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on the intention to adopt with amendments the Commission Delegated Regulation supplementing Regulation (EU) 2015/760 of the European Parliament and of the Council with regard to regulatory technical standards specifying obligations concerning hedging derivatives, redemption policy and liquidity management tools, trading and issue of units or shares of an ELTIF, and transparency requirements and repealing Delegated Regulation (EU) 2018/480

Annex

Ms Verena Ross
Chair
European Securities and Markets Authority
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Dear Ms Ross,

On 19 December 2023, the European Securities and Markets Authority ("ESMA") sent to the Commission the draft Regulatory Technical Standards ("RTS") on Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds ([1]) (hereinafter "ELTIF Regulation"), as amended by Regulation (EU) 2023/606. ([2]) The draft RTS specifies obligations of European long-term investment funds ("ELTIFs") and their managers concerning hedging of derivatives, redemption policy and liquidity management tools, trading and issue of units or shares of ELTIFs, and transparency requirements.

In its Final Report, ESMA recognises the diversity of ELTIFs, stressing the variety of assets in which ELTIFs may invest and the variety of ELTIFs' investment strategies ([3]). While the Commission notes that one of the objectives of Regulation (EU) 2023/606 is to provide for flexibility to ELTIF managers to pursue a broad range of investment strategies and objectives, in particular as regards their portfolio composition, the Commission believes that ESMA's draft RTS does not sufficiently cater for the individual characteristics of different ELTIFs.

Against this background, and taking into account the scope of the legal empowerments laid down in the ELTIF Regulation and the principle of proportionality laid down in Article 1(4) and (5), fifth sub-paragraph of Regulation (EU) 1095/2010, as amended ([4]), the Commission considers it necessary to take a more proportionate approach to the

([1]) OJ L 123, 19.5.2015, p. 98

([2]) ESMA's Final Report on draft regulatory technical standards under the revised ELTIF Regulation (ESMA34-1300023242-159), point 51, page 20. Available: https://www.esma.europa.eu/press-news/esma-news/esma-finalises-technical-standards-under-revised-eltif-regulation (05.01.2024).

([3]) Ibid, p. 20.

([4]) OJ L 331 15.12.2010, p. 84.

drafting of the RTS, in particular with regard to the calibration of the requirements relating to redemptions and liquidity management tools.

With this letter, and in line with the procedure set out in Article 10(1) of Regulation (EU) 1095/2010, as amended, I would like to inform ESMA that the Commission intends to adopt the proposed RTS with amendments. The main reasons for adopting the RTS with amendments are summarised below.

Article 4(2) of the draft RTS with respect to material changes to the redemption policy

- Article 4(2) of the draft RTS sets out that the manager of the ELTIF shall inform the competent authority of the ELTIF of material changes to the redemption policy, as soon as practically possible and not later than within 3 business days from the date that material change to the information became known or should have become known to the manager of the ELTIF.
- This provision can be construed as requiring the ELTIF managers to inform the national competent authorities of material changes solely on an *ex post* basis and hence limiting the ability of national competent authorities to receive the updated information before the ELTIF implements changes, including significant ones. To avoid such an interpretation, material changes should be notified to the national competent authorities *before* they occur, unless such material changes are beyond the control of the manager of the ELTIF. As an illustration, the manager of the ELTIF should not have the capacity to materially change, at its own initiative, the redemption frequency without prior authorisation of the regulator, and the national competent authority should not "learn" about such a material change on an *ex post* basis.
- Accordingly, Article 4(2) of the draft RTS should be deleted, or, alternatively, the draft RTS should be amended in a manner that would not be construed as limiting the competences of the NCAs.

Minimum notice period for redemptions (Article 5(5) and (6) of the draft RTS)

- The draft RTS introduces requirements on notice periods for redemption. Article 5(5) of the draft RTS stipulates that redemptions shall only be possible after a notice period is given by each investor. Article 5(5a) specifies that the notice period shall be a minimum of 12 months. Further, Article 5(6) of the draft RTS sets out that notwithstanding Article 5(5a), an ELTIF may allow investors to redeem their shares with a notice period of less than 12 months. In such a case, the notice period must be calibrated based on the minimum liquid assets as referred to in Article 9(1), point (b) of Regulation (EU) 2015/760, and the maximum percentage referred to in Article 18(2), first subparagraph, point (d), of Regulation (EU) 2015/760, in accordance with the table laid down in Article 5(6).
- The above-mentioned provisions imply that the draft RTS mandates the notice period as a general requirement for *all* ELTIFs, irrespective of their investment strategy, assets, leverage profile and other factual specific circumstances pertaining to each individualised ELTIF in question. In this regard, the Commission considers that linking the length of the notice periods with "fixed" percentages of minimum liquid assets and maximum percentages referred to in Article 18(2) first sub-paragraph, point (d) fails to sufficiently take into account the specific situation of ELTIFs.

