



Banc Ceannais na hÉireann  
Central Bank of Ireland

Eurosystem

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# AIFMD Questions and Answers May 2013



## AIFMD Questions and Answers

This document sets out answers to queries likely to arise in relation to the implementation of the AIFMD. It is published in order to assist in limiting any uncertainty until definitive positions and practises are finalised. It is not relevant to assessing compliance with regulatory requirements. In addition to being published in '*Markets Update*' it will be posted on the Central Bank website and will be updated there from time to time. You should check the website from time to time in relation to any matter of importance to you to see if the position has altered. The Central Bank reserves the right to alter its approach to any matter covered in this Q&A at any time.

### **Acronyms**

*(Below we provide explanations of some of the key terms used in the remainder of this document.)*

#### **ID 1001**

*Q. What does 'AIFMD' refer to?*

A. In this document 'AIFMD' refers collectively to the Alternative Investment Funds Managers Directive (Directive 2011/61/EU) and the Commission Delegated Regulation (EU) No 231/2013. In due course Directive 2011/61/EU will be transposed into Irish law. The transposing AIFMD Regulations will then become a relevant point of reference for understanding the relevant law.

#### **ID 1002**

*Q. What does 'AIF' refer to?*

A. 'AIF' stands for Alternative Investment Fund. Any structure for collective investment, which is not a UCITS, is probably an AIF.

#### **ID 1003**

*Q. What does 'AIFM' refer to?*

A. AIFM stands for Alternative Investment Fund Manager as defined in the AIFMD.

#### **ID 1004**

*Q. What is a 'RIAIF'?*

A. RIAIF stands for retail investor alternative investment fund which is an AIF authorised by the Central Bank of Ireland and which may be marketed to retail investors. This terminology was introduced in the Central Bank's consultation on the AIFMD.

#### **ID 1005**

*Q. What is a 'QIAIF'?*

A. QIAIF stands for a qualifying investor alternative investment fund which is an AIF authorised by the Central Bank of Ireland and which may be marketed to investors who



meet the qualifying investor criteria set out in the AIF Rulebook. It is similar to a 'QIF'. This terminology was introduced in the Central Bank's consultation on the AIFMD.

### **ID 1006**

*Q. What is a 'Registered AIFM'?*

A. A 'Registered AIFM' is an AIFM which only acts as AIFM to AIFs which are smaller than a threshold size set out in the AIFMD. Registered AIFM are not required to comply with all the regulatory requirements with which an 'Authorised AIFM' must comply. As set out below, during the transition periods, certain other AIFM are only required to comply with the Central Bank imposed obligations of a 'Registered AIFM' as a transitional measure.

## ***Applications***

### **ID 1007**

*Q. How do I apply for authorisation under the AIFMD?*

A. You apply by filling out the application forms which are now available. The forms are available [here](#).

The Central Bank has put in place an informal process to receive and process these applications. Once the Central Bank has been appointed as the competent authority for issuing authorisations under the AIFMD, it will be in a position to formally consider applications which have been lodged and informally processed. This appointment will happen before 22 July 2013.

### **ID 1008**

*Q. Can I fill in the application form before all my arrangements are in place?*

A. While the substance of the AIFMD requirements must be ready, it will be possible to apply for authorisation notwithstanding that details in relation to some arrangements, e.g. reporting procedures, are not finalised.

## ***Application process***

### **ID 1009**

*Q. When do I have to have submitted my application to be sure of getting an authorisation by 22 July, 2013?*

A. The Central Bank will continue to apply its 24 hour turnaround for QIAIFs. All other applications will be dealt with promptly. However, there is no date at which such previously submitted applications are guaranteed authorisation by 22 July 2013.

