



Banc Ceannais na hÉireann  
Central Bank of Ireland

Eurosystem

# Depositaries for AIFs under Regulation 22(3)(b) of the AIFM Regulations

## Guidance

2 February 2021

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# Guidance: Depositaries for AIFs under Regulation 22(3)(b) of the AIFM Regulations

This Guidance sets out the Central Bank's requirements for depositaries seeking authorisation under Regulation 22(3)(b) of the AIFM Regulations<sup>1</sup> ("Depositaries of Assets other than Financial Instruments" or "DAoFI").

## General

Following the Notice of Intention issued by the Central Bank of Ireland on 19 November 2018 (the "Notice") and responses received in relation to the Notice, the Central Bank has determined to make provision for entities to act as a depositary in the manner set out under Regulation 22(3) (b) of the AIFM Regulations. This Guidance Note sets out the Central Bank's requirements for firms seeking authorisation as a DAoFI.

The Central Bank recognises that DAoFI may only act for specific types of AIFs (i.e. those which have no redemption rights exercisable for at least five years from the date of initial investment and which generally do not invest in financial instruments that can be held in custody). This category of depositary is provided in AIFMD to take into account the nature of assets held by certain AIFs which attract less onerous depositary requirements (both in terms of liability standards and tasks to be performed). Arising from this a proportionate approach to the role of the depositary can be applied.

The AIF to which a DAoFI is appointed may, to a limited extent, invest in financial instruments which are the subject of custody obligations<sup>2</sup>. This may arise, for example, where the AIFs in question fulfil obligations regarding assets invested in, or have obligations relating to the ongoing management of the AIF and its assets (for example, payment of fees and expenses). The Central Bank expects that a DAoFI will generally seek to delegate the custody of financial instruments to a depositary. Provision for the holding of financial instruments by a DAoFI for and on behalf of AIFs is also provided for in this Guidance.

## 1. Eligible firms

An applicant must:

- a. be a company incorporated in Ireland which is authorised as an investment business firm under the Investment Intermediaries Act 1995; and

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<sup>1</sup> European Union (Alternative Investment Fund Managers) Regulations 2013.

<sup>2</sup> For example, units or shares in collective investment schemes unless, in accordance with applicable national law, they are only directly registered with the issuer itself or its agent, in the name of the AIF or the AIFM acting on behalf of the AIF (in which case the provisions of Article 88(2) of the AIFMD Level 2 Regulation apply).

- b. in addition to satisfying the Central Bank in relation to its suitability (including the fitness and probity and expertise of its staff), must demonstrate to the Central Bank:
  - a. its capacity and ability to meet safekeeping and oversight obligations as provided for under the AIFM Regulations;
  - b. it has effective policies and procedures to ensure the depositary oversight role is carried out; and
  - c. how it has the necessary systems access to effectively oversee the AIFM and any of its delegates, particularly those which are appointed to carry out fund administration or portfolio management.

## 2. Applicable AIF Rulebook requirements

A DAoFI must comply with the following requirements of Chapter 5 of the AIF Rulebook:

- a. section (i);
- b. section (ii), paragraph 1(b) – (g);
- c. section (iii), paragraphs 1 and 2;
- d. section (iv), paragraphs 1, 4 and 5;
- e. section (v); and
- f. section (vii).

## 3. Capital

- a. A DAoFI must meet the capital requirements set out in Chapter 5, section (ii), paragraph (1)(a) of the AIF Rulebook.
- b. Where the AIF in respect of which a DAoFI is appointed invests in financial instruments the Central Bank expects the DAoFI will seek to delegate custody of those instruments. Where it does not, the DAoFI may elect either to:
  - i. put in place a guarantee similar to that required by Regulation 22(3)(a)(iii) of the AIFM Regulations 2013 (i.e. a guarantee of liabilities of the DAoFI by an institution with paid up share capital not less than the limits specified in Section 9E of the Central Bank Act 1971); or
  - ii. hold sufficient financial resources (as calculated in accordance with Section 2.3 of Annex I of Chapter 5 of the AIF Rulebook) to cover the value of financial instruments in custody.

## 4. Professional indemnity insurance cover

A DAoFI may elect to cover potential risks of professional liability by either:

- a. additional own funds (calculated in the same manner as provided for AIFMs in Article 14 of Commission Delegated Regulation 231/2013); or
- b. appropriate professional indemnity insurance (calculated in the same manner as provided for AIFMs in Article 15 of Commission Delegated Regulation 231/2013).

The adequacy of coverage through additional own funds or professional indemnity insurance should be reviewed at least once a year by a DAoFI.

## 5. Financial instruments

Where an AIF in respect of which a DAoFI is appointed invests in financial instruments which are the subject of custody obligations the DAoFI may either:

- a. appoint a sub-custodian to custody these assets and concurrently discharge its liability to the AIF in respect of these assets; or
- b. hold additional capital (as set out at paragraph 3(b)).

## 6. Assets other than financial instruments

- a. The Central Bank does not propose to establish an exhaustive list of assets of the type envisaged by Regulation 22(3)(b) of the AIFM Regulations which would automatically be acceptable for a DAoFI to safe-keep.
- b. The Central Bank considers that the asset classes of the types of funds envisaged by Regulation 22(3)(b) of the AIFM Regulations and in respect of whom the DAoFI will be appointed will include documents of title for asset classes such as infrastructure, intellectual property, plant and equipment, land, art and wine. A list of asset classes will be available in a Central Bank Q&A and will be updated from time to time.
- c. In all cases (including for those assets referred to in the Central Bank Q&A), a DAoFI must provide satisfactory evidence to the Central Bank of its capacity to safe-keep and provide ongoing monitoring of assets for which it will provide services. This will assist the Central Bank in assessing, on the basis of evidence provided, the ability of the DAoFI to safe-keep these assets. In this regard the Central Bank will consider the extent to which the DAoFI has appropriate controls, policies and procedures to ensure that:
  - i. the AIF has a clear title of ownership to the assets that is properly registered and documented;
  - ii. the AIF's ownership of the assets can be verified and confirmed on an ongoing basis;
  - iii. the assets are safeguarded in order to preserve them; and
  - iv. risks to safeguarding of assets are identified, managed, monitored and mitigated.

Submissions should also include evidence of how proposals in this regard compare to industry best practice.

## 7. AIFs to which a DAoFI may be appointed

A DAoFI may only be appointed to authorised AIFs which are Qualifying Alternative Investor AIFs. It may not be appointed as depositary to authorised AIFs which are Retail Investor AIFs.

## 8. Disclosure

A DAoFI must ensure the AIF in respect of which it is appointed clearly discloses to investors the regulatory status of the DAoFI, the more limited nature of the DAoFI's activities (when compared to the requirements of a depositary which provides so-called "full scope" activities) and the standard of liability which applies to the DAoFI.

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