- Article 3 (i.e. provisions on the determination of the minimum holding period) and Article 5(3) of the draft RTS, read in conjunction, could lead to a misleading interpretation that a minimum holding period is mandatory and that its duration may correlate with, or be contingent on, the notice period. This conclusion would be at odds with the flexibility enshrined in Article 18(2)(a) of the ELTIF Regulation, which foresees that certain open-ended ELTIFs may provide for the possibility of having redemptions during the life of ELTIFs so that redemptions are not granted before the end of a minimum holding period or before the date specified in Article 17(1), point (a).
- Accordingly, the draft RTS should be amended to remove the requirement of a minimum 12-month notice period.

Liquidity requirements related to standardised notice periods requirements (Article 5(6), first sub-paragraph, of the draft RTS)

- Article 5(6), first sub-paragraph, of the draft RTS sets out that the notice period shall be calibrated based on the minimum liquid assets, which are deemed to be a liquid basket of the ELTIF as referred to in Article 9(1), point (b) of Regulation (EU) 2015/760, and taking into account the maximum percentage of the redeemable assets referred to in Article 18(2), first subparagraph, point (d), in accordance with the table set out in Article 5(6) of the draft RTS.
- The Commission considers that requiring the simultaneous application of these requirements fails to sufficiently take into account the individual situation of each ELTIF and would inevitably ill-fit ELTIFs pursuing well-established and legitimate investment strategies, in particular real estate and infrastructure, and private equity long-term investment funds.
- The Commission considers that the proposed requirements should be more proportionate in relation to the obligation "that the ELTIF has in place an appropriate redemption policy and liquidity management tools that are *compatible with the long-term investment strategy of the ELTIF*" provided for in Article 18(2)(b) of the ELTIF Regulation. As an illustration, an ELTIF with a quarterly redemption frequency and a 2% gate would limit the redemptions up to 8% each year. However, the draft RTS proposed by ESMA would force such an ELTIF to maintain at least 40% of the ELTIF's portfolio in liquid assets. At the same time, Article 13(1) of the ELTIF Regulation requires that ELTIFs invest at least 55% of the capital in eligible investment assets. In turn, this means that ESMA imposes an obligation for *all* ELTIFs with up to 6-month notice period, and notwithstanding their liquidity profile, investment style and strategy, balance sheet, redemption gates, leverage profile, investor base and redemption frequency, to comply with a very narrow liquidity band between 40% and 45% *at all times*. Such requirement would appear very difficult to be complied with in practice, and it would disregard the operational and risk management realities of long-term investment funds (e.g. relating to asset price fluctuations). Furthermore, such high liquidity requirements would create an inevitable cash drag on ELTIFs caused by excessive liquidity in its portfolio and would put under question the attractiveness of the ELTIFs and the capacity of ELTIFs to finance long-term projects.
- Ultimately, the Commission considers that setting out standardised requirements that may not be suited to the individual situation of the ELTIF could discentivise the use of ELTIFs and would defeat the objectives of the ELTIF Regulation and the purpose of the ELTIF regulatory reform. From this perspective, by failing to

put forward redemption policy and liqudity management tools that are *compatible* with the long-term investment strategy of the ELTIF and by failing to calibrate the liquidity requirements in a way that takes into account the individualised situation of the ELTIF, the draft RTS submitted by ESMA does not appear to respect the scope of the legal mandate laid down the ELTIF Regulation.

