article ■ 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. ***A UCITS shall select at least two appropriate liquidity management tools from those referred to in Annex IIA, points 2 to 8, after assessing the suitability of those tools in relation to its pursued investment strategy, its liquidity profile and its redemption policy. The UCITS shall include those tools in its fund rules or the instruments of incorporation ■ for possible use in the interest of the UCITS’ investors. It shall not be possible for that selection to include only the tools referred to in Annex IIA, points 5 and 6.***

***By way of derogation from the first subparagraph, a UCITS may decide to select only one liquidity management tool from those referred to in Annex IIA, points 2 to 8, if that UCITS is authorised as a money market fund in accordance with Regulation (EU) 2017/1131 of the European Parliament and of the Council\*.***

*The UCITS 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. The selection referred to in the first and second subparagraphs and the detailed policies and procedures for the activation and deactivation shall be communicated to the competent authorities of the UCITS home Member State.*

*Redemption in kind as referred to in Annex IIA, point 8, shall only be activated to meet redemptions requested by professional investors and if the redemption in kind corresponds to a pro rata share of the assets held by the UCITS.*

*By way of derogation from the fourth subparagraph of this paragraph, the redemption in kind need not correspond to a pro rata share of the assets held by the UCITS if that UCITS is solely marketed to professional investors, or if the aim of that UCITS' investment policy is to replicate the composition of a certain stock or debt securities index and that UCITS is an exchange-traded fund as defined in Article 4(1), point (46), of Directive 2014/65/EU.*

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

*When developing those draft regulatory technical standards, ESMA shall take account of the diversity of investment strategies and underlying assets of UCITS. Those standards shall not restrict the ability of UCITS to use any appropriate liquidity management tool for all asset classes, jurisdictions and market conditions.*

4. *By ... [12 months from the date of entry into force of this amending Directive], ESMA shall develop guidelines on the selection and calibration of liquidity management tools by UCITS for liquidity risk management and for mitigating financial stability risks. Those guidelines shall recognise that the primary responsibility for liquidity risk management remains with UCITS. They shall include indications as to the circumstances in which side pockets, as referred to in Annex IIA, point 9, can be activated. They shall allow adequate time for adaptation before they apply, in particular for existing UCITS.*



5. *ESMA shall submit the draft regulatory technical standards referred to in paragraph 3 of this Article to the Commission by ... [12 months from the date of entry into force of this amending Directive].*

Power is delegated to the Commission to *supplement this Directive by adopting* the regulatory technical standards referred to in *paragraph 3* in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

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\* *Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds (OJ L 169, 30.6.2017, p. 8).’;*

- (7) the following articles are inserted:

‘Article 20a

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

*The management company shall, in respect of each UCITS it manages, provide information on the instruments in which it is trading, on markets of which it is a member or where it actively trades, and on the exposures and assets of the UCITS. That information shall include the identifiers that are necessary to connect the data provided on assets, UCITS and management companies to other supervisory or publicly available data sources.*

2. *A management company shall, for each of the UCITS it manages, provide the following to the competent authorities of the UCITS home Member State:*
- (a) the arrangements for managing the liquidity of the UCITS, including the current selection of liquidity management tools, and any activation or deactivation thereof;*
  - (b) the current risk profile of the UCITS, including the market risk, liquidity risk, counterparty risk, other risks including operational risk, and the total amount of leverage employed by the UCITS;*
  - (c) the results of the stress tests performed in accordance with Article 51(1);*
  - (d) information regarding delegation arrangements concerning portfolio management or risk management functions as follows:*
    - (i) information on the delegates, specifying their name and domicile or registered office or branch, whether they have any close links with the management company, whether they are authorised or regulated entities for the purposes of asset management, their supervisory authority, where relevant, and including the identifiers of the delegates that are necessary to connect the information provided to other supervisory or publicly available data sources;*

