

AIFMD 2.0 Overview

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Depositories

November 2025

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Executive summary

In November 2023, the European institutions reached a political agreement on the text of a new [Directive](#) to amend the existing AIFMD (**the Amending Directive**).

The Amending Directive was published in the Official Journal in March 2024. Its provisions will come into effect on **16 April 2026**.

Among the issues agreed was a set of amendments to the depositary regime.

Please note that, where we refer to articles of the AIFMD, we are referring to the articles as amended by the Amending Directive.

Where will I find the changes?

The elements which make up the **depositary regime** are set out across a number of articles within the amended Level 1 text of the AIFMD, in particular:

- [Article 21](#) (Depositary)

We look, below, at the **new obligations** that the changes to this article impose.

In addition, aspects of the depositary regime will be among the matters on which the Commission has to report when it comes to conduct its review under [Article 69-a](#) (albeit this won't be until **16 April 2029**, i.e., **five years** after the Amending Directive entered into force).

Clicking on a link above will take you to the relevant section of the note.



What changes have been made?

1. Article 21 (Depositary)

Appointing a depositary established in a different Member State from the EU AIF

Currently, an AIF's depositary must be established:

- in the **AIF's home Member State** (in the case of an EU AIF) or
- in the **third country where the AIF is established** or in the AIFM's home Member State (for non-EU AIFs).

Under AIFMD 2.0, an EU AIF's home Member State has discretion (but is not required) to entitle its NCA to allow the AIF to appoint an EU credit institution as its depositary even when that credit institution is **established in another Member State**, provided that:

- the NCA has received from the AIFM "**a motivated request**" to allow the appointment of a depositary in another Member State
- the request demonstrates a lack of **relevant depositary services** in the AIF's home Member State which can effectively meet the needs of the AIF given its investment strategy and
- the **depositary market** in the AIF's home Member State does **not exceed EUR 50 billion** (or the equivalent in a different currency) of assets safekept on behalf of authorised or registered EU AIFs managed by an EU AIFM.

Even where these conditions are met, a depositary from another Member State can only be appointed after a **case-by-case assessment** of the lack of relevant depositary services in the AIF's home Member State, given the AIF's investment strategy.

When permission is given to appoint a **depositary from another Member State**, the NCA must notify ESMA.

What changes have been made?

Appointing a depositary established in a third country

In addition to the existing conditions as to when a depositary established in a third country can be appointed for a non-EU AIF, the Amending Directive specifies that the third country must:

- not be a **high risk third country** under the **EU's Anti-Money Laundering Directive (AML)** and
- not be on Annex I of the **EU's list of non-cooperative jurisdictions for tax purposes** (the so-called '**tax blacklist**').

These conditions apply as at the **date of the depositary's appointment** - if the third country where the depositary is established was not on the list of high risk countries or on the tax blacklist at the time it was authorised but is subsequently added to either, a new depositary must be appointed "within an appropriate period of time" and within no more than two years in any event.

Delegation by the depositary

(a) Safekeeping function

A depositary may currently delegate the **safekeeping function** to a third party subject to certain conditions.

All the existing conditions **continue to apply**. However, the condition that the depositary must exercise all due skill, care and diligence in the selecting and appointing a third party delegate will not apply where the third party is a **central securities depository (CSD)** acting as an investor CSD as defined in the Level 2 measure made under Article 29(3) and Article 48(10) of the **CSDR**.

What changes have been made?

Delegation by the depositary (cont'd)

(b) Custody function

Where services are provided:

- by a CSD acting as **an investor CSD**, this **will** be considered a delegation of the depositary's **custody function** and
- by a CSD acting as **an issuer CSD**, this does **not** constitute a delegation of the depositary's **custody function**.

Making information available to NCAs

A depositary must already **make available** to its NCA, on request, all information which it has obtained while performing its duties.

Under **AIFMD 2.0**, this obligation is amended as follows:

- the depositary must make available information on request not only to its own NCA but also to the NCA of the AIF and the AIFM and
- the NCAs may request any information that the depositary has obtained “while performing its duties” – the requirement for the information to be **'necessary'** for the NCAs has been removed.

A low-angle, upward-looking photograph of several modern skyscrapers with glass facades, set against a bright blue sky with scattered white clouds. The buildings are positioned on the left side of the page, creating a sense of height and scale.

Review

Article 69-a of the AIFMD provides for the Commission, with input from ESMA, to review the functioning of a number of the rules in the Directive and the experience acquired in applying them.

That review will include an assessment of:

- the **functioning of the derogation** by which Member States can allow an AIF to have its depositary in **another Member State** and
- the potential **benefits and risks** (including the impact on investor protection, financial stability, supervisory efficiency and the availability of market choices) of **amending the scope** of that derogation.

The review, though, isn't due to be started until **16 April 2029**, i.e., **five years** after the Amending Directive **entered into force**.

Note: The Amending Directive **entered into force** on **15 April 2024**, the twentieth day after its publication in the Official Journal. Its provisions will become effective on **16 April 2026**.

Simmons Talking Points

EU AIFs – depositary appointment

- As it currently stands, AIFMD requires that EU AIFs may only appoint a depositary established in the same Member State as them. If you're setting up an AIF in a Member State with a smaller depositary market, this could well mean you have a very limited range of depositaries to choose from. This might even impact your decision as to whether to establish an AIF in a particular Member State at all.
- AIFMD 2.0 opens the door for more flexibility to appoint any EU depositary (if certain conditions are met) – but ultimately the text hands over the decision to the individual Member States (and their NCAs). It remains to be seen how much take-up there will be.

Non-EU AIFs - depositary appointment

- AIFMD 2.0 will change the conditions for appointment of depositaries in third countries – the third country must not be a high-risk third country under the AML or on the so-called tax blacklist. These are ongoing requirements and if they cease to be satisfied a new depositary will need to be appointed within an appropriate period of time and within two years at the latest.
- If you manage any non-EU AIFs, you should review and update your existing processes to reflect this. When appointing third-country depositaries, you could consider whether any additional representations or warranties should be sought on these matters.

Where can I find more information?

See the other notes in our **Overview of AIFMD 2.0** series:

- **How AIFMD 2.0 applies to non-EU AIFMs**
- **The Loan Origination regime**
- **Authorisation of an AIFM and delegation**
- **Liquidity Management Tools**

These are available online [here](#) – or ask your usual contact at Simmons & Simmons for a copy

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