



Examining AIFMD II: Overview and perspectives from Germany, France, the Netherlands and the UK

17 April 2024

A. Introduction

While the first revision of the Alternative Investment Fund Managers Directive (*AIFMD*)¹, which entered into force on **15 April 2024**, does not entail a radical reform, Directive (EU) 2024/927 of 13 March 2024 (*AIFMD II*)² brings some minor but significant changes to the regulation of both alternative investment funds (*AIFs*) and undertakings for collective investment (*UCITS*), which are regulated by the UCITS-Directive (*UCITSD*)³. These may well have some substantial impact on certain areas of investment fund regulation, including in respect of non-EU AIFs and AIFMs. They concern:

- **loan originating funds** (below C.),
- **liquidity management tools** (below D.),
- **depositories** (below E.),
- **delegation** (below F.),
- **governance** of management companies (below G.),
- permitted **activities** (below H.),
- **marketing requirements** for non-EU AIFs and non-EU AIFMs (including **NPPR**) (below **Error! Reference source not found.**),
- **investor information** (below J.),
- **supervisory reporting** and cooperation (below K.)

AIFMD II does not introduce amendments to other areas of AIFMD, which are also currently on the political

agenda, such as, e.g., remuneration of management companies.

Except for the rules on loan originating funds and the amended rules on supervisory reporting, EU member states must have transposed AIFMD II into national law **two years** from entering into force, i.e. by **16 April 2026**.⁴

In this briefing, we summarize the changes introduced by AIFMD II and provide a high-level analysis of the relevant impacts, including comments on selected items from a **German, French, and Dutch** perspective. The changes will not apply in the **UK**, which is considering its **own amendments** to the onshore AIFMD regime (below L.).

B. Background and timeline

AIFMD II is based on the European Commission's report to the European Parliament and the Council assessing the application and the scope of the AIFMD⁵, as required by Art. 69 AIFMD, and a consequential letter by ESMA, recommending amendments to the AIFMD in 19 areas (our briefing on the ESMA recommendations can be found [here](#)). As some of the issues identified during the review process were deemed equally relevant for UCITS, amendments to the UCITSD were also proposed.

Following the publication of a consultation questionnaire in October 2020, the European Commission published its proposal for amending the AIFMD on 25 November 2021.⁶ European Parliament adopted the text of AIFMD II

¹ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.

² Directive (EU) 2024/927 of the European Parliament and of the Council of 13 March 2024 amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, the provision of depository and custody services and loan origination by alternative investment funds.

³ 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).

⁴ Art 3(1) AIFMD II.

⁵ Report from the Commission to the European Parliament and the Council, COM(2020) 232 final, 10.06.2020.

⁶ 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,

on 7 February 2024.⁷ The Council followed suit on 26 February 2024 and approved the European Parliament's position.⁸

After this years-long process, AIFMD II was finally published in the Official Journal of the European Union on 26 March 2024. It entered into force on **15 April 2024**, while EU member states will have 24 months for implementation. They will have to apply the new measures from **16 April 2026**, except for the rules on loan originating funds which are subject to a grandfathering clause and a transitional phase of five years (see below C.IV.) and the revised supervisory reporting requirements which are to be implemented one year later, i.e. by **16 April 2027** (see below K.).⁹

C. Loan-originating funds (LOFs)

I. General

AIFMD II introduces the **origination of loans** on behalf of an AIF as a new function of collective investment, recognising the right of an AIF to originate loans and aiming at establishing an efficient internal market in the EU for loan origination by AIFs.¹⁰ In order to establish a level-playing-field for LOFs, ensure a uniform level of investor protection and facilitate access to finance by LOFs for EU companies, all member states of the European Union are required to harmonize their rules on LOFs, as set out in AIFMD II.¹¹

However, the EU legislator clarifies that the provisions on AIFMs that manage LOFs will not prevent Member States from setting forth **national product frameworks** that define certain categories of AIFs with more restrictive rules.¹²

An AIF is considered a "**loan-originating AIF**" (**LOF**) if either (i) its **investment strategy** is mainly to originate loans or (ii) it has originated loans with a notional value representing at least **50 % of its net asset value**.¹³ Loan origination is defined broadly to capture the granting of a loan both (a) **directly** by an AIF as original lender, and (b) **indirectly** through a third party or a special purpose vehicle which originates a loan for or on behalf of the AIF or the AIFM, where the AIFM/AIF is involved in structuring the loan, or defining or pre-agreeing its

characteristics, prior to gaining exposure to the loan.¹⁴ This definition is intended to prevent **circumvention** of the rules on loan originating funds where the AIFM/AIF does not act as lender of record but still plays a pivotal role in the loan origination process.¹⁵

II. Risk Management Requirements

The recognition of loan origination as a function of collective investment is accompanied by several pre-requisites for the risk management system introduced by AIFMs in respect of loan origination.

