

III

(Preparatory acts)

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 9 August 2022

on a proposal for a directive as regards delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds

(CON/2022/26)

(2022/C 379/01)

Introduction and legal basis

On 25 November 2021 the European Commission published a package of legal acts in support of the Capital Markets Union, including a proposal for a directive amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds ⁽¹⁾ (hereinafter the 'proposed directive').

The European Central Bank (ECB) has decided to deliver an own initiative opinion on the proposed directive. The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union since the proposed directive contains provisions affecting the basic task of the European System of Central Banks (ESCB) to define and implement the monetary policy of the Union pursuant to Article 127(2) of the Treaty, the ESCB's task to contribute to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system pursuant to Article 127(5) of the Treaty, and the ECB's tasks relating to the collection of statistical information pursuant to Article 5 of the Statute of the European System of Central Banks and of the European Central Bank.

In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

General observations1. *Objectives of the proposed directive*

1.1. The ECB welcomes the proposed directive's principal aims to fill certain regulatory gaps in the functioning of Directive 2011/61/EU of the European Parliament and of the Council ⁽²⁾ (hereinafter the 'Alternative Investment Fund Managers Directive' or 'AIFMD'), to ensure a coherent supervisory approach to the risks that Alternative Investment Funds (AIFs) pose to the financial system and to provide a high level of investor protection, while facilitating their integration into the EU financial market.

⁽¹⁾ 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) 721 final.

⁽²⁾ 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).

- 1.2. The ECB also supports the proposed directive's general aim to better align the requirements of the AIFMD and Directive 2009/65/EC of the European Parliament and of the Council ⁽⁵⁾ (hereinafter the 'Undertakings for the Collective Investment in Transferable Securities Directive' or 'UCITS') on issues equally relevant to both directives, such as delegation arrangements and custodial services. This opinion, however, focuses on the proposed amendments to the AIFMD.
- 1.3. As further elaborated below, the ECB would have welcomed that the proposed directive also covered issues that are not addressed by the AIFMD, such as the operationalisation and development of macroprudential tools applied ex ante as a means of reducing risks to the financial system that are posed by AIFs, as well as ensuring that detailed data on individual AIFs are made available to the ECB and other relevant ESCB central banks.

Specific observations

2. *Liquidity management and macroprudential tools*

- 2.1. The ECB generally welcomes the proposed directive's aim to harmonise the obligations of AIF managers (AIFMs) as regards the management of liquidity risks, in particular the introduction of the types of liquidity management tools that are to be available to AIFMs of open-ended AIFs to manage liquidity risks to those funds, such as high levels of redemptions by investors within a short timeframe and redemptions that are concentrated in a particular funds segment. However, the proposed directive should also aim to limit the liquidity mismatch between the assets and liabilities of AIFs, by means of measures that specifically target either assets or liabilities.
- 2.2. The proposed directive's provisions regarding liquidity management tools ⁽⁴⁾ are modest. In this respect, the proposed directive requires AIFMs of open-ended AIFs to select at least one appropriate liquidity management instrument from the list set out in Annex II to the proposed directive for possible use in the interest of the AIF's investors ⁽⁵⁾. The proposed directive also allows, in exceptional circumstances, for the temporary suspension of the repurchase or redemption of AIF units where this is justified having regard to the interests of AIF investors ⁽⁶⁾. While the proposed directive thus specifies a common set of optional liquidity management tools which AIFMs of open-ended AIFs may use, the ability of such AIFs to withstand liquidity risks would be strengthened if AIFMs were required, as a minimum, to select several and not merely one of the listed tools.
- 2.3. The proposed directive requires the Commission to initiate a review of the functioning of the rules laid down in the AIFMD within 60 months of the proposed directive's entry into force ⁽⁷⁾. The ECB supports the proposed review, in particular insofar as it relates to the appropriateness of the requirements applicable to AIFMs that manage loan-originating funds, given the potential for risks to financial stability in this sector which is experiencing continued growth. However, the proposed review should be expanded to cover two additional aspects. First, the review should cover developments in macroprudential tools to manage liquidity risk, in particular the use of ex ante liquidity management tools to address the liquidity mismatch. Certain macroprudential tools ⁽⁸⁾ can be tailored to specific financial stability risks that may arise in the AIF sector and they can be implemented prior to a stress event occurring. Second, the review should specifically cover how AIFMs of leveraged open-ended AIFs set leverage limits and how, pursuant to the AIFMD ⁽⁹⁾, competent authorities use their supervisory powers in respect of such leverage limits. In assessing aspects of AIF management in the Member States, the Commission should also consider developments in relevant international standards.