- Accordingly, the liquidity related requirements linked to notice periods requirements set out in the draft RTS should be amended and should specifically take into account the principle of proportionality, the existing market practices for retail long-term funds and the invidual situation of ELTIFs. This could be achieved through targeted amendments which determine the liquidity profile of the ELTIF through the proportionate and carefully calibrated application of (i) the maximum percentage referred to in Article 18(2), first subparagraph, point (d), of the ELTIF Regulation, as well as the redemption frequency (since the liquid assets are mobilised each time there is a redemption) and the notice period of the ELTIF, or (ii) the redemption frequency, the minimum percentage of liquid assets referred to in Article 9(1), point (b) of the ELTIF Regulation and the maximum percentage referred to in Article 18(2), first subparagraph, point (d).

Liquidity management tools (Article 5(7) of the draft RTS)

- Article 5(7) of the draft RTS provides that the manager of the ELTIF shall select and implement at least one anti-dilution liquidity management tool, among anti-dilution levies, swing pricing and redemption fees. In addition to that or those anti-dilution tool(s), the manager of the ELTIF may also select and implement other liquidity management tools. The second sub-paragraph specifies that by way of derogation to the first subparagraph, and solely "*in specific circumstances*", the manager of the ELTIF may select and implement other liquidity management tools than those referred to in the first subparagraph.
- However, the Commission considers that the draft RTS could be construed as disentivising or limiting the possibility for ELTIF managers to implement different liquidity management tools, other than anti-dilution liquidity management tools, which could be equally or even more compatible with the long-term investment strategy of the ELTIF. Such limitation is neither mandated nor required under Article 18(2) of the ELTIF Regulation and does not seem justified in view of the flexibility needed to take into account the individualised situation of different ELTIFs. Furthermore, it is not clear why ELTIFs would be treated differently from other AIFs, including national long-term funds marketed to retail investors which are not subject to the same requirements imposed upon ELTIFs, and why the ELTIF regulatory treatment of liquidity management tools would depart from the liquidity management tools related requirements of Directive (EU) 2011/61 on alternative investment fund managers, as amended (hereinafter: "AIFMD") ([5]).
- Accordingly, the draft RTS should be amended in a manner that does not introduce new ELTIF-specific requirements with respect to selecting and implementing liquidity management tools beyond those set out in Article 18(2) of the ELTIF Regulation or otherwise limit the capacity of ELTIF managers in selecting and implementing liquidity management tools.

([5]) OJ L 174, 1.7.2011, p. 1.

Redemption gates (Article 5(8) of the draft RTS)

- Article 5(8) of the draft RTS sets out that the manager of an "ELTIF shall also implement redemption gates in accordance with the table set in paragraph 6, first subparagraph" of Article 5. However, according to Article 5(6), first sub-paragraph, this table is also aimed at calibrating the notice period based on the redemption gate and the size of the liquid assets. In addition, Article 5(8) of the draft RTS sets out that gates should be imposed "in certain specific circumstances", including situations where redemption gates are needed to mitigate any potential risk to financial stability and, in stressed market conditions, "where numerous or voluminous redemption requests could be received by the manager of the ELTIF at the same redemption point and where the sale of assets to meet those requests is either impossible or implies a sale at a highly discounted price".
- The Commission considers that Article 5(8) of the draft RTS appears to be at odds with Article 18(2), which entitles ELTIFs to allow redemptions during the life of of the ELTIF provided that, among other conditions, the redemption policy of the ELTIF ensures that redemptions are limited to a percentage of the assets of the ELTIF referred to in Article 9(1), point (b). The legal mandate granted to ESMA under Article 18(6), first subparagraph, point (d) of the ELTIF Regulation solely encompasses the development of technical standards specifying the "*criteria to assess the percentage* referred to in Article 18(2), first subparagraph, point (d)" rather than setting out *additional requirements*, whether linked to the notice period, or to the size of liquid assets, or limiting such redemptions to "specific circumstances". In addition, the Commission considers that the articulation between Article 5(6) and Article 5(8) is unclear and should be clarified.
- Accordingly, the draft RTS should be amended to ensure that the implementation and activation of redemption gates is not limited to "certain specific circumstances" or exclusively contingent on the notice period set out in the calibration table proposed by the draft RTS.

Common definitions, calculation methodologies and presentation formats of costs (Article 12 of the draft RTS)

- The draft RTS seems to introduce a cost disclosure methodology, which is different from that set out in Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail, as amended ([6]) (hereinafter: the PRIIPs Regulation), that of the Directive on Markets in Financial Instruments ("MiFID II") ([7]) and, where applicable, that of the AIFMD.
- Article 25(2) of the ELTIF Regulation has been amended to align the cost disclosure metholodgy under the ELTIF Regulation with the requirement laid down in the PRIIPs framework where all costs must be presented as reduction in yield figure ("RIY", i.e. impact on IRR of product due to the costs). However,

([6]) OJ L 352, 9.12.2014, p. 1.

