

ESMA updates AIFMD and UCITS Q&A

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The European Securities and Markets Authority (ESMA) has published an updated version of its questions and answers (Q&A) documents related to the application of the Alternative Investment Fund Managers Directive (AIFMD) and the Undertakings for the Collective Investment in Transferable Securities (UCITS) Directive.

In order to further align approaches of European supervisory authorities, ESMA has clarified its position on the delegation, performance and supervision of depositary functions, supporting tasks and safekeeping functions.

Delegation of supporting tasks

While depositaries of Alternative Investment Funds (AIFs) and UCITS are not permitted to delegate their depositary functions, supporting tasks linked to depositary tasks, such as administrative or technical functions performed by the depositary as a part of its depositary tasks, are not subject to the specific limitations and requirements.

ESMA has clarified that this principle, stated in the AIFMD, applies to both depositaries of AIFs and UCITS, under the following conditions: (i) the execution of the tasks must not involve any discretionary judgement or interpretation by the third party in relation to the depositary functions; (ii) the execution of the tasks must not require specific expertise in regard to the depositary function; and (iii) the tasks have to be standardised and pre-defined.

Delegation of tasks which would give third parties the ability to transfer assets belonging to AIFs and UCITS, without the depositary's intervention, is subject to delegation requirements set out in both directives^[1].

Establishment requirement, intra-group supervision and delegation

As both directives impose requirements related to the country of establishment of the depositary^[2], for depositaries which are branches established in a Member State (MS) other than that of its head office, ESMA has highlighted that, in order to remain compliant, a fund depositary which is such a branch may allocate its depositary functions to the head office, if its operational infrastructure and internal governance system is adequate to carry out depositary functions autonomously from its head office and to ensure compliance with national rules implementing the directives.

When it comes to supervision of branches, considering passporting of depositary activities is not granted, where those functions are performed by a branch established in the home MS of a fund different from the MS of the head office, in order to ensure compliance with the establishment requirement, the competent authority of the MS where the branch is established should be responsible for supervising the activities of the branch with regard to its depositary functions, including the allocation of depositary functions to its head office or vice versa.

Finally, ESMA has highlighted that allocation of depositary functions to a legal entity belonging to the same group should be considered as delegation, and these legal entities as "third parties" under the AIFMD and UCITS directives.

Should you have any questions on the above, please contact Ogier in Luxembourg.

[1] Article 21(11) of the AIFMD and Article 22a(2) of the UCITS Directive

[2] Article 21(5) of the AIFMD and Article 23(1) of the UCITS Directive

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