1. Limitation of loan exposure

Art. 15(4a), (4c), (4d) AIFMD¹⁶ introduce different limits regarding loan exposure of AIFs:

- Loans originated to **financial undertakings** (e.g., credit institutions, insurance undertakings, investment firms)¹⁷, other AIFs or UCITS shall be limited to an aggregate of **20 %** of the capital of the AIF. This requirement helps to fulfil the general aim to decrease interconnectedness in financial markets. The limit does not apply during ramp-up and ramp-down during liquidation, nor during capital increases and reductions.¹⁸
- The **maximum leverage** permitted for loan-originating AIFs (calculated in accordance with the commitment method) is for open-ended AIF 300% and for closed-ended AIF 175 %.¹⁹ Borrowing arrangements which are fully covered by contractual capital commitments from investors shall not be regarded as exposure and hence not count towards that limit.²⁰ This requirement does not apply to AIFs whose lending activities consist solely of originating shareholder loans, provided their notional value does not exceed 150% of the capital of that AIF.²¹ This exclusion is helpful for private equity funds whose lending activities are limited to portfolio companies in which they hold shares.
- AIFs shall maintain 'skin in the game' in that they shall retain **5% of the notional value** of each loan where AIFs originate and subsequently

supervisory reporting, provision of depositary and custody services and loan origination by alternative investment funds, COM(2021) 721 final, 2021/0376(COD), 25.11.2021.

⁷ European Parliament, Legislative resolution of 7 February 2024, Pg_TA(2024)0064.

⁸ Council of the European Union, 16 February 2024, 2021/0376(COD).

⁹ Art. 3(1) subpara. 1 and 2 AIFMD II.

¹⁰ Annex I (2)(d) AIFMD, see Recital 13 AIFMD II.

¹¹ Recital 13 AIFMD II.

¹² Recitals 13 et seq. AIFMD II.

¹³ Art. 4(1)(ar) and (at) AIFMD. Please note that all references to AIFMD and UCITS are references to the AIFMD and UCITSD as amended by AIFMD II.

¹⁴ Art. 4(1)(ar) AIFMD.

¹⁵ Recital 14 AIFMD II.

¹⁶ Art. 1(7)(b) AIFMD II.

¹⁷ Art. 13 point (25) Solvency II, Recital 17 AIFMD II.

¹⁸ Art. 15(4c) AIFMD.

¹⁹ Art. 15(4b) subpara. 1,2 AIFMD; Art. 1(7)(b) AIFMD II.

²⁰ Art. 15(4b) subpara. 3 AIFMD.

²¹ Art. 15(4b) subpara. 5 AIFMD.

transfer loans to third parties. However, this limit does not apply under certain circumstances, such as when selling loans during a liquidation phase, or where selling the entire loan is in the best interest of the investors.²²

2. Certain prohibitions on granting loans

To prevent conflicts of interest, AIFs may not grant loans to **related parties** (i.e., the AIFM and its staff, the depositary and any delegates of the AIFM and the depositary, their sub-delegates and affiliates of the AIFM).²³

Further, Member States may, but are not required to, prohibit AIFs from granting **consumer loans** within the meaning of the EU Consumer Credit Directive within their territory.²⁴ However, they may not prevent marketing of AIFs that grant loans to consumers within their territory.²⁵

In order to avoid “moral hazard” and to prevent a negative impact on the overall credit quality of loans originated by AIFs, AIFs shall not originate loans solely to transfer the loan or the respective risk to third parties.²⁶ This is likely to have a substantial impact to “**originate-to-sell**” transactions of AIFs.

3. Implementation of policies procedures and processes

Regardless of whether the relevant AIFs meet the definition of loan originating AIFs, AIFMs shall implement **effective policies**, procedures and processes for the granting of loans, including for assessing credit risk and administering and monitoring their credit portfolio where they manage AIFs that engage in loan origination, also where those AIFs gain exposure to loans through third parties.²⁷ Such requirement does not apply to the origination of shareholder loans if the notional value of such loans does not exceed 150% of the capital of the AIF.²⁸

III. LOF in principle to be closed-ended

Deviating from the general approach of AIFMD to not regulate fund products, but only fund managers, AIFMD II stipulates a new principle that AIFMs shall generally ensure that the loan-originating AIFs they manage are

closed-ended.²⁹ Only in certain cases, loan-originating AIFs may be open-ended.³⁰ These provisions have been added in the context of the amendments to liquidity management requirements which apply to open-ended AIFs (see section E. below) as closed-ended funds are considered to require no formal liquidity management given that they do not have to fulfil redemption requests during the lifetime of the AIF.

It will be upon ESMA to develop draft regulatory technical standards to determine the requirements with which loan-originating AIFs have to comply in order to be permitted to maintain an open-ended structure.³¹

IV. Grandfathering and transitional phase

The legislator acknowledges that AIFMs may have difficulties implementing the new regulation during the lifecycle of a specific AIF due to the potentially illiquid and long-term nature of an AIF’s assets.³² By way of **grandfathering**, AIFs that originate loans and were constituted before AIFMD II entered into force on 15 April 2024, are exempt from the requirements on risk management systems for loan origination and risk retention, as well as the prohibition on loans to related parties, consumer loans, and originate-to-sell models.³³

With respect to the 20% limit for loans to financial undertakings, AIFs and UCITS, the leverage limits of 175%, resp. 300%, and the introduction of liquidity management tools, a **transitional phase of five years** applies for AIFs which were constituted before 15 April 2024. After that phase, **all AIFs which still raise capital** need to comply with these requirements.³⁴

V. Comment

The rules on credit funds already existing in Germany, France and the Netherlands will require some substantial amendments to reflect the new harmonized requirements on loan-originating AIFs introduced by AIFMD II.