- (ii) the number of full-time equivalent human resources employed by the management company for performing day-to-day portfolio management or risk management tasks within that management company;*
- (iii) a list and description of the activities concerning portfolio management and risk management functions which are delegated;*
- (iv) where the portfolio management function is delegated, the amount and percentage of the UCITS' assets which are subject to delegation arrangements concerning the portfolio management function;*
- (v) the number of full-time equivalent human resources employed by the management company to monitor the delegation arrangements;*
- (vi) the number and dates of the periodic due diligence reviews carried out by the management company to monitor the delegated activity, a list of issues identified and, where relevant, of the measures adopted to address those issues and the date by which those measures are to be implemented;*

- (vii) where sub-delegation arrangements are in place, the information required under points (i), (iii) and (iv) in respect of the sub-delegates and the activities related to the portfolio management and risk management functions that are sub-delegated;*
  - (viii) the commencement and expiry dates of the delegation and sub-delegation arrangements;*
  - (e) the list of Member States in which the units of the UCITS are actually marketed by its management company or by a distributor which is acting on behalf of that management company.*
- 3. The competent authorities of the UCITS home Member State shall ensure that all information gathered under this Article in respect of all UCITS that they supervise and the information gathered under Article 7 is made available to other relevant competent authorities, ESMA, 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\* (known collectively as ‘European Supervisory Authorities’ or ‘ESAs’) and the European Systemic Risk Board (ESRB), whenever necessary for the purpose of carrying out their duties, by means of the procedures set out in Article 101.*

*The competent authorities of the UCITS home Member State shall ensure that all information gathered under this Article in respect of all UCITS that they supervise is made available, for statistical purposes only, to the ESCB, by means of the procedures set out in Article 101.*

*The competent authorities of the UCITS home Member State shall, without delay, provide information by means of the procedures set out in Article 101, and bilaterally to the competent authorities of other Member States directly concerned, if a management company under their responsibility, or a UCITS managed by that management company, could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions in other Member States, or to the stability of the financial system in another Member State.*

- 4. Where necessary for the effective monitoring of systemic risk, the competent authorities of the UCITS home Member State may require information in addition to that described in paragraph 1, on a periodic or ad hoc basis. The competent authorities shall inform ESMA of any such additional reporting requirements.*

*In exceptional circumstances, and where required in order to ensure the stability and integrity of the financial system or to promote long-term sustainable growth, ESMA after consulting the ESRB may request the competent authorities of the UCITS home Member State to impose additional reporting requirements.*

5. ESMA shall develop draft regulatory technical standards specifying:
- (a) the details *of the information* to be reported *in accordance with paragraph 1, paragraph 2, points (a), (b), (c) and (e), and paragraph 4;*
  - (b) *the appropriate level of standardisation of the information to be reported in accordance with paragraph 2, point (d);*
  - (c) *the reporting frequency and timing.*

*When developing the draft regulatory technical standards referred to in the first subparagraph, point (b), ESMA shall not introduce reporting obligations in addition to those set out in paragraph 2, point (d).*

*When developing the draft regulatory technical standards referred to in the first subparagraph, points (a) and (b), ESMA shall take into consideration other reporting requirements to which the management companies are subject, international developments and standards, and the findings of the report issued in accordance with Article 20b.*

ESMA shall submit those draft regulatory technical standards to the Commission by ... [36 months *from* the date of entry into force of *this amending* Directive].

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

6. ESMA shall develop draft implementing technical standards specifying:
- (a) the format and data standards for the reports referred to in *paragraphs 1, 2 and 4*;
  - (b) *the identifiers that are necessary to connect the data on assets, UCITS and management companies in the reports referred to in paragraphs 1, 2 and 4 to other supervisory or publicly available data sources*;
  - (c) *the methods and arrangements for submitting the reports referred to in paragraphs 1 and 2 of this Article, including methods and arrangements to improve data standardisation and efficient sharing and use of data already reported in any Union reporting framework by any relevant competent authority, at Union or national level, taking into account the findings of the report issued in accordance with Article 20b*;
  - (d) *the template, including the minimum additional reporting requirements, to be used by management companies in exceptional circumstances as referred to in paragraph 4*.

ESMA shall submit those draft implementing technical standards to the Commission by ... [36 months *from* the date of entry into force of *this amending* Directive].

