

Markets Policy Division,  
Central Bank of Ireland,  
Block D,  
Iveagh Court,  
Harcourt Road,  
Dublin 2.

29th May 2014

**Re: Consultation on carrying out depositary duties in accordance with Article 36 of the AIFMD (Consultation Paper CP 78)**

Dear Sir or Madam,

The IFIA welcomes both the publication of, and the opportunity to comment on, the Central Bank's Consultation Paper "*Consultation on carrying out depositary duties in accordance with Article 36 of the AIFMD*" (Consultation Paper CP 78) (the "**Consultation Paper**"), and following consultation with our member firms, we would like to make the following comments to matters raised therein.

By way of a general comment, we are keen that the "Article 36 Depositary services" market be afforded the opportunity to develop in Ireland, while recognising that the Central Bank must ensure that the twin objectives of financial stability and investor protection are not impaired as a result. That being the case, we are satisfied that, given the large, mature, and well-regulated fund services provider sector existing in Ireland, the Irish funds industry stands well-placed to provide the services concerned. Where particular regulatory standards to protect against risks specific to this service are required, we believe these can be adhered to and serve to help the market develop, so long as such obligations are imposed in a specific, targeted manner, and not one which places unnecessary restrictions on the providers concerned.

With respect to such regulatory standards, we ask that the Central Bank pay particular regard to the requirements imposed by other European competent authorities for the purposes of Directive 2011/65/EU ("**AIFMD**"), and that the Central Bank not act in a manner which puts it out of step with its fellow supervisory authorities across Europe and at a competitive disadvantage without any meaningful benefit in terms of achieving regulatory objectives.

This is especially important given the drive to achieve regulatory convergence and harmonisation of regulatory standards across Europe,<sup>1</sup> and the nascent stage of development of the "Article 36 Depositary services" market at present. We remain of the opinion that it is permissible for the Central Bank to construct a targeted, protective and responsive regulatory system with respect to "Article 36 Depositary services", and this may be done without erecting an unnecessarily restrictive domestic regime, which would effectively prevent this service being offered by Irish fund service providers.

We think it would be useful to look at some of the Depositary duties which are required to be undertaken by one or more entities according to Article 36 of the Directive.

**(i) Article 21 (8)(a) of AIFMD – Safekeeping of Financial instruments that can be held in custody:**

The following sentence on page 2 of the Consultation Paper is not wholly accurate and should be revisited:

*If an Irish entity proposes to provide the safe-keeping duties set out in Article 21(8) it must have authorisation to provide "custodial operations involving the safe-keeping*

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<sup>1</sup> See Recital 68 of AIFMD, for example, in this regard.

*and administration of investment instruments” under the Investment Intermediaries Act 1995.*

The inaccuracy concerned arises given that an Irish entity may also provide the services outlined above where it is authorised under the relevant provisions of the European Communities (Licensing and Supervision of Credit Institutions) Regulations, 1992,<sup>2</sup> Central Bank Act 1971, or European Communities (Markets in Financial Instruments) Regulations 2007<sup>3</sup> (the “**MiFID Regulations**”). That is, there are three categories of authorisation beyond those recounted by the Central Bank which, where held, would permit an entity to provide depositary services and the Central Bank’s Q&A document might be updated accordingly.

**(ii) Article 21 (9) of AIFMD – Oversight Duties:**

The proper provision of these duties requires an entity to perform ex post controls and verifications of processes and procedures that are under the responsibility of the AIFM, the AIF or an appointed third party. Such processes and procedures include but are not limited to those in relation to how shares or units are issued, sold or redeemed and processes and procedures in relation to how the value of units or shares are calculated. In the majority of circumstances these processes and procedures are those of the administrator. Therefore we agree with there is an inherent conflict of interest when the same administration entity is responsible for the performance of a process or procedure and is permitted to oversee the performance of such a process or procedure.

While we do see merit in the proposal that the provision of such oversight duties should be performed in a separate subsidiary entity, we are of the view that this is an overly cumbersome and expensive option. Furthermore we are of the view that it is more appropriate that a completely separate entity from the administrator performing administration functions to the AIF should perform such oversight duties.

Such an entity should be authorised and supervised by the Central Bank or should be 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 oversight duties and meet the commitments inherent in those duties.

Finally, we ask that the Central Bank considers the matters outlined in this correspondence in a prompt manner. Where, having considered matters, the Central Bank decides to act on the basis of what has been outlined in this submission, we ask that this be done soon so as to limit any unintended consequences for fund services providers in the State. Further, in light of the submissions outlined above, we ask that the Central Bank reconsider the manner in which it responds to queries from other European supervisors where it is asked to confirm the capacity, or otherwise, of Irish service providers to perform relevant services.

We hope the Central Bank finds these comments helpful, and the IFIA remains at your disposal to discuss the issues raised in this response further.

Yours faithfully,



Pat Lardner  
**Chief Executive**

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<sup>2</sup> S.I. No. 395 of 1992.

<sup>3</sup> S.I. No. 60 of 2007.