
Introduction

The EU Alternative Investment Fund Managers Directive (Directive 2011/61/EU or AIFMD) aims to create a harmonised regulatory framework for the management and marketing of private equity, venture capital and other alternative investment funds (AIFs) in the European Economic Area (comprising EU and EFTA members).

The AIFMD entered into force on 22 July 2011. The deadline for transposition was 22 July 2013, the date that the AIFMD took effect in national law across the European Union.

In general, an EEA-based alternative investment fund manager (AIFM) will need to submit an application for authorisation under the AIFMD as soon as is practicable and no later than one year after the transposition date (i.e. by 22 July 2014). On 22 July 2014 it must comply in all other respects with the Directive's requirements.

One of the key provisions of the AIFMD requires the AIFM to ensure that a single depositary is appointed for each AIF it manages, even where the AIF was established before the Directive entered into force. For AIFMs and AIF investors the key questions are the availability of service providers, their capacity, expertise and understanding in relation to private equity investment and the cost of their service.

What is a depositary?

A depositary typically has three core functions¹:

- the safekeeping of the assets of the fund;
- the day-to-day administration of the assets of the fund; and
- the control of the fund's operation (including compliance with investment policies and receipt of funds from / payment of funds to investors).

The need to have a single depositary for each AIF performing these roles will represent a significant, and potentially costly, change for private equity management in many EEA jurisdictions.

Exceptions

A depositary is not required in relation to non-EEA AIFs that are:

- managed by a non-EEA AIFM and marketed in the EEA via national private placement regimes; or
- managed by an EEA AIFM but not marketed in the EEA.

Where a non-EEA fund is managed by an EEA AIFM and marketed in the EEA via national private placement regimes, a depositary must still be appointed, but the Directive's full provisions on depositary liability, delegation and who can be a depositary do not apply. They will apply, however, once the passport is used.

Who can be a depositary?

A depositary for an EEA fund must be:

- (a) an EEA credit institution;
- (b) a MiFID investment firm subject to the same CRD capital requirements as credit institutions; or
- (c) a prudentially regulated and supervised institution of a type that (at the date the AIFMD entered into force) is eligible to be a UCITS depositary under the UCITS IV Directive.

For non-EEA AIFs, the depositary may also be an entity "of the same nature" as one within (a) or (b) above, provided that it is subject to effectively enforced prudential regulation and supervision to the same effect as that under EEA law.

¹ For more information on the tasks and role of a depositary under the AIFMD, please see the AIFMD Essentials, which is available here.

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Additional flexibility is provided for (primarily) private equity funds whose investors have no redemption rights for five years from the date of their initial investment. Private equity AIFMs have the ability to appoint a non-bank, non-investment bank depositary in accordance with Article 21(3)(c), final sub-paragraph.

The depositary to these funds may be an entity (e.g. a fund administrator or auditor) which:

- carries out depositary functions as part of its professional or business activities;
- is subject to mandatory professional registration recognised by law, to legal or regulatory provisions or to rules of professional conduct; and
- can furnish sufficient financial and professional guarantees.

Several such alternative depositary service providers have emerged across the Union and may offer a more suitable and lower cost depositary service for private equity funds compared to banks and investment banks.

Implementation

The Directive provides that the facility to use such an alternative depositary is at the discretion of each Member State. In order to maintain a level playing field it is vital that the AIFMD is consistently implemented across the Member States.

This memorandum focuses on one particular aspect of the AIFMD and gives an overview of how the AIFMD provisions in relation to depositaries have been implemented and will apply across the EU.

It should be noted, however, that not all countries have finalised their national transposition measures². As an evolving document, the emphasis in this edition is on those countries that have completed (or are close to completing) the transposition process: The Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Romania, Slovakia, Spain, Sweden and the United Kingdom.

Note: This briefing has been prepared in cooperation with the EVCA Tax, Legal and Regulatory Committee and the Representative Group. It does not intend to give legal advice or be an exhaustive or definitive explanation of the AIFMD private equity depositary provisions. Some of the information remains subject to change due to the on-going negotiations on (the interpretation of the) AIFMD transposition (rules) in the Member States. For further information please visit www.evca.eu.

² Countries where transposition is delayed include Estonia, Greece, Italy, Lithuania, Poland, Portugal, Romania, Slovenia and Spain.

Structure of the paper

This paper describes how the depositary provisions of particular relevance and importance to the private equity and venture capital industry have been implemented across the EU Member States.

The information is accessible in two different formats:

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Section one: Question-by-question analysis

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Question-by-question analysis










1. In your jurisdiction, has the competent authority exercised its discretion to permit certain AIFMs to use a depositary meeting the requirements of Article 21(3) final paragraph (referred to in this questionnaire as a “PE AIF Depositary”)?

Article 21(3) final paragraph reads as follows:

“In addition, Member States may allow that in relation to AIFs which have no redemption rights exercisable during the period of 5 years from the date of the initial investments and which, in accordance with their core investment policy, generally do not invest in assets that must be held in custody in accordance with point (a) of paragraph 8 or generally invest in issuers or non-listed companies in order to potentially acquire control over such companies in accordance with Article 26, the depositary may be an entity which carries out depositary functions as part of its professional or business activities in respect of which such entity is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct and which can provide sufficient financial and professional guarantees to enable it to perform effectively the relevant depositary functions and meet the commitments inherent in those functions.”