([7]) This is also acknowledged by ESMA in its Final Report: "…notably because the cost disclosure framework as requested by the PRIIPs Regulation is not entirely consistent with the purpose of Article 25 of the ELTIF Regulation"

Article 12(10) of the draft RTS requires costs to be presented "as a percentage of the capital of the ELTIF" resulting in divergent presentations of costs.

- Similarly, Article 12(5) of the draft RTS requires that costs "shall be expressed as a percentage of the capital of the ELTIF over a one-year period", which is at odds with the amendment of Article 25(2) of the ELTIF Regulation (i.e. the disclosure of an overall ratio of the costs to the capital of the ELTIF has been replaced by the requirement of the disclosure of an overall cost ratio of the ELTIF).
- In addition, the draft RTS does not seem to take into consideration that there are several layers of cost disclosures: (i) the constitutive documents typically allow to charge a certain cost, (ii) the prospectus discloses the maximum costs, (iii) the PRIIPS KID discloses all direct and indirect costs associated with an investment in the PRIIP and (iv) the report discloses the actual costs. The draft RTS is raising questions as to how the costs need to be disclosed, how to keep consistency among the different layers and at which frequency costs are to be updated (notably whether the prospectus needs to be updated each time the PRIIPs KID of an ELTIF is updated). This, if left unadressed, would in the Commission's view cause uncertainty and additional operational burdens.
- Overall, the Commision is of the view that cost disclosures (both the methodology and the presentation) under the revised ELTIF Regulation should not give rise to sector-specific requirements unless duly justified by the characteristics of the ELTIFs.
- Accordingly, the draft RTS should be amended in a manner that takes into account the above concerns and ensures a better alignment of the ELTIF Regulation with that of the PRIIPs Regulation, MiFID and the AIFMD.

In light of the above, I would like to inform you that the Commission, acting in accordance with the procedure set out in the fifth and sixth sub-paragraphs of Article 10(1) of Regulation (EU) No 1095/2010, as amended, intends to adopt the RTS submitted by ESMA once the above-mentioned concerns are taken into account and the necessary modifications are made by ESMA.

As per Article 10(1), sub-paragraph 5 of Regulation (EU) No 1095/2010, as amended, where the Commission intends to adopt a draft RTS in part or with amendments, it shall send the draft RTS back to the Authority, explaining the reasons for its amendments, and within a period of 6 weeks, the Authority may amend the draft RTS on the basis of the Commission's proposed amendments and resubmit it in the form of a formal opinion to the Commission.

It should be recalled that the procedure laid down in in Article 10(1), sub-paragraph 6 of Regulation (EU) No 1095/2010, as amended, sets out that if, on the expiry of that six-week period, the Authority has not submitted an amended draft RTS, or has submitted a draft RTS that is not amended in a way consistent with the Commission's proposed amendments, the Commission may adopt the RTS with the amendments it considers relevant, or reject it.

It is noteworthy that Article 10(1) sub-paragraph 2 of Regulation (EU) 1095/2010 militates that regulatory technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based.

In this context, it is essential to underline that the regulatory technical standards shall be in conformity with the legal mandate set out in the ELTIF Regulation and shall, among

other requirements, respect the proportionality principle in allowing various liquidity fund set-ups while ensuring that liquidity risk is effectively managed.

I would like to express our appreciation for the work undertaken by ESMA to deliver the draft RTS and look forward to continuing our good cooperation on this legal act.

Yours sincerely,

Electronically signed

John BERRIGAN

Enclosure:	Amendments to the draft Commission Delegated Regulation supplementing Regulation (EU) 2015/760 of the European Parliament and of the Council with regard to regulatory technical standards specifying obligations concerning hedging derivatives, redemption policy and liquidity management tools, trading and issue of units or shares of an ELTIF, and transparency requirements and repealing Delegated Regulation (EU) 2018/480
c.c.:	Irene Tinagli MEP, Chair of the Committee on Economic and Monetary Affairs, European Parliament; Thérèse Blanchet, Secretary-General of the Council of the European Union