⁽⁵⁾ 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).

⁽⁴⁾ See Article 1, point (6), of the proposed directive inserting paragraphs 2a to 2h in Article 16 of the AIFMD and Annex II of the proposed directive replacing Annex V of the AIFMD. See also Article 2, point (4), of the proposed directive as regards the equivalent amendment to Directive 2009/65/EC.

⁽⁵⁾ Article 1, point (6), of the proposed directive (inserting paragraph 2b in Article 16 of the AIFMD).

⁽⁶⁾ Article 1, point (6), of the proposed directive (inserting paragraph 2c in Article 16 of the AIFMD).

⁽⁷⁾ Article 1, point (21), of the proposed directive (inserting Article 69b in the AIFMD).

⁽⁸⁾ These would include tools such as the supervisory imposition of leverage limits (Article 25 AIFMD, which contains the power of a national competent authority to impose leverage limits on the AIF), the suspension of redemptions in the public interest (Article 46(2), which contains the power of a national competent authority to suspend redemptions in the public interest), or potentially other restrictions such as capital buffers and loan-to-value (LTV) ratios.

⁽⁹⁾ See Article 25(3) of the AIFMD, which concerns, amongst other powers, the power of the competent authority of the home Member State of the AIFM to impose limits to the level of leverage that the AIFM is entitled to employ in its management of an AIF.

3. Reporting

- 3.1. The proposed directive aims to eliminate duplicative reporting requirements existing under Union and national legislation, including, in particular, certain statistical regulations adopted by the ECB ⁽¹⁰⁾, to improve efficiency and reduce administrative burdens for AIFMs ⁽¹¹⁾. To this end, the proposed directive mandates the European Securities and Markets Authority (ESMA) to submit to the Commission a report for the development of an integrated supervisory data collection which would focus, inter alia, on how to reduce areas of duplications and inconsistencies between the reporting frameworks in the asset management sector and other sectors of the financial industry. When preparing this report, it is proposed that ESMA should work in close cooperation with, inter alia, the ECB ⁽¹²⁾.
- 3.2. The ECB stands ready to cooperate with ESMA in the preparation of this report for the development of an integrated supervisory data collection so as to ensure consistency with other reporting requirements for investment funds. The ECB stresses, however, that the integration of the underlying reporting infrastructure must not interfere with or otherwise prejudice the ECB's competence to adopt statistical regulations for its own purposes or to continue to include the full set of relevant statistical reporting requirements in relevant ECB regulations, such as those on the collection of statistics on holdings of securities and on the assets and liabilities of investment funds ⁽¹³⁾.

4. ESCB access to detailed data on the AIF sector

- 4.1. The ECB notes that Article 25(2) of the AIFMD requires the competent authorities ⁽¹⁴⁾ of the home Member State of an AIFM to ensure that all information gathered under Article 24 of the AIFMD in respect of all AIFMs that they supervise and the information gathered under Article 7 of the AIFMD (hereinafter the 'individual AIF data') is made available to the competent authorities of other relevant Member States, as well as to ESMA and to the ESRB, by means of the procedures set out in Article 50 of the AIFMD on supervisory cooperation. However, the proposed directive does not significantly change either the types of individual AIF data required by competent authorities from the AIFMs they supervise under Article 24 of the AIFMD, or the other authorities to whom competent authorities must make such data available ⁽¹⁵⁾.
- 4.2. The proposed directive should require ESMA, which currently receives individual AIF data from the competent authorities, to make that data available also to the ECB and to other relevant ESCB central banks, to enable them to fulfil their tasks, including those under the Treaty, of defining and implementing monetary policy and contributing to the stability of the financial system.
- 4.3. First, regarding the ESCB's basic task of defining and implementing monetary policy and the ESCB's primary objective of ensuring price stability, it should be noted that AIFs take positions in the securities market, in particular in fixed income products ⁽¹⁶⁾. As part of their investment strategies their positions are often leveraged ⁽¹⁷⁾, including by using derivatives. Such strategies can potentially amplify movements in sovereign bonds markets ⁽¹⁸⁾, thus affecting the

⁽¹⁰⁾ Regulation (EU) No 1011/2012 of the European Central Bank of 17 October 2012 concerning statistics on holdings of securities (ECB/2012/24) (OJ L 305, 1.11.2012, p. 6) and Regulation (EU) No 1073/2013 of the European Central Bank of 18 October 2013 concerning statistics on the assets and liabilities of investment funds (ECB/2013/38) (OJ L 297, 7.11.2013, p. 73).