Country	Details
 The Czech Republic	Yes; Article 21(3) has been transposed into section 84 of the Czech Act on Investment Funds and Investment Companies (the “AICIF”). Public notaries are entitled to serve as depositaries for funds of qualified investors (the “FQIs”) under the AICIF.
 Denmark	Yes. The wording of section 46(3) of the Danish Act on Alternative Investment Fund Managers (the “AIFM Act”) is basically identical to Article 21(3) of the Directive. To our knowledge only three companies have thus far obtained permission from the Danish FSA to function / act as a PE AIF Depositary.

Section one: Question-by-question analysis

Country	Details
Finland ³ 	Yes
France 	No
Germany 	Yes. The German legislator has exercised this option in Section 80 para. 3 of the German Capital Investment Code (<i>Kapitalanlagegesetzbuch, "KAGB"</i>). The alternative depositaries are called "trustees" (<i>Treuhänder</i>). This language was used to clarify that the position of alternative depositaries is not limited to certain professions or professional groups.
Hungary 	No
Ireland 	Yes. The text of Regulation 22(3)(b) of the European Union (Alternative Investment Fund Managers) Regulations 2013 tracks the language of Article 21(3) (c) (ii) of AIFMD.
Italy 	In Italy, in accordance with the Transposition Decree approved by the Council of Ministers on 28 February and published on 25 March 2014 in the Official Gazette (Legislative Decree No. 44/2014), the depositary functions can be exercised only by institutions supervised by the <i>Banca d'Italia</i> , i.e. Italian banks, European banks with a subsidiary established in Italy, Italian investment firms and branches of investment firms established in Italy. In other words, the competent authority did not exercise its discretion to permit certain AIFMs to use a depositary meeting the requirements of Article 21(3) final paragraph.
Latvia 	No, the discretion provided in the final paragraph of Article 21(3) of the AIFMD has not been exercised in Latvia.
Luxembourg 	Yes. Luxembourg does allow this provision in its transposition of the AIFMD. Article 19(3) of the Law of 12 July 2013 (the Luxembourg 'AIFM Law') transposes Article 21(3) final paragraph of the AIFMD into Luxembourg law.
The Netherlands 	Yes





³ The responses are based on the Government Bill and the current draft law, and may be subject to changes in connection with the consideration of the Government bill by the Finnish Parliament.

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Country	Details
Romania 	<p>The draft norm regarding alternative investment fund managers (hereinafter referred to as the "Draft Transposition Norm") does not allow for the possibility provided under Article 21(3) final paragraph of the AIFMD.</p>
Slovakia 	<p>Yes</p>
Spain 	<p>No. The Implementing Draft Law transposing Directive 2011/61/EU (hereinafter "Draft") establishes that Spanish AIFMs, in relation to a PE AIF Depository, shall follow the requirements set out in the European Commission's Delegated Regulation n° 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council. However, the Draft does not regulate this type of depository.</p>
Sweden 	<p>Yes. Sweden has basically implemented Article 21(3) final paragraph word by word.</p>
The UK 	<p>Yes.</p> <p>The UK has introduced a new regulated activity of "acting as a trustee or depository of an AIF". Any person who wishes to carry on this activity must be appropriately authorised by the UK Prudential Regulation Authority or the Financial Conduct Authority (the "FCA") under the Financial Services and Markets Act 2000 ("FSMA").</p> <p>Amongst those who may be authorised by the FCA to carry on this regulated activity are persons who are to be appointed as depository only to UK AIFs which meet the conditions specified in Article 21(3) final paragraph AIFMD. These are referred to by the FCA as "PE AIF depositaries" (even though they may act as depository not only to private equity AIFs but also, for example, to real estate AIFs meeting the qualifying conditions). PE AIF depositaries are subject to a regulatory capital requirement which is in practice an own funds requirement of EUR 125,000.</p> <p>Key parts of the FCA rule book include: FUND 3.11.12R to 3.11.15G and IPRU(INV) 5.2.3R(3)(a)(ia).</p> <p>Until 22 July 2014 there is transitional relief which, subject to certain conditions, permits firms already authorised by the PRA or the FCA for other regulated activities to act as a PE AIF depository.</p> <p>In practice, a number of PE AIF depositaries have entered the market. Many such businesses have been established by fund administration firms. There is considerable competition between the new PE AIF depositaries (and between them and banks).</p>

Section one: Question-by-question analysis

2. If the answer to Question 1 is yes, have the authorities in your jurisdiction given any guidance on the interpretation of the conditions of that paragraph?

Country	Details
The Czech Republic 	We are not aware of any guidance. However, the interpretation of section 84 appears to be relatively straightforward.
Denmark 	Yes. The Danish FSA has issued Guidelines on Depositories for Alternative Investment Funds dated 16 June 2013 (the "Guidelines"), which describe in more detail the entities allowed to act as depositories and the functions of depositories.
Finland 	According to the Government Bill a central securities depository as defined in the Finnish Act on the Book-entry System and the Clearing System may, without any separate permission, act as a special depository. In addition, any other limited liability company that has been granted a license to act as a depository could serve as a special depository. The proposed legislation only includes some general provisions relating to the owners of the depository, the management of the depository and the depository company itself. The Finnish Ministry of Finance may issue a decree with more detailed provisions on the required information that should be provided for the license application.
France 	Not applicable. Please see the answer to Question 1.

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