What is the AIFMD?

The Alternative Investment Fund Managers Directive ("AIFMD") introduces a new passport system for the marketing of alternative investment funds ("AIFs") in the EU and creates a legal framework operating at European level to monitor and supervise alternative investment fund managers ("AIFMs") within a harmonised system for the first time. EU Member States were required to transpose the AIFMD into national law by 22 July 2013. A key component of AIFMD is the clarification and harmonisation of the rules relating to the appointment, functions and liability of depositaries of AIFs.

Appointment of Depositaries

Depositary Eligibility

An AIFM must appoint a single depositary in respect of each AIF it manages. The depositary can be an EU credit institution, an EU investment firm, or institutions entitled to act as a UCITS depositary. For non-EU AIFs, the depositary may also be an institution equivalent to an EU credit institution or EU investment firm provided that it is subject to effective prudential regulation (including minimum capital requirements) and supervision having the same effect as EU law. The European Commission has adopted a delegated act containing implementing measures under the AIFMD (the "Level 2 Regulation") which elaborates on the criteria to be applied in assessing third country prudential and supervisory regimes.

In recognition of the fact that private equity and venture capital funds do not rely on third party custodians, the AIFMD provides that EU member states may permit entities which carry out the depositary functions as part of their professional or business activities (eg, law firms, notaries, investment firms) to act as AIF depositaries for AIFs with investment lock-up periods of at least five years or that invest in illiquid assets for which custody may not be appropriate.

Depositaries to EU AIFs must be established in the home member state of the AIF. For non-EU AIFs, the depositary should be established either in the home third country of the non-EU AIF, in the home member state of the AIFM, or in a non-EU AIFM’s member state of reference. If the depositary is established in a third country, then in addition to the prudential and supervisory equivalency referred to above, the following requirements apply:

- there must be co-operation, exchange of information and multi-lateral tax agreements in place between (i) the depositary’s competent authorities and (ii) the competent authorities of any member state into which the AIF is to be marketed and, if different, of the home member state of the AIFM;
- the third country must be FATF compliant; and
- the depositary must contractually agree to the liability standards specified in AIFMD.

Depositary Contracts

In every case, there must be a written contract of appointment of the depositary to an AIF. The Level 2 Regulation provides that, if permitted under national law, this can be a framework agreement between an AIFM and the depositary covering all AIFs which the AIFM manages and to which that depositary is appointed.

The Level 2 Regulation prescribes particulars of the contract appointing the depositary, which correspond with the provisions contained in the UCITS management directive (Directive 2010/43/EC), amended as necessary to take into account specific characteristics of AIFMD (eg, the need to describe the types of assets falling within the safe-keeping obligation and the AIFMD specific liability standard and discharge rules). However, the Level 2 Regulation sensibly stopped short of prescribing a model agreement, given the wide range of funds which are regulated under AIFMD.
AIFMD Factsheet: Depositaries

Functions and Obligations of Depositaries

The depositary serves two broad functions: (1) to safekeep the AIF’s assets; and (2) to oversee compliance with the AIF’s constitutional documents and with applicable laws and regulation (collectively the “AIF applicable rules”). An obligation on the depositary to monitor the AIF’s cashflows is also separately set out in AIFMD.

Safekeeping

The duty to safekeep consists of either custody or record-keeping depending on the type of asset owned by the AIF.

The Level 2 Regulation provides that the custody function includes proper asset segregation on the depositary’s or its delegate’s books, due care of assets held in custody and assessment and monitoring of custody risk throughout the custody chain.

The custody function applies to all assets which can be held in custody, whether by physical delivery or by way of registration in a financial instruments account (which must be segregated) in the depositary’s books. The Level 2 Regulation addresses the types of financial instrument which should be included in the scope of the depositary’s custody function, namely transferable securities, money market instruments and units in collective investment undertakings, which are registered or held directly or indirectly in an account in the name of the depositary. Assets which are subject to re-hypothecation rights remain in custody while the rights of re-use remain unexercised.

All assets which cannot be held in custody are subject to the record-keeping obligation. The depositary’s obligations as regards such other assets are to maintain up-to-date records and verify ownership (based on such information to be provided by the AIF or AIFM or, if available, external evidence, as the depositary deems necessary to be able to satisfy itself as to ownership, and subject to procedures to ensure such assets cannot be transferred without the depositary or its delegate being informed). In this regard, there is a strong dependency on the ability of the depositary to obtain information from third parties and a corresponding obligation on the AIFM to procure its provision to the depositary.

The Level 2 Regulation also specifies reporting obligations for prime brokers appointed by an AIF or AIFM, imposing the primary obligation on the AIFM to ensure the provision to the depositary of the mandated information.

Oversight

The oversight, or monitoring, obligations imposed on depositaries will already be familiar to Irish custodians of non-UCITS, mirroring as they do the existing oversight obligations imposed by the Central Bank of Ireland (“CBI”) on the custodians of all Irish authorised funds. These obligations require that a depositary:

• ensure that dealings in units or shares of the AIF are in accordance with the AIF applicable rules;
• ensure unit or share valuation is calculated in accordance with the AIF applicable rules and the valuation principles in AIFMD;
• carry out the instructions of the AIFM unless they conflict with the AIF applicable rules;
• ensure that in transactions involving the AIF’s assets, any consideration is remitted to the AIF within usual time limits; and
• ensure that the AIF’s income is applied in accordance with the AIF’s rules.