While there is no guaranteed timeline for these other entities (i.e. an AIFM or a RIAIF), the Central Bank will prioritise the most urgent applications, in so far as practical. The amount of time it will take to process the application will depend on the complexity and

nature of the proposal as well as the number of other applications which are received. Therefore, entities which have a strong business need to be authorised by 22 July 2013 are encouraged to submit their application at the earliest possible date and to indicate the urgency of the application at the time of submission. Applicants should explain the nature of the urgency in as much detail as practical in order to allow the authorisation teams to prioritise their work effectively.

### **ID 1010**

*Q. Who do I contact if I have a query in relation to the application process?*

A. You should send your queries to: [AIFauthorisations@centralbank.ie](mailto:AIFauthorisations@centralbank.ie); [AIFMauthorisations@centralbank.ie](mailto:AIFMauthorisations@centralbank.ie) as relevant.

### **ID 1011**

*Q. When is the last date for receipt of applications for authorisation under the NU Series of Notices?*

A. Completed applications for QIFs must have been received by 3pm on the 20 July 2013.

### **ID 1012**

*Q. Will applications for authorisation for non-QIFs under the NU Series of Notices which have been received by the 20 July be processed and authorisations issued even if not issued by the 22 July?*

A. This depends on the terms of the transposing AIFMD Regulations. Unless there is a legislative obstacle to doing so, the Central Bank will process such applications and issue authorisations.

### **ID 1013**

*Q. How can I ensure that I can continue to market my AIF from 22 July 2013 but subject to the AIFM passporting provisions?*

A. The 20 day time-limit in Article 32 is a maximum period within which marketing passporting notifications have to be processed. The Central Bank will seek to process these notifications more quickly to meet urgent priorities. Applicants are advised to submit their applications for authorisation early and to set out clearly where they have a concern regarding an interruption to marketing.

## ***Rules***

### **ID 1014**

*Q. What rules will apply to me as an AIF or an AIFM? There was guidance in the NU Series of Notices and related guidance notes that I relied on. Where do I get guidance now?*

A. The AIFMD sets down a range of regulatory requirements which will apply to all AIFs and AIFMs. Many of these overlap with regulatory requirements which currently apply to non-UCITS investment funds and which have, up to now, been set out in the NU Series of Notices. Because of the overlap, the Central Bank has conducted a

consultation process to determine to what extent it will alter its existing non-UCITS investment funds regime to take into account the protections provided by the AIFMD. The original consultation document can be accessed here: [CP60](#)

Following the consultation, an overview of the proposed approach was set out in a “draft AIF Handbook” which was published on 1 February 2013. This covered all matters which had previously been covered in the NU Series of Notices and related guidance notes, including references to legislative requirements, guidance and some procedural matters. It is available here: [AIF Handbook Draft 2](#)

Since then, the Central Bank has prepared what is called the “AIF Rulebook”. This AIF Rulebook sets out the conditions which will be applied to an AIF or AIFM or other relevant entities when an authorisation is issued.

Please note the following:

- The AIF Rulebook does not include legislative requirements which apply directly. You must familiarise yourself with these legislative requirements and comply with them. You are advised to procure appropriate legal and professional compliance advice to inform your decisions in this regard.
- The AIF Rulebook does not include any of the matters of guidance which had been included in the draft AIF Handbook. However, you may continue to make use of the guidance set out within the draft AIF Handbook to inform your approach. Please note that nothing in the draft AIF Handbook supersedes a requirement in the AIF Rulebook.
- In future guidance material will be published from time to time in the “**Markets Update**”.

The definitive version of the conditions which will apply to your authorisation will be set out in a letter of authorisation which will be provided to you when an authorisation is issued. Meanwhile the AIF Rulebook provides you with the information you need on what those conditions will be. The AIF Rulebook is available on the AIFMD webpage [here](#).

## **ID 1015**

*Q. Will the AIF Rulebook change?*

A. Yes the AIF Rulebook will change over time as there continue to be issues where further work is being done. Over the longer term, the Central Bank is in a constant process of dialogue with industry and constantly monitors market developments to ensure that its rules are appropriate.

