Article 101

Liability discharge under Article 21(12) of Directive 2011/61/EU

1. A depositary's liability under the second subparagraph of Article 21(12) of Directive 2011/61/EU shall not be triggered provided the depositary can prove that all the following conditions are met:

(a) the event which led to the loss is not the result of any act or omission of the depositary or of a third party to whom the custody of financial instruments held in custody in accordance with point (a) of Article 21(8) of Directive 2011/61/EU has been delegated;

(b) the depositary could not have reasonably prevented the occurrence of the event which led to the loss despite adopting all precautions incumbent on a diligent depositary as reflected in common industry practice;

(c) despite rigorous and comprehensive due diligence, the depositary could not have prevented the loss.

This condition may be deemed to be fulfilled when the depositary has ensured that the depositary and the third party to whom the custody of financial instruments held in custody in accordance with point (a) of Article 21(8) of Directive 2011/61/EU has been delegated have taken all of the following actions:

(i) establishing, implementing, applying and maintaining structures and procedures and insuring expertise that are adequate and proportionate to the nature and complexity of the assets of the AIF in order to identify in a timely manner and monitor on an ongoing basis external events which may result in loss of a financial instrument held in custody;

(ii) assessing on an ongoing basis whether any of the events identified under point (i) presents a significant risk of loss of a financial instrument held in custody;

(iii) informing the AIFM of the significant risks identified and taking appropriate actions, if any, to prevent or mitigate the loss of financial instruments held in custody, where actual or potential external events have been identified which are believed to present a significant risk of loss of a financial instrument held in custody.

2. The requirements referred to in points (a) and (b) of paragraph 1 may be deemed to be fulfilled in the following circumstances:

(a) natural events beyond human control or influence;

(b) the adoption of any law, decree, regulation, decision or order by any government or governmental body, including any court or tribunal, which impacts the financial instruments held in custody;

(c) war, riots or other major upheavals.

3. The requirements referred to in points (a) and (b) of paragraph 1 shall not be deemed to be fulfilled in cases such as an accounting error, operational failure, fraud, failure to apply the segregation requirements at the level of the depositary or a third party to whom the custody of financial instruments held in custody in accordance with point (a) of Article 21(8) of Directive 2011/61/EU has been delegated.

4. This Article shall apply mutatis mutandis to the delegate when the depositary has contractually transferred its liability in accordance with Article 21(13) and (14) of Directive 2011/61/EU.

Article 102

Objective reasons for the depositary to contract a discharge of liability

1. The objective reasons for contracting a discharge pursuant to Article 21(13) of Directive 2011/61/EU shall be:

(a) limited to precise and concrete circumstances characterising a given activity;

(b) consistent with the depositary's policies and decisions.

2. The objective reasons shall be established each time the depositary intends to discharge itself of liability.

3. The depositary shall be deemed to have objective reasons for contracting the discharge of its liability in accordance with Article 21(13) of Directive 2011/61/EU when the depositary can demonstrate that it had no other option but to delegate its custody duties to a third party. In particular, this shall be the case where:

(a) the law of a third country requires that certain financial instruments be held in custody by a local entity and local entities exist that satisfy the delegation criteria laid down in Article 21(11) of Directive 2011/61/EU; or

(b) the AIFM insists on maintaining an investment in a particular jurisdiction despite warnings by the depositary as to the increased risk this presents.