The provisions in the Level 2 Regulation acknowledge that, while the processes and procedures for exercising the oversight function should be proportionate to the estimated risks of the relevant AIF and without prejudice to the depositary’s ability to conduct appropriate ex-ante verifications, in principle most verification checks will be ex-post second level controls.

Cash Monitoring

The cash monitoring obligations imposed on depositaries, while not addressed as part of the oversight function, are nonetheless complementary to that function, given that they require the depositary to have a full overview of the cash position and cash movements of the AIF, including subscription monies. The Level 2 Regulation requires that there be effective implementation and periodic review by the depositary of cash monitoring procedures, in particular as regards reconciliations, and the notification of the AIFM of any identified discrepancies that have not been rectified without undue delay. Of necessity, where cash accounts are in the name of the AIF or the AIFM on behalf of the AIF, the depositary will again be dependent on compliance by the AIFM with its obligations to ensure the provision of timely and accurate information to the depositary.

Conflicts

An AIFM cannot act as a depositary. A prime broker acting as a counterparty to an AIF is only permitted to act as a depositary if it has functionally and hierarchically separated the performance of its depositary functions from its tasks as prime broker and any potential conflicts of interest are properly identified, managed, monitored and disclosed to the AIF investors.

Depositaries are also under a general obligation to act honestly, fairly, professionally, independently and in the interest of the AIF and its investors. They cannot undertake potentially conflicting activities with regard to an AIF unless there is functional and hierarchical separation between the depositary functions and such other potentially conflicting activities and the potential conflicts are managed, monitored and disclosed to investors.
AIFMD Factsheet: Depositaries

Delegation

A depositary may only delegate responsibility for its safe-keeping functions to third parties; it cannot delegate its oversight responsibilities. Delegation (and sub-delegation) is subject to a number of conditions, including that an objective reason for the delegation can be demonstrated by the depositary and that the intention behind the delegation is not to avoid the requirements of AIFMD. The depositary must, as is currently the case under CBI rules, exercise "all due skill, care and diligence" in the selection, appointment and ongoing review and monitoring of its delegates and furthermore must ensure that the delegate meets, at all times during the performance of the delegated tasks, certain specified standards (including as regards its expertise, prudential regulation and supervision and as regards segregation of assets).

In circumstances where delegation is required due to third country rules requiring that certain financial instruments be held by a local entity (a "third country custody requirement"), but no local entity which meets the prudential regulation and supervision requirements of AIFMD can be identified, a depositary may still delegate custody provided that the relevant AIF’s investors are duly informed, in advance, of the reasons and justifications for the delegation and the AIF or AIFM on its behalf instructs the depositary to delegate to such local entity. Use of securities settlement systems is not considered to be custody delegation for AIFMD purposes.

The AIFMD has introduced significant changes in the approach to depositary liability for custody, in order to address perceived weaknesses in the existing regime. As a result of these changes, a loss by a depositary or its delegate of a financial instrument held in custody will give rise to an obligation to replace the instrument or pay the value to the AIF without undue delay.

A depositary can only avoid this strict liability standard where it can prove, cumulatively, that the loss was as a result of an external event, beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary. If the loss has been caused by a delegate, there is a limited ability for the depositary to discharge itself from liability if it can prove, again cumulatively that:

- it has met all AIFMD requirements relating to delegation;
- the written contract between the depositary and the delegate transfers liability to the delegate and permits either direct enforcement by the AIF, or by the AIFM or depositary on its behalf, against the delegate; and
- the depositary’s contract with the AIF (or AIFM on its behalf) expressly allows such a discharge and establishes the objective reason for this.

Finally, where a delegation has arisen due to a third country custody requirement, the depositary can again discharge its liability provided the AIF’s constitutional documents expressly allow for a discharge in such circumstances; the delegation requirements associated with a third country custody requirement, identified above, have been met; investors have been pre-advised of the discharge and its justification; and the depositary contract and delegation contract contain, respectively, the required transfer, enforcement and discharge provisions.

Aside from its custody obligations, the AIFMD provides that a depositary will be liable to the AIF or its investors for all losses caused by its negligent or intentional failure to fulfil properly its obligations under the AIFMD.

In terms of enforcement, liability to the investors of the AIF may be invoked either directly or indirectly through the AIFM, depending on the legal relationship between the depositary, the AIFM and the investors.
AIFMD Factsheet: Depositaries

Comment

Many of the depositary-related provisions of the AIFMD reflect pre-implementation practice for Irish custodians, who were therefore well positioned to deal with the operational impacts of AIFMD implementation. The introduction of the AIFMD required custodians / depositaries to review and revise their custody contracts and sub-custody agreements to address a number of AIFMD specific issues, including to describe the types of assets falling within the safe-keeping obligation, specify information requirements and, not least, reflect the AIFMD specific liability standard and discharge rules.

Full details of the Asset Management and Investment Funds Group, together with further updates, articles and briefing notes written by members of the Asset Management and Investment Funds team can be accessed at www.matheson.com.
Matheson’s Asset Management and Investment Funds Group: Key Contacts

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