

Single Rulebook Q&A

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Subparagraph	29
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Type of submitter	Competent authority
Subject matter	Scope of ASA definition under IFR
Question	Should all of the assets for which an investment firm provides depositary services (under 2011/61/EU Directive) be included in the definition of assets safeguarded and administered (ASA)?
Background on the question	An investment firm (IF) provides depositary services for alternative investment funds (AIFs) based on Article 21(3) of 2011/61/EU Directive. According to Article 4(1) 29 of the IFR, assets safeguarded and administered (ASA) means the value of assets that an investment firm safeguards and administers for clients, irrespective of whether assets appear on the investment firm's own balance sheet or not are in third-party accounts. Article 21(8) of 2011/61/EU Directive on the other hand specifies the way assets of an AIF should be entrusted to the depositary for safe keeping. In particular, the assets of the AIF or the alternative investment fund manager (AIFM) acting on behalf of the AIF shall be entrusted to the depositary for safe keeping, as follows: (a) for financial instruments that can be held in custody: i. the depositary shall hold in custody all financial instruments that can be registered in a financial instruments account opened in the depositary's books and all financial instruments that can be physically delivered to the depositary; ii. for that purpose, the depositary shall ensure

that all those financial instruments that can be registered in a financial instruments account opened in the depositary's books are registered in the depositary's books within segregated accounts in accordance with the principles set out in Article 16 of Directive 2006/73/EC, opened in the name of the AIF or the AIFM acting on behalf of the AIF, so that they can be clearly identified as belonging to the AIF in accordance with the applicable law at all times; (b) for other assets: i. the depositary shall verify the ownership of the AIF or the AIFM acting on behalf of the AIF of such assets and shall maintain a record of those assets for which it is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership of such assets; ii. the assessment whether the AIF or the AIFM acting on behalf of the AIF holds the ownership shall be based on information or documents provided by the AIF or the AIFM and, where available, on external evidence; iii. iii. the depositary shall keep its record up to date. For the purposes of the definition of ASA, and further, the calculation of K-ASA, it seems to be clear that the assets held by the IF in custody (Article 21(8)(a) of 2011/61/EU Directive) should be included in the definition of ASA, as the IF acting as a depositary at the same time makes use of the MiFID license (safe-keeping and administration of financial instruments). However, the assets for which the IF (acting as a depositary) only maintains a record (referred to in Article 21(8)(b) of 2011/61/EU Directive), such as real estate or units of UCITS or other CIUs or other assets, for which the investment firm, acting as a depositary only verifies and keeps record of ownership, raises doubts regarding the rationale of their inclusion in the capital requirements under the IFR (K-ASA).

Final answer

On the basis of Article 21(3) b of Directive 2011/61/EU, the depositary for Alternative investment funds (AIF) or AIF managers (AIFM) can be "*an investment firm having its registered office in the Union, subject to capital adequacy requirements in accordance with Article 20(1) of Directive 2006/49/EC including capital requirements for operational risks and authorised in accordance with Directive 2004/39/EC and which also provides the ancillary service of safe-keeping and administration of financial instruments for the account of clients in accordance with point (1) of Section B of Annex I to Directive 2004/39/EC; such investment firms shall in any case have own funds not less than the amount of initial capital referred to in Article 9 of Directive 2006/49/EC*".

Article 21(8) provides clarification as to the manner in which the custody of the assets of an AIF or of an AIFM acting on behalf of the AIF is entrusted to a depositary. To this end, paragraph 8 distinguishes between two classes of assets: those that can be held in custody by the depositary and those that the depositary is satisfied that the AIF or the AIFM acting on behalf of the AIF has ownership of and for which it will have to keep a register.

Under the IFR, all investment firms should calculate their own funds

requirement by reference to a set of K-factors, which capture Risk-To-Client, Risk-to-Market and Risk-to-Firm. Among the K-factors which capture the client risks there is the Assets Safeguarded and Administered (K- ASA) which captures the risk of safeguarding and administering client assets and ensures that investment firms hold capital in proportion to such balances, regardless of whether they are on its own balance sheet or in third-party accounts.

Regulation (EU) 2019/2033 in Article 4(1)(29) defines Assets Safeguarded and Administered (ASA) as "The value of assets that an investment firm safeguards and administers for clients, irrespective of whether assets appear on the investment firm's own balance sheet or are in third-party accounts".

For an investment firm that acts as a depository for safeguarding and administering client assets, all assets entrusted to it and which it can hold in custody (i.e., those referred to in Article 21(8)(a) of Directive 2011/61/EU must be taken into account for the purpose of calculating the K-ASA factor.

The K-ASA captures the risk of safeguarding and administering client assets and ensures that investment firms hold capital in proportion to such balances (IFR, §24). Consequently, the K-ASA factor should apply to an IF which holds assets on behalf of its clients and must return these assets to its clients.

For other assets (Article 21(8)(b) of Directive 2011/61/EU), which are owned by the AIF, it is specified that the firm only provides an operational record-keeping service on behalf of the AIF or of an AIFM acting on behalf of the AIF. There is therefore no safeguarding of client assets in the context of the provision of this service. Moreover, the text does not provide for any obligation of restitution towards the AIF or an AIFM acting on behalf of the AIF.

Consequently, without safeguarding and without any obligation of restitution, the assets concerned should not be taken into account in the calculation of the K-ASA factor.

A purely operational record-keeping activity does not oblige the IF to refund the assets to its clients. Consequently, such an activity should not be considered as a safeguarding or administering activity within the meaning of article 4(1)(29) of the IFR as the K-ASA factor's rationale lies in the risk for the IF to be unable to refund the assets it held as a depository to their rightful owners.

Since a record-keeping activity within the meaning of Article 21(8)(b) of Directive 2011/61/EU poses no threat to the assets' restitution, such an activity should be excluded from the K-ASA factor's calculation.

Link	https://www.eba.europa.eu/single-rule-book-qa/qna/view/publicId/2021_5864
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