Power is *conferred on* 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 ... [24 months *from* the date of entry into force of this *amending* Directive], ESMA shall submit to the Commission a report *regarding* the development of **■** the integrated *collection of* supervisory data **■** , which shall focus on how to:
  - (a) reduce areas of *duplication* and inconsistencies between the reporting frameworks in the asset-management sector and other sectors of the financial industry; and
  - (b) improve data standardisation and efficient sharing and use of data already reported within any Union reporting framework by any relevant competent authority, at Union or national level.

*In that report, ESMA shall also make a comparison of best practices for data collection in the Union and in other markets for retail investment funds.*

2. When preparing the report referred to in paragraph 1, ESMA shall work in close cooperation with the European Central Bank, the other *ESAs*, and the competent authorities.

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\* *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).*;



(8) Article 22a is amended as follows:

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

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

(b) paragraph 4 is replaced by the following:

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

(9) in Article 29(1), *second subparagraph*, 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 *two natural persons meeting such conditions who either are employed full-time by that investment company or are executive members or members of the management body of the investment company* committed full-time to *conducting* the business of that *investment* company, and *who are domiciled in the Union*; 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.’;

(10) *in Article 57, the following paragraph is added:*

‘3. *Where a UCITS activates side pockets as referred to in Article 84(2), point (a), by means of asset segregation, the segregated assets may be excluded from the calculation of limits laid down in this Chapter.*’;

(11) *in Article 69, the following paragraph is added:*

*'6. In order to ensure the uniform application of the rules relating to the name of the UCITS, ESMA shall by ... [24 months from the date of entry into force of this amending Directive] develop guidelines to specify the circumstances in which the name of a UCITS is unfair, unclear or misleading. Those guidelines shall take into account relevant sectoral legislation. Sectoral legislation setting standards for fund names or marketing of funds takes precedence over those guidelines.'*

(12) *in Article 79, paragraph 1 is replaced by the following:*

*'1. Key investor information, including the name of the UCITS, shall constitute pre-contractual information. It shall be fair, clear and not misleading. It shall be consistent with the relevant parts of the prospectus.'*

**(13)** 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 unitholders, temporarily suspend the subscription, repurchase and redemption of its units *as referred to in Annex IIA, point 1*, or activate *or deactivate* other liquidity management *tools* selected *from points 2 to 8 of that Annex* in accordance with Article 18a(2). *The UCITS may also, in the interest of its unitholders, activate side pockets as referred to in Annex IIA, point 9;*
- (b) in the interest of *investors, in exceptional circumstances and after consulting the UCITS, the competent authorities of the UCITS home Member State may require a UCITS to activate or deactivate the liquidity management tool referred to in Annex IIA, point 1, where there are risks to investor protection or financial stability that, on a reasonable and balanced view, necessitate such activation or deactivation.*

*A UCITS shall only use a suspension of subscriptions, repurchases and redemptions or side pockets as referred to in the first subparagraph, point (a), in exceptional cases where circumstances so require and where ■ justified having regard to the interests of its unitholders.*

3. The UCITS shall **■** , without delay, **notify** the competent authorities of *its* home Member State **of the following**:

*(a) where the UCITS activates or deactivates the liquidity management tool referred to in Annex IIA, point 1;*

*(b) where the UCITS activates or deactivates any of the liquidity management tools referred to in Annex IIA, points 2 to 8, in a manner that is not in the ordinary course of business as envisaged in the fund rules or the instruments of incorporation of the UCITS.*

*A UCITS shall, within a reasonable timeframe before it activates or deactivates the liquidity management tool referred to in Annex IIA, point 9, notify the competent authorities of its home Member State of such activation or deactivation.*

The competent authorities of the *UCITS* home Member State **shall inform, without delay, the competent authorities of the management company's home Member State, the competent authorities 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** any notification received in accordance with this paragraph. *ESMA shall have the power to share the information received pursuant to this paragraph with the competent authorities.*