However, the AIF Rulebook, as now issued, benefits from a consultation process which has covered the bulk of the issues raised by the AIFMD and should, therefore, be relatively stable over the coming months.

Updates to the AIF Rulebook will appear in updated editions on the Central Bank website and these will be announced in the ‘*Markets Update*’ newsletter.

***AIFs which fall within the scope of AIFMD*****ID 1016**

*Q. How do I find out whether my investment structure falls to be regulated under the AIFMD?*

A. If in doubt, you must review your status and seek appropriate legal advice. Should you operate without an authorisation when one is required, you will be in breach of the law. The Central Bank will pursue any such matters vigorously.

In considering your position, you may wish to have regard to the guidance on key concepts of the AIFMD which is expected to issue from ESMA shortly.

You may assume that if your investment structure requires an authorisation under the current Irish investment fund legislation and is not a UCITS it is within the scope of AIFMD.

**ID 1017**

*Q: Are there vehicles which are currently not authorised under Irish domestic investment fund legislation which may fall within the definition of AIF and therefore fall within the scope of the AIFMD Regulations?*

A. The definition of an AIF in the AIFMD is wide. It provides that an AIF means collective investment undertakings, including any investment compartment thereof, which:

- (i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- (ii) do not require authorisation pursuant to Article 5 of Directive 2009(65/EC) (UCITS).

You should not assume that because you have not required an authorisation up to now that you do not require authorisation. Please check and get legal advice, if in any doubt.

**ID 1018**

*Q. What is the Central Bank doing to help entities which will require authorisation for the first time?*

A: The Central Bank recognises that there may be other structures or similar arrangements which have been established in order to channel funds from investors and which have some element of pooled investment. In its consultation paper CP 60 the Central Bank highlighted the existence of Exempt Unit Trusts (EUTs) and its intention to look at the applicability of the domestic regulatory regime for authorised investment funds to EUTs. This work is on-going and we will also look at the impact of our AIF Rulebook for any structures which are not structured like typical collective investment funds. While the Central Bank will initially focus on EUTs, a review of other structures will also form part of our work, when these are brought to our attention. However, you should not wait for the outcome of this work to determine whether your structure requires authorisation or not. If in doubt, seek legal advice now. If it is not evident to you how the type of structure you use can comply with the AIF Rulebook requirements, please initiate a discussion with our policy team. You may email them here

[FASDpolicy@centralbank.ie](mailto:FASDpolicy@centralbank.ie). This email address should not be used for authorisation queries.

## ***MiFID authorisations***

### **ID 1019**

*Q. Where AIFMs are authorised to provide the services set out in Article 6(4) of the AIFMD, will the Central Bank authorise AIFMs to passport Article 6(4) services across the EU or to provide such services in Ireland?*

A. The EU Commission has stated it as its interpretation of the AIFMD that the services listed in Article 6(4) of that directive may not benefit from the AIFMD passport. It has also stated it as its view that entities which receive an authorisation as an AIFM under the AIFMD cannot also get an authorisation under another piece of EU legislation (e.g. the MIFID). Therefore there will not be an option to passport such services from Ireland to other EU countries in reliance on a passport under EU law. The one exception to this will be that where AIFMs also manage UCITS and are in a position to obtain an authorisation under the UCITS Directive they will be free to offer Article 6(4) services cross-borders under the UCITS passport.

## ***Registered AIFM***

### **ID 1020**

*Q. If I think I am a Registered AIFM should I register with the Central Bank on 22 July 2013?*

A. Not necessarily. If you are not sure of your status or what your likely status will be by July 2014, you should consider carefully whether you may either require authorisation as an AIFM, or wish to opt-in to that regime. Please consider this carefully before contacting the Central Bank to register as a Registered AIFM. You are advised to seek registration as soon as you are clear that registration will be the appropriate option for you as at July 2014.