⁽¹¹⁾ Recital 16 of the proposed directive.

⁽¹²⁾ Recital 16 and Article 1, point (21), of the proposed directive (inserting Article 69b in the AIFMD. See also Article 2, point (5), of the proposed directive (inserting Article 20b in the UCITS).

⁽¹³⁾ See footnote 10 above.

⁽¹⁴⁾ Article 4(1)(f) of the AIFMD defines competent authorities as the authorities empowered by law or regulation to supervise AIFMs.

⁽¹⁵⁾ See especially Article 24(2) of the AIFMD. Article 1(10) of the proposed directive (amending Article 24 of the AIFMD) requires AIFMs to regularly report to the competent authorities of its home Member State on the markets and tools in which an AIFM trades on behalf of the AIF it manages. The said Article mandates ESMA to draft RTS specifying the details to be reported. Article 2(5)(1) of the proposed directive (introducing new Article 20a of the UCITS) is the equivalent provision in respect of UCITS.

⁽¹⁶⁾ EU alternative investment funds - 2022 statistical report, available on the ESMA's website at www.esma.europa.eu.

⁽¹⁷⁾ Article 4(1)(v) of AIFMD defines 'leverage' as any method by which the AIFM increases the exposure of an AIF it manages whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means.

⁽¹⁸⁾ See for example the Financial Stability Board 'Holistic review of the March market turmoil', November 2020 and literature cited therein <https://www.fsb.org/wp-content/uploads/P171120-2.pdf> (page 30 et seq.).

transmission of monetary policy to the economy since sovereign bond yields act as a reference rate for the financing conditions of firms and households. Such interactions with monetary policy are particularly relevant at the current time of monetary policy 'normalisation' for two reasons. The first is the above-mentioned potential for AIF investment strategies to amplify movements in sovereign bond yields, thus creating an unwarranted tightening of private sector financing conditions. The second is that AIFs can also engage in investment strategies that involve purchasing certain euro area sovereign bonds whilst selling other euro area sovereigns, thus potentially contributing to diverging euro area sovereign bond yields. The relevance of such amplification effects in sovereign bond markets has been observed during the COVID-19 ⁽¹⁹⁾ pandemic and may be expected to increase as the AIF sector continues to grow in size ⁽²⁰⁾. AIFs also increasingly contribute to the financing of the real economy as they are significant investors in securities issued by corporates. In this respect, the ECB's Strategy Review ⁽²¹⁾ noted that evolving financial structures, such as the rise in financial intermediation via the non-bank sector, have altered the transmission of monetary policy.

4.4. Second, access to individual AIF data would enable ESCB central banks to effectively perform their task of contributing to the stability of the financial system. The risks to financial stability posed by AIFs were exposed during the recent market turmoil in March 2020, when many AIFs faced acute liquidity stress owing to significant outflows and difficulties in selling assets in markets with little or no secondary trading. AIFs responded to this pressure on liquidity with large scale asset sales and cash hoarding, and a significant number of them even suspending redemptions. This behaviour by AIFs added to pressure on asset valuations and market liquidity, which contributed to the tightening of funding conditions in the real economy and was ultimately only eased when central banks took extraordinary policy action ⁽²²⁾. The events of March 2020 highlight how the ESCB's primary objective of price stability and its task of contributing to financial stability are intertwined, where one is a precondition for performance of the other. As noted in the ECB's Strategy Review, in view of the price stability risks generated by financial crises, there is a clear conceptual case for the ECB to take financial stability considerations into account in its monetary policy deliberations ⁽²³⁾.

4.5. It should be noted that the ESCB already has access to various datasets on non-bank entities that are collected by competent authorities and trade repositories under Union regulations ⁽²⁴⁾, thus recognising the ESCB's need to access these datasets for the purposes of carrying out its monetary policy and financial stability mandates. In the ECB's view, such legislative solutions – whereby multiple authorities access the same datasets – are efficient for data sharing between relevant authorities as they avoid duplicative reporting requirements, lower the costs of collecting data and facilitate data quality checks. They also foster cooperation between authorities, which in turn facilitates the fulfilment of their respective mandates. Moreover, the datasets reported under Regulation (EU) 2015/2365 of the European Parliament and of the Council ⁽²⁵⁾ (hereinafter the 'Securities Financing Transactions Regulation' or 'SFTR') and Regulation (EU) No 648/2012 of the European Parliament and of the Council ⁽²⁶⁾ (hereinafter the 'European Market Infrastructure Regulation' or 'EMIR') record individual derivatives and secured financial transactions; these are transactions executed in markets in which AIFs are important players. In order to understand the risk characteristics of individual AIFs (e.g. leverage, liquidity mismatch, interconnectedness and investor base) and the extent to which these characteristics (and their heterogeneity) drive AIFs' activity in the above markets, all relevant authorities need to

⁽¹⁹⁾ See the Financial Stability Board article referred to in footnote 18.