Although loan origination is permitted for closed-ended **German** vehicles available only to (semi-)professional investors, the activity is more narrowly defined than “loan origination” under AIFMD II. There is a similar concentration limit, but a different leverage limit and loan origination is not permitted to lenders who are consumers. By contrast, AIFMs are already required as part of their risk management system to provide for an

²² Art. 14(4i) AIFMD.

²³ Art. 15(4e) AIFMD.

²⁴ Art. 3(a) Directive 2008/48/EG.

²⁵ Art. 15(4g) AIFMD; Art. 1(7)(b), Recital 15 AIFMD II. If Member States make use of this option they shall inform the Commission, Art. 60 AIFMD.

²⁶ Art. 15(4h) AIFMD, Recital 20 AIFMD II.

²⁷ Art. 15(3)(d) subpara. 1 and 2 AIFMD, Recital 16 AIFMD II.

²⁸ Art. 15(3)(d) subpara. 3 AIFMD.

²⁹ Art. 16 para. 2a subpara. 1 AIFMD.

³⁰ Art. 16 para. 2a subpara. 2 AIFMD.

³¹ Art. 16 (2f) AIFMD, Art. 1(8) AIFMD II.

³² Art. 61(6) AIFMD, Recital 23 AIFMD II.

³³ Art. 61(6) AIFMD, Recital 23 AIFMD II.

³⁴ Art. 61(6) subpara. 2 and 3 AIFMD.

appropriate organisational structure and processes for any lending business in which they engage for the account of their AIFs³⁵ which can be leveraged to meet the new risk management requirements.

Under currently applicable **French** law provisions, AIFMs, whose AIFs under management wish to engage in lending activity, must be appropriately licensed. Such licence requires compliance by the AIFM with additional organisational requirements³⁶ including notably the implementation of policies (with respect to e.g., lending, credit risk analysis and risk monitoring), implementation of appropriate control systems, appointment of staff with appropriate professional experience, and reporting requirements. These provisions could be revised following entry into application of AIFMD II.

In the **Netherlands**, AIFMs may grant loans to parties that do not qualify as ‘consumers’ under Dutch law.³⁷ Apart from that, under Dutch law (i) there are no restrictions with respect to the assets in which an AIF may invest and (ii) granting loans (to non-consumers) is already considered a permissible part of the management of an AIF’s portfolio. There are no specific rules for AIFMs managing AIFs that engage in loan origination. AIFMs should however properly manage for each AIF involved in lending the risks related to investment strategies, including loan origination, and ensure sound liquidity management (for open-ended AIFs).

D. Management of liquidity risks

With regard to liquidity, AIFMD II provides for new rules regarding the management of liquidity risks for open-ended AIFs, in order to “ensure a more effective response to liquidity pressure [...] and to better protect investors”. AIFMD had originally introduced a general requirement to provide for liquidity management but based on a recommendation by the European Systemic Risk Board (ESRB) more **granular** prerequisites and tools are introduced by AIFMD II.³⁸

I. Liquidity management tools

The new Annex V (see Annex II AIFMD II) identifies a set of liquidity management tools to be made available to AIFMs by member states for the management of AIFs.³⁹

The first liquidity management tool listed in Annex V, the **suspension** of subscriptions, repurchases and redemptions, shall be generally available for open-ended AIFs.⁴⁰ Yet, it shall only be used in **exceptional cases** where circumstances so require and where justified having regard to the interests of the AIF investors.⁴¹ An AIFM must notify their home state regulator when it activates and deactivates this liquidity tool.⁴²

In addition, there are **optional** liquidity management tools to be selected by the AIFMs:

- **Redemption gates** (Annex V, point 2 AIFMD),
- **Extension of notice periods** (Annex V, point 3 AIFMD),
- **Redemption fees** (Annex V, point 4 AIFMD),
- **Swing pricing** (Annex V, point 5 AIFMD),
- **Dual pricing** (Annex V, point 6 AIFMD),
- **Anti-dilution levy** (Annex V, point 7 AIFMD),
- **Redemption in kind** (Annex V, point 8 AIFMD).

AIFMs will be required to choose per AIF at least **two** of the tools listed above (with redemption in kind subject to restrictions) which must be appropriate on the basis of an assessment of the suitability of the tools in relations to the pursued investment strategy, the liquidity profile and the redemption policy of the AIF.⁴³ The decision must be reflected in the AIF rules (or equivalent). For AIFMs who manage a money market fund, it will be sufficient to select only one tool per fund.⁴⁴

By 16 April 2025, ESMA is required to produce regulatory technical standards specifying the characteristics of liquidity tools as set out in Annex V AIFMD.⁴⁵ While recognising that the primary responsibility for liquidity risk management remains with the AIFM, 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.

II. Policies and procedures regarding implemented tools

In addition, AIFMs must have detailed policies and procedures for the activation and deactivation of liquidity tools and operational and administrative arrangements for their use.⁴⁶

³⁵ § 29(5a) KAGB; BaFin, KaMaRisk, Section 5.

³⁶ *AMF Instruction DOC-2016-02*.

³⁷ Granting loans to consumers requires a separate licence pursuant to Article 2:60 of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, **DFSA**). In practice, the Dutch Financial Markets Authority (*Autoriteit Financiële Markten*, **AFM**) however does not allow AIFMs to grant loans to consumers because this is considered by the AFM as a non-permissible activity (Article 2:67a(1) DFSA).

³⁸ See also AIFMD II Recital 29-31.