- 3a. *Where* the competent authorities of the UCITS home Member State *exercise powers pursuant to paragraph 2, point (b), they* shall notify the competent authorities of *the UCITS host Member State, the competent authorities of the management company's home Member State, ESMA and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.*
- 3b. The competent *authorities of the UCITS host Member State or the competent authorities of the management company's home Member State* may request the competent *authorities* of the UCITS home Member State to exercise powers *pursuant to* paragraph 2, point (b), specifying the reasons for the request and *informing* ESMA and, *if there are potential risks to the stability and integrity of the financial system,* the ESRB thereof.
- 3c. Where the competent *authorities* of the UCITS home Member State *do* not agree with the request referred to in paragraph 3b, *they* shall inform the requesting competent *authorities*, ESMA and, *where the ESRB was informed of that request pursuant to paragraph 3b, the ESRB thereof,* stating the reasons for the disagreement.

- 3d. On the basis of the information received *pursuant to* paragraphs 3b and 3c, ESMA shall issue *without undue delay* an opinion to the competent authorities of the UCITS home Member State on *the exercise of* powers *pursuant to* paragraph 2, point (b). *ESMA shall communicate that opinion to the competent authorities of the UCITS host Member State.*
- 3e. Where the competent *authorities of the UCITS home Member State do* not act in accordance with ESMA's opinion referred to in paragraph 3d, or *do* not intend to comply with that opinion, *they* shall inform ESMA *and the requesting competent authorities thereof*, stating the reasons for *their* non-compliance or intention *not to comply. In the event of a serious threat to investor protection, to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union, and unless such publication conflicts with the legitimate interests of the UCITS' unitholders or of the public*, ESMA may publish the fact that *the* competent *authorities of the UCITS home Member State do* not comply or *do not* intend to comply with its *opinion, together with* the reasons provided by *those competent authorities for their non-compliance or intention not to comply*. ESMA shall *analyse whether the benefits of publication would outweigh the amplification of the threats to investor protection, to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union resulting from that publication and shall* give the competent authorities advance notice *of* such publication.

- 3f. *By ... [24 months from the date of entry into force of this amending Directive] ESMA shall develop guidelines providing indications to guide the competent authorities in their exercise of the powers set out in paragraph 2, point (b), and indications as to the situations that might lead to the requests referred to in paragraph 3b of this Article and Article 98(3) being put forward.* When developing those *guidelines*, ESMA shall consider the potential implications of such supervisory intervention for investor protection and financial stability in another Member State or in the Union. *Those guidelines shall recognise that the primary responsibility for liquidity risk management remains with UCITS.*’;

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

- ‘3. The competent *authorities* of the UCITS host Member State may, *where they have reasonable grounds for doing so*, request the competent *authorities* of the UCITS home Member State to exercise, without delay, powers *pursuant to* paragraph 2, *other than point (j) of that paragraph*, specifying the reasons for *their* request *in as specific a manner as possible* and *informing* ESMA and, if there are potential risks to the stability and integrity of the financial system, the ESRB thereof.

The competent *authorities* of the UCITS home Member State shall, without *undue* delay, inform the competent *authorities* 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 *of their* findings.



4. ESMA may request the competent *authorities* to submit, *without undue delay*, explanations to ESMA in relation to specific cases ■ which *raise a serious threat to investor protection, to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union.*';

(15) *Article 101 is amended as follows:*

(a) *in paragraph 1, the first subparagraph is replaced by the following:*

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

(b) *in paragraph 9, the first subparagraph is replaced by the following:*

*'In order to ensure uniform conditions of application of this Article and of Article 20a, ESMA may develop draft implementing technical standards to establish common procedures for competent authorities:*

(a) *to cooperate in on-the-spot verifications and investigations as referred to in paragraphs 4 and 5; and*

(b) *to determine the procedures for exchange of information between competent authorities, the ESAs, the ESRB, and members of the ESCB, subject to the applicable provisions of this Directive.'*;

