Depositary made easier: How AIFMD 2.0 will impact managers

Amendments to AIFMD mean private markets fund managers in Europe can use depositary services outside their fund's home country. Angel Ramon Martinez Bastida and Eva Devine run through the changes, the limitations, and how managers can leverage them for better performance.

AIFMD came into force in 2011, with the aim to create a comprehensive and effective regulatory and supervisory framework for alternative investment fund managers within the European Union. A new version has now been adopted and the amendments include changes to delegation, authorisation, disclosure to investors, reporting, and the introduction of a new loan origination regime. AIFMD 2.0 entered into force on 15 April 2024, but the important date for EU member states is 16 April 2026, by which date the provisions must be transferred into their national law.

For private market managers the changes are noteworthy as they allow funds to use the services of cross-border depositaries. Though it doesn't go so far as to allow a depositary passport, for EU AIFs it allows the national competent authority (NCA) of a fund's home country to allow institutions established in another member state to be appointed as a depositary where certain conditions are met.

How does AIFMD 2.0 affect cross-border depositary services?

1. Cross-border depositary services: AIFMD 2.0 introduces the option to provide depositary services across borders. However, it does not introduce a cross-border depositary passport. Instead, it requires enhanced collaboration between depositaries and their respective national competent authorities (NCA), as well as the competent authorities of the fund and the AIFM, if they aren't the same.

2. Case-by-case assessment: Applying cross-border depositary services under AIFMD 2.0 is subject to the "necessity principle" and the AIFM will need to prove the lack of relevant depositary services in the member state of the fund, to fulfil the requirements of its investment strategy. After this, the relevant cross-border depositary authorisation will be granted based on the fund’s investment strategy. Following this process, the appointed depositary will need to co-operate not just with its own NCA but also those of the fund and the AIFM.

3. Third country depositaries: AIFMD 2.0 introduces new requirements for appointing a depositary in a third country by a non-EU fund. The third country must not be identified as a high-risk third country based on the EU’s Anti-Money Laundering Directive, nor be mentioned in Annex I to the EU list of non-cooperative jurisdictions for tax purposes.

4. Replacement of non-compliant depositaries: If a depositary is subsequently identified as being in a high-risk third country or a country is added to the tax blacklist, a new depositary must be appointed within an appropriate period, taking account of investors’ interests. This period can’t be longer than two years.

5. Country-by-country approach: The AIFM needs to demonstrate a lack of suitable depositary services within the fund’s home member state. This would be difficult to argue in established financial centres such as Luxembourg and Ireland but will be easier in less developed financial centres where the offer of depositary services is more limited.

What makes a superior depositary service?

A good depositary service should have several key qualities to ensure it effectively safeguards assets and provides reliable oversight.

Here are 6 to consider:

1. Knowledge and expertise: The depositary should have a deep understanding of relevant regulations and industry standards. Their expertise can be invaluable in helping clients navigate complex regulatory frameworks.

2. Flexibility and adaptability: The depositary should be able to adapt to the evolving needs of clients and the market. This includes being able to handle increased volume and complexity while maintaining quality and compliance.

3. Independence: The depositary must be independent of the fund and its manager to avoid conflicts of interest. This ensures that they can act in the best interests of investors.

4. Robust control framework: A good depositary service should have strong systems in place for cashflow monitoring, asset verification, and oversight.

5. Transparency and auditability: The service should provide clear dashboards and audit trails to ensure transparency and accountability. This helps in spotting and flagging issues or discrepancies quickly.

6. Client-centric approach: The depositary should focus on providing excellent client service. This means having a clear understanding of the clients and their activities to support them to adhere to the regulations and protect investors. They should be proactive, efficient, and able to meet tight deadlines.

Quick reference of the different competencies of an AIFM and a depositary:

For private market fund managers, choosing a depositary service is an important part of streamlining the service they provide to their investors. To find out more about the new regulations or our market-leading depositary services, please contact us below.