³⁹ Art. 16 (2e) AIFMD, Art. 1(8) AIFMD II.

⁴⁰ Art. 16 (2c) AIFMD Annex V, point 1 AIFMD; Recital 30 AIFMD II.

⁴¹ Art. 16 (2c) subpara. 2 AIFMD, Art. 1(8) AIFMD II.

⁴² Art. 16(2d) lit. a AIFM, Art. 1(8) AIFMD II

⁴³ Art. 16(2b) subpara. 1 AIFMD.

⁴⁴ Art. 16(2b) subpara. 2 AIFMD.

⁴⁵ Art. 16(2g), (2h), (2i), AIFMD.

⁴⁶ Art. 16(2b) subpara. 3 AIFMD.

It should be noted that – where AIFMs activate or deactivate a tool in a manner outside the ordinary course of business (i.e., outside the AIF rules) – they must notify their home member state regulator.⁴⁷

E. Depositaries

I. Passport for member states with small markets

While discussions on an EU-wide depositary passport have been ongoing since 1993, endeavours have not caught on and neither ESMA nor the Commission had proposed that a general depositary passport is introduced. However, the EU legislator recognized that some markets lack a competitive supply of depositary services.⁴⁸ Accordingly, AIFMD II does not introduce an EU passport for depositaries, but it enables Member States to introduce provisions to **derogate** from the general principle that depositaries for EU-AIFs generally must be established in the home Member State of the AIF on a **case-by-case basis**.⁴⁹ Member States may permit their national competent authorities (**NCAs**) to authorise credit institutions having their registered office **in another EU member state** to act as a depositary for AIFs established in the member state of the NCA where (1) the **depositary market** of that member state does not exceed **50 billion EUR** (or equivalent) in asset entrusted to safekeeping on behalf of EU AIFs managed by EU AIFMs, and (2) the AIFM submitted a **reasoned request** stating that there is a lack of national depositaries that can fulfil the needs of the AIF.⁵⁰ Such authorisation can be granted if the NCA has checked on a case-by-case basis whether there is actually a **lack of suitable depositary services** in the home member state.⁵¹ Where third-country depositaries are used (i.e., in respect of non-EU AIFs), the same requirements apply with respect to the country of establishment as are introduced in respect of non-EU AIF/AIFM marketing requirements set out below in **Error! Reference source not found.**. Should the NCA decide to authorise such depositary, ESMA shall be notified.⁵²

⁴⁷ Art. 16(2d) lit. b AIFMD.

⁴⁸ AIFMD II Recital 40.

⁴⁹ Art. 21(5) AIFMD.

⁵⁰ Art. 21(5a) subpara. 1 and 2, in conj. with Art. 21(3) subpara. 1(a) AIFMD.

⁵¹ Art. 21 subpara. 3 AIFMD.

⁵² Art. 21 subpara. 4 AIFMD.

⁵³ 'Investor CSD' means a CSD that either is a participant in the securities settlement system operated by another CSD or that uses a third party or an intermediary that is a participant in the securities settlement system operated by another CSD in relation to a securities issue, Art. 1(f) Commission Delegated Regulation (EU) 2017/392.

II. CSDs as sub-custodians

In line with ESMA's recommendation to subject **investor CSDs**⁵³ but not **issuer CSDs**⁵⁴ to the UCITSD and AIFMD delegation requirements for depositaries,⁵⁵ under AIFMD II entrusting CSDs with custody functions in its capacity of an investor CSD is explicitly exempt from being considered a delegation of custody functions and hence not subject to the delegation rules.⁵⁶ Correspondingly, delegating functions to a CSD in its capacity as investor CSD is explicitly subjected to the delegation rules under AIFMD, except for the requirement to perform ex ante due diligence in the selection of CSDs as a sub-delegate.⁵⁷ Consequently, CSDs will be required to adhere to the asset segregation requirements and be subject to the standard liability regime for sub-custodians.⁵⁸ The underlying aim of the EU legislator is to enable depositaries to carry out their tasks regardless of the type of sub-custodians that safekeeps the AIF's assets, including CSDs, and to ensure a steady flow of information between the custodian and the depositary.⁵⁹

F. Delegation

One of the main objectives of the amendments to the AIFMD and UCITSD is to ensure that EU AIFMs and UCITS do not operate as 'letter box' entities.

I. Harmonization of the application of the delegation regime

New rules for AIFs and UCITS

While the EU institutions could not agree on broader restrictions to delegation, several rules are introduced that aim to harmonize and refine the existing rules on delegation and sub-delegation.

First, it is clarified that entrusting any of the investment management functions and any other functions of collective investment (as listed in Annex I of AIFMD and Annex II UCITSD) and any of the permitted ancillary services (as listed in Art. 6(4) AIFMD and Art. 6(3) UCITSD) constitutes a delegation arrangement.⁶⁰ This

⁵⁴ 'Issuer CSD' means a CSD which provides in relation to a securities issue the notary service or the central maintenance service, as referred to in point 1 or 2 of Section A of the Annex to Regulation (EU) No 909/2014 (CSDR), Art. 1(e) Commission Delegated Regulation (EU) 2017/392.

⁵⁵ ESMA, Opinion on Asset segregation and application of depositary delegation rules to CSDs, para. 140.

⁵⁶ Art. 21(11) subpara. 5 AIFMD, Art. 22a(4) UCITSD.