(16) *Article 102 is amended as follows:*

(a) *in paragraph 1, the first subparagraph is replaced by the following:*

*‘Member States shall provide that all persons who work or who have worked for the competent authorities, as well as auditors and experts instructed by the competent authorities, be bound by the obligation of professional secrecy. That obligation means that no confidential information which those persons receive in the course of their duties shall be divulged to any person or authority whatsoever, save in summary or aggregate form such that UCITS, management companies and depositaries (undertakings contributing towards UCITS’ business activity) cannot be individually identified, without prejudice to cases covered by criminal or taxation law.’;*

(b) *in paragraph 2, the following subparagraph is added:*

*‘Paragraph 1 and the first and second subparagraphs of this paragraph shall not preclude the exchange of information between competent authorities and tax authorities that are located in the same Member State. Where the information originates in another Member State, it shall only be disclosed in accordance with the first sentence of this subparagraph with the express consent of the competent authorities which have disclosed it.’;*

(17) the following article is inserted:

‘Article 110a

By ... [**60** months *from* the *date of* entry into force of this *amending* Directive], and following the ■ report produced by ESMA in accordance with Article 13(6), 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 effectiveness of the authorisation requirements in Articles 7 and 8 as regards the delegation regime laid down in Article 13 of this Directive, in particular with regard to preventing the creation of letter-box entities in the Union;*
- (b) *the appropriateness and impact on investor protection of the appointment of at least one non-executive or independent director to the management body of the UCITS management companies or investment companies;*

(c) *the appropriateness of the requirements applicable to management companies managing a UCITS at the initiative of a third party as laid down in Article 14(2a) and the need for additional safeguards to prevent circumvention of those requirements, and, in particular, whether the provisions of this Directive on conflicts of interest are effective and appropriate in order to identify, manage, monitor and, where applicable, disclose conflicts of interest arising from the relationship between the management company and the third-party initiator.*’;

(18) Article 112a is amended as follows:

(a) in paragraph 2, the following subparagraph is *inserted after the first subparagraph*:

‘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 ... [the date of entry into force of this *amending* Directive].’;

(b) █ paragraph 3 is replaced by the following:

‘3. The delegation of power referred to in Articles 12, 13, 14, █ 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) █ paragraph 5 is replaced by the following:

‘5. A delegated act adopted pursuant to Articles 12, 13, 14, █ 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.’;

(19) Annex I is amended *in accordance with* Annex III to this Directive;

(20) the text *set out* in Annex IV to this Directive is inserted as Annex IIA.

Article 3  
Transposition

1. Member States shall adopt and publish, by ... [24 months *from* the *date of* entry into force of this *amending* Directive], the laws, regulations and administrative provisions necessary to comply with this Directive. They shall *immediately* communicate **█** the text of those *measures to the Commission*.

They shall apply those *measures* from ... [24 months *from the date of entry into force of this amending Directive*], *with the exception of the measures transposing Article 1(12), and those transposing Article 2(7) with regard to Article 20a of Directive 2009/65/EC, which they shall apply from ... [36 months from the date of entry into force of this amending Directive]*.

When Member States adopt *those measures*, they shall contain *a* 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.

2. 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 *twentieth* 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 ...,

*For the European Parliament*

*For the Council*

*The President*

*The President*

## ANNEX I

In Annex I, **point 2**, the following points are added:

- (d)** Originating loans *on behalf of an AIF*;
- (e)** Servicing securitisation special purpose entities.’.