## ***Depositary services***

### **ID 1021**

*Q. May an Irish authorised entity provide the safe-keeping and oversight duties set out in Article 21(7)-(9) of the AIFMD in respect of non-EU AIF as set out in Article 36 (1)(a)? If so is a specific authorisation required?*

A. Article 36(1)(a) does not set out eligibility criteria for entities, who will provide the safe-keeping and oversight duties prescribed in Article 21(7), (8) and (9), in respect of non-EU AIF where Article 36 applies.

If an Irish entity proposes to provide such services it must ascertain whether these will fit within its existing authorisation and, if not, whether authorisation under the Investment Intermediaries Act 1995 might be necessary.

## *Transitional arrangements*

### **ID 1022**

*Q. I am an existing Irish AIFM for an existing AIF. What rules apply to me and to the AIF, including the depositary, from 22 July 2013?*

A. In accordance with Article 61(1) of AIFMD, an AIFM performing activities before 22 July 2013 shall take all necessary measures to comply with national implementing legislation and submit an application for authorisation within one year. The European Commission has stated, as its interpretation of this Article, that during the one year transitional period AIFMs are expected to comply on a best efforts basis with national law.

National Law has not yet issued. However, in the case of an existing Irish AIFM, with an existing AIF, the intention of the Central Bank is that the NU Series of Notices which have been imposed prior to 22 July, 2013 will continue apply to the AIF until the AIFM is authorised, at which point the AIF Rulebook will become applicable to both the AIFM and its AIFs. This is the case for both external AIFM and self-managed AIF.

### **ID 1023**

*Q. I am an existing Irish AIFM with an existing umbrella AIF. Can I establish a new sub-fund notwithstanding that I have not yet submitted my application for authorisation under the AIFMD Regulations?*

A. Yes, a new sub-fund may be established and will, pending your authorisation as an AIFM under the AIFMD Regulations, be subject to the NU Series of Notices. Once you have been authorised under the AIFMD as its AIFM, the AIF Rulebook will apply to it. This is the case for both external AIFM and self-managed AIF.

### **ID 1024**

*Q. I am an existing Irish AIFM. Can I establish a new AIF pending submission of my application for authorisation under the AIFMD Regulations?*

A. Yes. An existing Irish AIFM may establish a new AIF during the transitional period. In this case, the AIF Rulebook will apply to the AIF. The AIFM must comply on a best efforts basis. The depositary will, pending authorisation of the AIFM, be permitted to comply with the depositary regime applicable to start-up AIFMs as set out in the Rulebook. AIFMs in this situation are advised to pay particular attention to ensuring that their planning towards compliance with the AIFMD takes fully into account the complex compliance challenges they particularly face in achieving best efforts.

### **ID 1025**

*Q. I am an existing EU AIFM with an existing Irish AIF. Can I continue to act for this AIF from 22 July 2013 and establish new sub-funds? Can I establish a new Irish AIF?*

A. Yes. A non-Irish EU AIFM with an existing Irish AIF may continue to act for that AIF, establish new sub-funds if it is an umbrella fund and establish new Irish AIF under the same conditions as are applied to Irish AIFM. Once authorised in its home Member



State the Central Bank will expect to receive a passporting notification in accordance with Article 33 of the AIFMD.

**ID 1026**

*Q. I am a non-Irish EU Investment Manager performing investment management functions for an Irish AIF. Can I be the designated AIFM for that Irish AIF?*

A. Yes. Non Irish EU AFIM who have been performing functions for Irish AIF can be the designated AIFM for Irish AIF from 22 July 2013, provided they are availing of a transition period in their home Member State. At the end of the transition period in their home Member State (or at the time of their authorisation if that is earlier), a passport notification in accordance with Article 33 of AIFMD should be issued.