⁵⁷ Art. 21(11) subpara. 2(c) AIFMD; Art. 22a(2)(c) UCITSD.

⁵⁸ Art. 21(12)–(13) AIFMD; Art. 21(1)–(4) UCITSD.

⁵⁹ AIFMD II Recital 34.

⁶⁰ Art. 20(1) AIFMD, Art. 13(1) UCITSD.

clarification is in line with the position the AFM already takes in the **Netherlands** and BaFin takes in **Germany**: the outsourcing of these functions and activities constitutes a delegation. Secondly, amendments were introduced clarifying that the provisions on delegation also apply to the outsourcing of ancillary services (by contrast to applying only to the delegation of investment management functions and other functions of collective investment).⁶¹

Solely the **distribution** of an AIF by one or several distributors which act on their own behalf and in accordance with either MiFID or IDD shall not be considered a delegation subject to the delegation requirements, irrespective of any distribution agreement between the management company and the distributor.⁶² Conversely, arrangements whereby the distributor acts on behalf of the AIFM are considered delegation arrangements.⁶³ With that amendment, the EU legislator moves away from ESMA's position that commissioning third parties with the marketing of their AIFs generally constitutes a delegation⁶⁴, aligning e.g. with the **German** position of BaFin that had also taken a deviating view from ESMA's guidance in this regard.⁶⁵

Further, AIFMD going forward stipulates that the AIFM has to ensure that both the performance of the functions of collective investment and the provision of ancillary services under the top-up authorisation comply with the requirements of AIFMD where such functions or services are delegated.⁶⁶ This obligation applies regardless of the regulatory status or location of the delegate or sub-delegate, including where it is located outside the EU.⁶⁷ An identical provision was added for UCITS management companies.⁶⁸

Note that the proposed reporting obligation of NCAs to notify ESMA on an annual basis where an AIFM "delegates more portfolio or risk management to entities in third countries than it retains" was **not included** in the final version of AIFMD II.⁶⁹

Aligning UCITSD rules with AIFMD

Finally, several new provisions are introduced to the UCITSD in order to align the delegation rules therein with the ones already contained in the AIFMD. UCITS management companies shall

- **notify** the competent authorities of their home Member State before **delegation arrangements** become effective;⁷⁰
- be able to justify their entire delegation structure by **objective reasons**;⁷¹
- not delegate their functions or provision of ancillary services to the extent that, in essence, they can no longer be considered to be the manager of the UCITS, or the provider of the ancillary services and to the extent that it becomes a **letter-box entity**.⁷²

As is already the case for the delegation of functions and services of AIFs,⁷³ the Commission is now also authorised to adopt **delegated acts** with regard to the delegation of functions and services for UCITS by UCITS management companies, which shall also lay out the conditions for delegation and the prevention of creating a "letter box entity".⁷⁴

For **Germany**, this adjustment does not require substantial changes to German law since the requirements applicable to the delegation of UCITS and AIFs management companies are already almost identical. The same holds true for the **Netherlands**.

Under currently applicable **French** law provisions, UCITS management companies are solely required to inform the AMF without delay of the existence of a delegation arrangement. This means that the implementation of AIFMD II will require changes to the current French UCITS delegation notification regime.

II. Information on delegation in the context of applications for authorisation

When applying for authorisation, additional information shall be provided to the regulator with respect to the delegation and sub-delegation arrangements.⁷⁵ Besides standard information, such as LEI, jurisdiction and competent supervisory authority (if any) of the delegate, the UCITS and AIF management company shall in future include

- 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 and monitoring the delegated activity;

⁶¹ Art. 20(1)(f), (3), (4), (6) AIFMD; Art. 13(1)(g), (h), (i) UCITSD.

⁶² Art. 20(6)(a) AIFMD; Art. 13(3) UCITSD, Recital 10 AIFMD.

⁶³ AIFMD II Recital 10.

⁶⁴ ESMA Q&A ID 1026 (see also ESMA34-32-352, Q&A on the application of the AIFMD, Question 4).

⁶⁵ BaFin, FAQ on delegation pursuant to Sec. 36 KAGB, Nr. 1.

⁶⁶ Art. 20(3a) AIFMD.

⁶⁷ Art. 1(9)(b) AIFMD II.

⁶⁸ Art. 13(4) UCITSD.

⁶⁹ Art. 1(3)(b) AIFMD II.

⁷⁰ Art. 13(1) UCITSD; aligned with Art. 20(1) AIFMD.

⁷¹ Art. 13(1)(j) UCITS; see Art. 20(1)(a) AIFMD; see also Recital 48 AIFMD II.

⁷² Art. 13(2) AIFMD, aligned with Art. 20(3) AIFMD.

⁷³ Art. 20(7) AIFMD.

⁷⁴ Art. 13(5)(b) UCITS.

⁷⁵ Art. 7(e) AIFMD.

- a brief description of both the **delegated portfolio management** function and the delegated **risk management** function for each AIF managed or intended to be managed, including whether such delegation amounts to a partial or full delegation;
- a description of the periodic **due diligence measures** to be carried out by the management company to monitor the delegated activity.