⁽²⁰⁾ For example, as measured by their assets under management - see ESMA report referred to in footnote 16. See also pages 4 to 5 of the ECB Occasional Paper Series, Non-bank financial intermediation in the euro area: implications for monetary policy transmission and key vulnerabilities, of December 2021, available on the ECB's website at www.ecb.europa.eu.

⁽²¹⁾ See the ECB Strategy Review 2022, available at: https://www.ecb.europa.eu/home/search/review/html/ecb.strategyreview_monpol_strategy_overview.en.html.

⁽²²⁾ See, for example, Section 5.2 in the Financial Stability Review, ECB, May 2021, available on the ECB's website at www.ecb.europa.eu.

⁽²³⁾ See the ECB Strategy Review 2022; see also the ECB Financial Stability Review, November 2021, box entitled 'The role of financial stability in the ECB's new monetary policy strategy'.

⁽²⁴⁾ See Article 81(3)(g) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1); and Article 12(2)(f) of Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (OJ L 337, 23.12.2015, p. 1).

⁽²⁵⁾ Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (OJ L 337, 23.12.2015, p. 1).

⁽²⁶⁾ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

be able to combine financial transaction information with the balance sheets of important market players. The growing presence and activity of AIFs in these markets increasingly has an impact on the monetary policy transmission mechanism and on financial stability risks, both of which the ESCB must assess in order to effectively fulfil its primary objective of price stability and its task of contributing to financial stability.

- 4.6. Lacking its own access to data on individual AIFs, the ECB currently relies on commercial sources, which provide data that is expensive, incomplete and non-transparent. In contrast to the mandatory nature of data reporting under a regulatory framework, AIFs can decide themselves whether or not to report information for inclusion in commercial datasets, thus giving the ESCB an incomplete and potentially distorted view of the market. This results in less-informed monetary policy decisions and financial stability assessments. Moreover, data quality checks on commercial datasets are difficult. The ECB could, in principle, amend its own relevant regulations concerning statistical reporting ⁽²⁷⁾ to collect the same, or very similar, data as those collected under the AIFMD. However, this would be contrary to the aim of the proposed directive to eliminate duplicative reporting requirements under Union and national legislation ⁽²⁸⁾. It should also be noted that in carrying out its statistical collection task under Article 5.1 of the Statute of the European System of Central Banks and of the European Central Bank, the ECB is required to follow certain principles, which include minimising the burden on reporting agents ⁽²⁹⁾. In addition to the costs for reporting agents, duplicative reporting requirements in relation to certain types of data not included in current statistical reporting requirements would also result in substantial costs for the ESCB central banks and the ECB. On the other hand, the costs in practice to the ECB of accessing the AIFMD data would be substantially lower, since the data are already now available in the ECB's databases and systems as a result of the ECB's statistical and other support of the ESRB ⁽³⁰⁾, although staff of the ECB and the ESCB central banks are unable to access that data ⁽³¹⁾.

Where the ECB recommends that the proposed regulation is amended, specific drafting proposals are set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document is available in English on EUR-Lex.

Done at Frankfurt am Main, 9 August 2022.

The President of the ECB
Christine LAGARDE

⁽²⁷⁾ These are primarily Regulation (EU) No 1011/2012 of the European Central Bank of 17 October 2012 concerning statistics on holdings of securities (ECB/2012/24) (OJ L 305, 1.11.2012, p. 6), and Regulation (EU) No 1073/2013 of the European Central Bank of 18 October 2013 concerning statistics on the assets and liabilities of investment funds (ECB/2013/38) (OJ L 297, 7.11.2013, p. 73).

⁽²⁸⁾ The ECB is exploring how ECB regulations could more fully meet the ECB's data needs in this area without resulting in an additional reporting burden on AIFMs.

⁽²⁹⁾ Article 3a of Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank (OJ L 318, 27.11.1998, p. 8).

⁽³⁰⁾ See Recital 10 of the 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).

⁽³¹⁾ I.e. the data are not available to the ECB for any other purposes than the narrow purpose of statistical support of the ESRB.