**ID 1027**

*Q. I am an existing non-EU Investment Manager operating as the delegate of the management company for non-UCITS funds or a self-managed investment company, do I have to stop in July 2013?*

A. No, you may continue to operate for so long as the AIF to which you provide services is authorised to continue.

**ID 1028**

*Q. I am an existing non-EU AIFM operating as the delegate of the management company for non-UCITS funds or a self-managed investment company, Can I be the designated AIFM from July 2013?*

A. You can be the designated AIFM for a QIAIF. You cannot be the designated AIFM for a RIAIF.

**ID 1029**

*Q. Will the Central Bank authorise a QIAIF from July 2013 which envisages a non-EU AIFM?*

A. Yes. The fact that the QIAIF would have a non-EU AIFM will not be an obstacle to its application for authorisation from July 2013 being processed. Notwithstanding this approach, the Central Bank would intend, needless to say, to conform to any common EU position on this, if one were to emerge before July 2013.

**ID 1030**

*Q. Does a non-EU AIFM immediately have to fulfil all the obligations imposed on AIFMs?*

A. No. The Central Bank of Ireland will allow a transition benefit to non-EU AIFMs. Any QIAIF which was authorised prior to 22 July 2013 and which designates a non-EU entity as its AIFM will only be obliged to ensure that it has an AIFM capable of carrying out all the tasks of an authorised AIFM by 22 July 2015.

Any QIAIF which is authorised on or after 22 July 2013 on the basis of designating a non-EU AIFM must only ensure that the non-EU AIFM is capable of carrying out all the tasks of an authorised

AIFM within two years from the QIAIF's date of launch, i.e. the date when the initial offer period closes or, where there are multiple closings, the date of first closing.

The Central Bank will keep the extent of this transition under review with a view to extending the transition period to align with the coming into effect of Article 37 of the AIFMD, unless there are strong reasons not to do so in the light of intervening experience in relation to the regulation of AIFs which have non-EU AIFM.

### **ID 1031**

*Q. What requirements apply to QIAIFs with non-EU AIFMs during the transition period?*

A. QIAIF authorised before 22 July 2013 which designate a non-EU AIFM, will be allowed to avail of the relevant transition period outlined above provided that, at all times the QIAIF can show that its management company and AIFM arrangements when considered in their entirety at least meet the standard which would have applied under the non-UCITS regime which applied in Ireland immediately prior to 22 July 2013.

A QIAIF authorised on or after the 22 July 2013 which designates a non-EU AIFM, will be allowed to avail of the transition period provided that it and its non-EU AIFM comply with the provisions of the AIF Rulebook that apply in the case of QIAIFs with registered AIFMs.

### **ID 1032**

*Q. Can a RIAIF have a non-EU AIFM in the period before Article 37 of the AIFMD becomes effective?*

A. No, a RIAIF must have an authorised AIFM. A non-EU AIFM cannot become an authorised AIFM before Article 37 is effective.

### **ID 1033**

*Q. As an existing AIFM do I have to notify the Central Bank by 23 July 2013 of my intention to avail of the transitional arrangements under Article 61 of AIFMD?*

A. Notification is not required.

### **ID 1034**

*Q. Must an AIFM which is subject to transitional arrangements ensure that co-operation agreements between the Central Bank and a supervisory authority in a third country are in place in the event that the AIFM has delegated portfolio or risk management to a third country entity?*

A. No, not during the transitional period.

### **ID 1035**

*Q. I am a depository to an existing AIF. When must I comply with the AIFMD Regulations?*

A. The obligation on depositories is to provide depository services which meet the conditions imposed on the AIF and AIFM to which they provide services. A depository must comply with the AIFMD Regulations in relation to each AIF from the date of

authorisation of the AIFM of that AIF or from the end of the relevant transition period at the latest.

### **ID 1036**

*Q. What are the 'objective' conditions which justify delegation or discharge of liability by depositaries?*

A. The AIFMD provides that a depositary may delegate certain safe-keeping functions to a third party provided that the depositary can demonstrate that there is an objective reason for the delegation. The AIFMD also requires a written contract between the AIF (or the AIFM acting on behalf of the AIF) and the depositary to expressly allow for a discharge of liability and establish the objective reason to contract such a discharge.