Any material change to the above conditions requires a notification to the competent authority prior to implementation (this being an existing requirement for AIFMs but newly introduced for UCITS management companies).⁷⁶

III. Supervisory reporting regarding delegation

AIF and UCITS management companies will be obliged to **regularly report** to their national competent authority an extensive list of information regarding **delegation arrangements concerning portfolio management or risk management** functions:⁷⁷

- list and description of the activities concerning portfolio management and risk management functions which are delegated and sub-delegated;
- names, domicile, authorisation, supervisory authority and close links, if any, with the management company, of all delegates and sub-delegates;
- where the portfolio management function is delegated and sub-delegated, **amount** and **percentage** of the UCITS' or AIF's **assets** which are subject to the delegation arrangement;
- number of **FTEs** performing **day-to-day portfolio management or risk management** tasks;
- number of **FTEs** to **monitor** the delegation arrangements;
- 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 of the **measures adopted** to address those issues and the date by which those measures are to be implemented;
- the **commencement** and **expiry dates** of the delegation and sub-delegation arrangements.

⁷⁶ Art. 10 AIFMD, Art. 7(7) UCITSD.

⁷⁷ Art. 24(2)(d) AIFMD; Art. 20a(2)(d) UCITSD; Recital 11 AIFMD II.

⁷⁸ Art. 24 (5a), (5b) AIFMD; Art. 24a(5), (6) UCITSD.

ESMA will draft **regulatory technical standards** specifying the details to be provided as well as the frequency and timing of the reports.⁷⁸

In addition, where an AIFM 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, the AIFM shall in future submit to their NCA **detailed explanations** and evidence of their compliance with the requirements on conflicts of interest, 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 discloses any such conflicts of interest.⁷⁹

ESMA shall **report** the current **market practices** regarding delegation of functions and services of AIF and UCITS management companies and compliance with the rules on delegation set out in the AIFMD and UCITSD to the European Parliament, Council and Commission by 16 April 2029, i.e. within **five years** from AIFMD II entering into force.⁸⁰

While concerns have not materialised that outsourcing arrangements and in particular the host AIFM model would be regulated more rigorously, the above new supervisory reporting regime on delegation arrangements and third-party initiators places comprehensive outsourcing arrangements under **increased supervisory scrutiny** and may lay a foundation to more restrictive regulation in the future. Further, these changes may impact delegates through stricter contractual provisions as well as more extensive due diligence and monitoring from EU AIFMs and UCITS management companies.

G. Governance of management companies

With respect to the two mandatory directors of a UCITS and AIF management company, the AIFMD and UCITSD are amended to the effect that they shall additionally be employed **full-time** by that management company or are executive members of the management body of the management company committed full-time to conducting the business of that management company and are domiciled in the Union.⁸¹

Further details shall be provided on the **programme of activity** to be submitted in the application for authorisation setting out the **organisational structure**

⁷⁹ Art. 14(1) and (2) AIFMD.

⁸⁰ Art. 7(8) AIFMD; Art. 13(6) UCITSD.

⁸¹ Art. 7(1)(b) UCITSD and Art. 8(1)(c) AIFMD.

of the management company in that it shall include details on the **human and technical resources** that will be used to conduct the business of the management company. UCITS and AIF management companies shall submit information on the specific persons effectively conducting the business of the AIFM, including:⁸²

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

In that context, AIFMD II expresses the desirability of having at least **one independent or non-executive director** on the board of an AIFM, UCITS management company or investment company in the recitals, but it does not introduce a corresponding legal requirement to AIFMD or UCITSD.⁸³ Rather, AIFMD and UCITSD require the European Commission to undertake a review of the impacts of a mandatory requirement if it were introduced by 16 April 2029.⁸⁴

H. List of permitted activities

I. AIFMs

Besides the loan origination on behalf of AIFs (see above C.I.), the activity of **servicing securitisation special purpose entities** is newly introduced as another function of collective investment.⁸⁵ In addition, the list of possible top-up licenses for ancillary services is extended so that AIFMs may be authorised to engage in:⁸⁶

- **benchmark administration** in accordance with Regulation (EU) 2016/1011 provided such benchmarks are not used in the AIFs they manage;
- **credit servicing** activities in accordance with Directive (EU) 2021/2167;
- **non-core services** comprising any other function or activity which is already provided by the AIFM in relation to an AIF that it manages,

or in relation to services that it provides, provided that any potential conflict of interest created by the provision of that function or activity to other parties is appropriately managed.

Furthermore, AIFMD II removes the current restriction for granting a top-up authorisation for non-core services (such as for investment advice, custody, and reception and transmission of orders) without the AIFM also being authorised for the (top-up) provision of portfolio management services.⁸⁷

In the **Netherlands**, all these activities will need to be introduced as permitted activities.⁸⁸ By contrast, the catch-all clause for non-core services above is already existing under **German** law⁸⁹, but the other activities are yet to be introduced to the catalogues of permitted activities.

French law already provides that AIFMs may engage in “ancillary” activities other than the provision of MiFID core and non-core services⁹⁰. Guidance on the type of such ancillary activities is provided by the AMF⁹¹, which notably encompasses the provision of switching services (*mandats d'arbitrage*) with respect to unit-linked life insurance policies, insurance brokerage or administration of benchmarks, provided such activities are related to the portfolio management activity of the AIFM.