## ANNEX II

### ‘ANNEX V

#### LIQUIDITY MANAGEMENT **TOOLS** AVAILABLE TO AIFMs MANAGING OPEN-ENDED AIFs

1. Suspension of subscriptions, repurchases and redemptions: suspension of subscriptions, repurchases and redemptions **means temporarily disallowing the subscription, repurchase and redemption of the fund’s units or shares.**
2. Redemption **gate**: a redemption gate **means** a temporary **and partial** restriction of the right of **unit-holders or** shareholders to redeem their **units or** shares **■** , so that investors can only redeem a certain portion of their **units or** shares.
3. **Extension of** notice periods: **the extension of notice periods means extending the period of notice that unit-holders or shareholders** must give to fund managers, **beyond a minimum period which is appropriate to the fund**, when redeeming their **units or** shares.
4. Redemption **fee**: redemption fee **means** a fee, **within a predetermined range that takes account of the cost of liquidity, that is paid to the fund by unit-holders or shareholders** when redeeming **units or shares, and that ensures that unit-holders or shareholders who remain in the fund are not unfairly disadvantaged.**
5. Swing pricing: swing pricing **means a pre-determined mechanism by which the net asset value of the units or shares of** an investment fund **is adjusted by the application of a factor (‘swing factor’) that** reflects the cost of **liquidity.**
6. **Dual pricing: dual pricing means a pre-determined mechanism by which the subscription, repurchase and redemption prices of the units or shares of an investment fund are set by adjusting the net asset value per unit or share by a factor that reflects the cost of liquidity.**
7. Anti-dilution levy: **■ anti-dilution levy means a fee that is paid to the fund by a unit-holder or shareholder at the time of a subscription, repurchase or redemption of units or shares, that compensates the fund for the cost of liquidity incurred** because of **the size of that transaction, and that ensures that other unit-holders or shareholders are not unfairly disadvantaged.**

8. **Redemption in kind:** *redemption in kind means transferring assets held by the fund, instead of cash, to meet redemption requests of unit-holders or shareholders.*
9. **Side pockets:** *side pockets means separating certain assets, whose economic or legal features have changed significantly or become uncertain due to exceptional circumstances, from the other assets of the fund.'*

## ANNEX III

In Annex I, Schedule A, **■** point 1.13 is replaced by the following:

<p>1.13. Procedures and conditions for repurchase and redemption of units, and circumstances in which subscription, repurchase and redemption may be suspended or other liquidity management tools may be activated.</p>		<p>1.13. Procedures and conditions for repurchase and redemption of units, and circumstances in which subscription, repurchase and redemption may be suspended or other liquidity management tools may be activated. In the case of investment companies having different investment compartments, information on how a unitholder may pass from one compartment into another and the charges applicable in such cases.</p>
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## ANNEX IV

### ‘ANNEX IIA

#### LIQUIDITY MANAGEMENT *TOOLS* AVAILABLE TO UCITS

1. Suspension of subscriptions, repurchases and redemptions: suspension of subscriptions, repurchases and redemptions *means temporarily disallowing the subscription, repurchase and redemption of the fund’s units or shares.*
2. Redemption *gate*: a redemption gate *means* a temporary *and partial* restriction of the right of *unit-holders or* shareholders to redeem their *units or* shares ■ , so that investors can only redeem a certain portion of their *units or* shares.
3. *Extension of* notice periods: *the extension of notice periods means extending the period of notice that unit-holders or shareholders* must give to fund managers, *beyond a minimum period which is appropriate to the fund*, when redeeming their *units or* shares.
4. Redemption *fee*: redemption fee *means* a fee, *within a predetermined range that takes account of the cost of liquidity, that is paid to the fund by unit-holders or shareholders* when redeeming *units or shares, and that ensures that unit-holders or shareholders who remain in the fund are not unfairly disadvantaged.*
5. Swing pricing: swing pricing *means a pre-determined mechanism by which the net asset value of the units or shares of* an investment fund *is adjusted by the application of a factor* (‘*swing factor*’) *that* reflects the cost of *liquidity.*

6. **Dual pricing:** *dual pricing means a pre-determined mechanism by which the subscription, repurchase and redemption prices of the units or shares of an investment fund are set by adjusting the net asset value per unit or share by a factor that reflects the cost of liquidity.*
  7. **Anti-dilution levy:** ■ *anti-dilution levy means a fee that is paid to the fund by a unit-holder or shareholder at the time of a subscription, repurchase or redemption of units or shares, that compensates the fund for the cost of liquidity incurred because of the size of that transaction, and that ensures that other unit-holders or shareholders are not unfairly disadvantaged.*
  8. **Redemption in kind:** *redemption in kind means transferring assets held by the fund, instead of cash, to meet redemption requests of unit-holders or shareholders.*
  9. **Side pockets:** *side pockets means separating certain assets, whose economic or legal features have changed significantly or become uncertain due to exceptional circumstances, from the other assets of the ■ fund.'*
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