Where a depositary delegates safe-keeping functions to a third party and also contractually discharges liability to that third party, distinct obligations exist to be able to demonstrate objective reasons. Depositaries may avail of this option, but only in the manner permitted by AIFMD and the Central Bank would expect that separate consideration would have been given to identifying suitable objective reasons for delegation and to identifying suitable objective reasons for discharge of liability.

Whether an appropriate objective reason for delegation and/or discharge of liability exists depends on the particular nature of each entity's business model, which is not only particular to it but may also vary over time. It is a matter for depositaries to judge this in the first instance and to keep the matter under review. Given the importance of this matter it would be prudent that the analysis and ongoing review should be documented and approved at least at a senior managerial level within the depositary. It may also be appropriate to have the matter approved at Board level.

AIFM, in choosing depositaries, are advised to be satisfied that the depositaries they use are diligent in their compliance with these legislative obligations on an ongoing basis.

It is a matter for the Courts to determine where liability rests and judge contractual disputes between depositaries and third parties. The new Central Bank application forms require filing of all material contracts. However, the Central Bank will not review arrangements relating to discharge of liability as part of the authorisation or supervision process, but will take action where it sees evident disregard for a depositary's duty to conscientiously manage its compliance with the legislative requirements.

Depositaries are advised to seek expert legal advice on any envisaged delegation and contractual discharge of liability and to ensure that their legal advisors are fully advised on the objective nature of their business.

## ***Delegation***

### **ID 1037**

*Q. Will the Central Bank permit AIFM to delegate portfolio or risk management functions?*

A. In part, yes. However, this cannot include either of the functions in its entirety. Specifically, it can never include the tasks, as set out in the AIF Rulebook, which must be exercised directly by the board or its designated persons. Rather, certain portfolio and risk management tasks may be delegated. The proposed extent of delegation must be set out clearly for the Central Bank which will review each such proposed arrangement.

### ***Qualifying investors***

#### **ID 1038**

*Q. Can an Irish investor who is currently permitted to invest in a Qualifying Investor Fund invest in a QIAIF notwithstanding that the investor does not fall within the definition of professional investor in AIFMD?*

A. The AIF Rulebook provides that investors in QIAIF must be investors who fall within one of the following categories:

- a) be a professional client in accordance with MiFID; or
- b) receive an appraisal from an EU credit institution, MiFID firm or UCITS management company that he/she has appropriate expertise, experience and knowledge; or
- c) self-certify that he/she sufficient knowledge and experience to enable him/her to properly evaluate the investment or his/her business involves the management, acquisition or disposal of property of the same kind as the property of the QIF.

In addition, the AIF Rulebook provides that within the EU, QIAIF may only be marketed to professional investors as defined in the AIFMD unless the Member State in question permits, under the laws of that Member State, AIF to be sold to other categories of investors and this permission encompasses investors set out in categories (b) and (c) above. Accordingly Irish investors who fall within any one of the categories a), b) or c) above are eligible to be sold units in a QIAIF.

### ***Remuneration guidelines***

#### **ID 1039**

*Q. Do the recently issued ESMA guidelines on remuneration apply equally to AIFM and self-managed AIF?*

A. Yes

### ***Passporting arrangements***

#### **ID 1040**

*Q. As an authorised AIFM can I operate under the passporting arrangements set out in Articles 32 and 33 notwithstanding that the AIFMD has not been implemented in a host Member State?*

A. Yes – AIFMD is effective across the EU from 22 July 2013



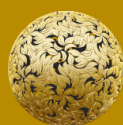
*AIFs in liquidation*

**ID 1041**

*Q. My AIF is in liquidation or will be in liquidation during the transitional period and I do not propose to establish new AIF. Must I seek authorisation before 22 July 2014?*

A. Subject to the AIFMD Regulations, the Central Bank considers that AIFMs acting solely for AIF which are in liquidation or will be in liquidation during the transitional period will not require authorisation provided the AIF have entered into a liquidation process before the expiry of the transitional period.

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