II. UCITS

For UCITS, the list of ancillary services is also extended. **Non-core services** in future may also include:⁹²

- **reception and transmission of orders** in relation to financial instruments;
- **administration of benchmarks** in accordance with Regulation (EU) 2016/1011 provided such benchmarks are not used in the UCITS that they manage;
- **any other function** or activity which is already provided by the management company in relation to a UCITS that it manages, or in relation to services that it provides, provided that any potential conflict of interest created by the provision of that function or activity to other parties is appropriately managed” (see Art. 2(2a)(i) AIFMD II).

⁸² Art. 7(2)(a) and (c) AIFMD; Art. 7(b) and (c) UCITSD.

⁸³ Recital (9) AIFMD II.

⁸⁴ Art. 110a UCITSD; 69a(1)(f) AIFMD.

⁸⁵ Annex I(2)(e) AIFMD.

⁸⁶ Art. 6(4)(c), (d) and (5)(b)(iv), (e) AIFMD.

⁸⁷ Art. 6(5)(b) AIFMD is deleted by AIFMD II.

⁸⁸ Pursuant to Article 2:67a DFSA permitted non-core services are limited to (i) portfolio management on a client-by-client basis, (ii) investment advice (in connection with portfolio

management), (iii) safe-keeping and administration in relation to shares or units of collective investment undertakings, and (iv) reception and transmission of orders in relation to financial instruments.

⁸⁹ Sec. 20(2) No. 8 and (3) No. 9 KAGB.

⁹⁰ Article L.532-9, VIII of the French Monetary and Financial Code.

⁹¹ AMF Position – *Recommandation DOC-2012-19*.

⁹² Art. 6(3)(b)(iii), (iv), (c) UCITSD.

Like for AIFMs, the top-up authorisation for non-core services is no longer restricted to UCITS management companies being also authorised for the management of (individual) portfolios and investments.⁹³

I. Marketing requirements for non-EU AIFs and non-EU AIFMs (including NPPR)

The requirements for the **country of establishment** for **non-EU AIFs** and investment funds managed by **non-EU AIFMs** whose units are marketed in the EU have been changed. Under AIFMD II, the point of reference for non-permitted countries of establishment in respect of NPPR and passporting rules for non-EU AIFs/ AIFMs is no longer the FATF's list of Non-Cooperative Countries and Territories, but the list of **high-risk third countries pursuant to the 5th EU Anti-Money Laundering Directive**.⁹⁴ In addition, all provisions have been aligned to uniformly prescribe that the country of establishment

- shall have 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
- shall not be mentioned in Annex I to the Council conclusions on the revised **EU list of non-cooperative jurisdictions for tax purposes**.⁹⁵

This requirement mirrors those set forth in the EU Securitisation Regulation with respect to the domicile of securitisation special purpose entities (SSPEs)⁹⁶ and other EU legislation such as the EU Crowdfunding Regulation.⁹⁷ While this amendment would not be an issue for third-country funds and fund managers from jurisdictions such as the **UK, U.S., Hong Kong and Switzerland**, it may eventually pose a problem in respect of jurisdictions generally under elevated scrutiny of tax authorities, such as **Cayman Islands, British Virgin Islands, Jersey, and Guernsey**.

⁹³ Art. 6(3) subpara. 2 UCITS D.

⁹⁴ Art. 35(1)(b), 36(1)(c), 37(7)(e), 40(2)(b), 42(1)(c) AIFMD.

⁹⁵ Art. 35(1)(c), 36(1)(d), 37(7)(f), 40(2)(c), 42(1)(d) AIFMD.

⁹⁶ Art. 4(a) Regulation (EU) 2017/2402.

⁹⁷ Art. 5(2)(b) Regulation (EU) 2020/1503.

⁹⁸ Art. 2(11), Art 3(11), (12) AIFMD II.

⁹⁹ Art. 23(1)(a) AIFMD, Art. 79(1) UCITS D. Note that such obligation is not new in respect of UCITS and AIF distributed to retail clients, since the name has to be provided in the PRIIPS-

J. Investor information

AIFMD II also complements the pre-contractual information requirements of AIFMs and UCITS management companies vis-à-vis investors which is not only relevant for EU-AIFMs, but also non-EU AIFMs marketing fund units in the EU under NPPR.⁹⁸

The EU legislator emphasises the importance of the name of an AIF/a UCITS and its potential influence on investors' choices by, first, explicitly stipulating that it needs to form part of the pre-contractual information for AIFs and UCITS.⁹⁹ Second, ESMA is mandated to develop guidelines to specify situations where names could be considered unfair, unclear or misleading to the investor.¹⁰⁰

AIFMD II further adds the following items to the list of **pre-contractual information** for AIFs:

- the selected liquidity management tools¹⁰¹ (see above D.),
- 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 AIF¹⁰².

Periodic disclosure obligations for AIFs will in future need to be supplemented with information on

- fees, charges and expenses that were directly or indirectly borne by investors (on an annual basis)¹⁰³;
- the composition of originated loan portfolios¹⁰⁴; and
- other entities (i.e., parent undertakings, subsidiaries, or special purpose vehicles) utilised in relation to the AIF's investments by or on behalf of the AIFM (on an annual basis)¹⁰⁵.

K. Supervisory reporting and cooperation

AIFMD II is intended to improve the supervisory reporting regime with a view to effective market monitoring and to facilitate an efficient use of reported data in order to reduce duplicative reporting and related reporting burdens.¹⁰⁶

KID under Regulation (EU) No 1286/2014 (PRIIPs-Regulation), see also AIFMD II Recital 66.

¹⁰⁰ Art. 23(7) AIFMD; Art. 69(6) UCITS D.

¹⁰¹ Art. 23(1)(h) AIFMD

¹⁰² Art. 23(1)(i) AIFMD.

¹⁰³ Art. 23(4)(e) AIFMD.

¹⁰⁴ Art. 23 (4)(d) AIFMD.

¹⁰⁵ Art. 23 (4)(f) AIFMD.

¹⁰⁶ AIFMD II Recitals 24, 25, 57, 58.

AIFMD II expands the list of information to be reported by AIFMs to their NCA by means of the **Annex IV reporting template** of AIFMD Delegated Regulation (Level 2)¹⁰⁷. Besides the information to be submitted on delegation arrangements concerning portfolio or risk management (see above F.III), the following items shall be included:¹⁰⁸

- in respect of each AIF, information on the **instruments** in which it is trading, the **exposure** and the **asset of each AIF** (by contrast to the current limit to the “main” instruments, the “principal” exposure and the “most important concentrations”);
- the total amount of **leverage** employed by the AIF;
- 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.

It further refines the rules on information sharing and cooperation amongst supervisory authorities.¹⁰⁹ Moreover, it introduces an equivalent **reporting regime for UCITS management companies** in a new Art. 20a UCITSD.¹¹⁰

Reporting contents, format and processes for both AIFMs and UCITS management companies shall be further specified in RTS and Implementing Technical Standards (ITS) to be developed by ESMA and adopted by the Commission.¹¹¹

Member states and regulators are asked to transpose and apply the new reporting obligations by **16 April 2027**¹¹² which is also the deadline for ESMA’s submission of draft RTS/ITS – which will still require subsequent adoption by the Commission. However, a seamless transition will likely depend on the **new RTS/ITS**, and it remains to be seen whether these will have been adopted by that date.¹¹³

In addition, AIFMD II introduces new rules related to the use of supervisory powers in cross-border scenarios.¹¹⁴ In particular, it establishes a process for host supervisors to request the home supervisor to exercise the new supervisory power to activate or deactivate **liquidity management tools**.¹¹⁵

¹⁰⁷ Delegated Regulation (EU) No. 231/2013.

¹⁰⁸ Art. 24(1), (2)(c)(d)(f) AIFMD.

¹⁰⁹ Art. 25 (2), Art. 50(5)-(7) AIFMD.

¹¹⁰ Art. 2(7) AIFMD-II; also see Art. 2(13)-(15) AIFMD-II on information sharing and cooperation amongst authorities in respect of UCITS management companies (Art. 84(2)-(3f), Art. 98 (3) and (4), Art. 101 (1) and (9) AIFMD).

¹¹¹ Art. 24(5a) and (5b) AIFMD, Art. 20a(5) and (6) UCITSD. ESMA is also requested to submit a report on the development of the integrated collection of supervisory data by 16 April 2026, including on areas of duplication and data standardisation and

L. Implications for the UK

The changes made by AIFMD II will not apply in the UK. The UK government is in the process of **repealing** and replacing onshore EU law relating to financial services, using powers under the Financial Services and Markets Act 2023. These powers will be used to repeal and replace law deriving from AIFMD.

Ahead of this process, the FCA published a discussion paper (DP23/2) in February 2023, which explored ways to **reform** asset management regulation. The discussion paper indicates a number of areas which the FCA wishes to improve in the future, including **liquidity management, reporting and investment due diligence**.

In a speech published in October 2023, the FCA confirmed that it will consult on amendments to the AIFMD regime in 2024. The FCA’s speech suggested that the main priority is to make the AIFM regime more **proportionate**, so that it operates depending on the nature and scale of a firm’s business. The FCA is also considering modifications to allow full-scope AIFMs to carry out other activities within the same legal entity. A further priority involves considering whether changes could be made to reporting requirements for AIFs – with the indication being that the regulatory reporting regime will be reviewed in 2025.

In addition, the House of Lords is currently considering a private members’ bill that would amend the Alternative Investment Fund Managers Regulations 2013 to remove **listed investment companies** from designation as AIFs.

Against this background, and since AIFMD II applies only to EU Member States but not the UK, the AIFMD regime in the UK and EU will **differ materially** once AIFMD II is implemented in EU Member States. This will have an impact on UK AIFMs marketing into the EU or acting as delegates of EU AIFMs.

sharing amongst authorities (Art. 69a(2) AIFMD, Art. 20b UCITSD).

¹¹² Art. 3(1) subpara. 2 AIFMD II.

¹¹³ to Art. 2(12) and Art. 3(7) AIFMD-II.

¹¹⁴ Art. 50(5)-(5h) AIFMD, Art. 84 (2)-(3f) and Art. 98(3) and (4) UCITSD.

¹¹⁵ In the case of disagreement, ESMA may issue an opinion to the involved supervisors and make it public if the home supervisor decides to deviate from this opinion (Art. 50(5)(e) AIFMD, Art. 84(3)(e) UCITSD).

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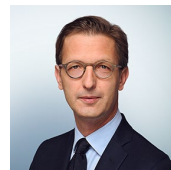
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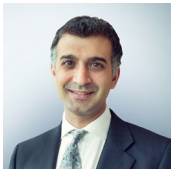
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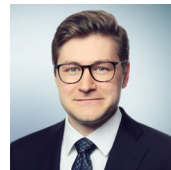
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