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MEETING DOCUMENT

From:	Presidency
To:	Working Party on Financial Services and Banking Union (MISP) Financial Services Attachés
Subject:	Market Integration and Supervision Package Working Party meeting of 16 June 2026 - Asset Management: CZ-SI non-paper on depositary passport under the MISP package

CZ-SI non-paper on depositary passport under the MISP package

1. Purpose of the non-paper

This non-paper supports a technical discussion on the introduction of an EU depositary passport under the Market Integration and Supervision Package (MISP). It focuses on identifying key regulatory and supervisory conditions that are relevant for the effective functioning of such a passport, with a particular emphasis on supervisory clarity and legal certainty.

The analysis builds on the proposed amendments to Article 21(5) of AIFMD and Article 23(1) of UCITS, which would allow depositary services to be provided on a cross-border basis without a territorial link to the home Member State of the fund.

The intention is not to revisit the policy objective of market integration or the core role of depositaries under EU fund law, but to highlight those aspects of the proposal that merit closer attention from a regulatory and supervisory perspective.

2. Role of the depositary in EU fund law

Under both AIFMD and UCITS, notwithstanding the last revision of AIFMD, the depositary forms an integral part of the fund-law control and investor-protection framework applicable to investment funds. Its tasks encompass cash-flow monitoring, safekeeping and record-keeping of assets as well as oversight and verification functions, combined with a specific liability regime.

These responsibilities distinguish the depositary from a standard custody service provider and explain why, under the existing framework, depositary functions have been closely linked to the supervisory jurisdiction of the fund's home Member State.

3. Shift introduced by the MISP

The MISP proposal introduces a significant evolution by allowing depositary services to be provided across borders without requiring local establishment in the home Member State of the fund. As proposed, Article 21(5) AIFMD would enable AIFMs to appoint depositaries established in another Member State provided that they are authorised under the CRD or MiFID framework. The proposal would therefore allow the depositary passport to build on the existing cross-border authorisation frameworks applicable to banks and, for AIFs, also investment firms.

While this approach pursues a legitimate Single Market objective and may improve access to depositary services, it may also be perceived as altering the traditional supervisory set-up by loosening the territorial link between the performance of depositary functions and the authorities responsible for fund supervision.

4. Interaction with CRD and MiFID: a possible regulatory gap

While the depositary passport is introduced through amendments to the fund legislation, its practical operation inevitably intersects with the sectoral frameworks governing credit institutions and investment firms.

- Authorisations under CRD IV and MiFID II cover, inter alia, safekeeping and administration of financial instruments (**Annex I, CRD IV; Annex I, Section B, MiFID II**). These activities form only a part of the depositary function under fund law. In particular, sectoral authorisations neither extend to the fund-specific oversight tasks imposed by AIFMD and UCITS, nor to the tailor-made liability regime attached to the depositary function.
- Existing CRD IV and MiFID II passports are designed around the provision of banking and investment services. They neither provide for cross-border performance of depositary duties as such, nor allocate supervisory responsibility for those duties in relation to individual AIFs or UCITS.
- ESMA has clarified in its Questions and Answers on the application of AIFMD and UCITS (see ESMA Q&A 1212 on AIFMD and UCITS, depositary sections: https://www.esma.europa.eu/regulation/investment-funds/questions-and-answers-aifmd) that existing sectoral legislation does not establish a passport for depositary activities. ESMA has further indicated that sectoral passports do not in themselves determine the allocation of supervisory responsibilities for depositary functions performed on a cross-border basis.

In the absence of further clarification, reliance on the existing sectoral frameworks alone risks leaving material uncertainty as to which competent authority (NCA) is responsible for supervising execution of depositary duties vis-à-vis a specific fund, and which supervisory tools are available to address deficiencies or breaches in a cross-border context.

These elements suggest that while CRD IV and MiFID II authorisations are a necessary precondition for acting as a depositary, they are not sufficient on their own to support a fully functional depositary passport with a sound supervisory basis.

5. Authorisation of depositary services

One possible way forward worth considering would be to reflect depositary services more explicitly within the MiFID framework, while ensuring coherent interaction with the CRD framework applicable to credit institutions.

If depositary services were recognised as ancillary services under MiFID II, this would allow investment firms to passport those services on the basis of their MiFID II authorisation.

In such a case, **no amendment to Annex I of CRD IV would be required for credit institutions**, as CRD IV already contains a general reference to services listed under MiFID II, allowing credit institutions to provide the same services on that basis.

This could involve recognising depositary functions as ancillary services in Annex I, Section B, MiFID II, thereby allowing the freedom to provide services and to establish branches under Articles 34 and 35 MiFID II to apply in a structured and transparent manner.

On that basis, AIFMD and UCITS could specify targeted supervisory powers for host NCAs in relation to depositary functions, drawing on approaches already used in other areas of EU financial law. Such a solution could help close the current regulatory gap, strengthen the position of host authorities, and provide greater legal certainty for funds, depositaries and investors.

In Annex I to Directive 2014/65/EU, section B is amended as follows:

…

(1) point (8) is added:

(8) Depositary services for investment funds under Article 21 of Directive 2011/61/EU or Article 22 of Directive 2009/65/EC.

Finally, it would be appropriate to consider inclusion of a transitional provision in MiFID II. Such a provision could allow entities that currently provide depositary services under national law to be deemed, by operation of law, to have notified and obtained authorisation for the corresponding ancillary service under MiFID II.

Transitional provision

Investment firm or credit institution that is entitled to provide depositary service in accordance with applicable national law before *(OP please insert the date 18 months after the date of entry into force of this Directive)*, shall be deemed as authorised to provide depositary service in accordance with Annex I section B of Directive 2014/65/EC.

This proposed amendment would ensure continuity of service provision and legal certainty, while improving supervisory transparency. In particular, it would allow host NCAs to clearly identify when depositary services are passported into their jurisdiction and to establish appropriate information channels with the relevant authorities, thereby ensuring access to the information necessary for effective supervision of AIFs and UCITS.

The provision in **UCITS** might thus stay in its MISP proposed form:

(16) in Article 23(1), the following subparagraph is added:

'By way of derogation from the first subparagraph, the depositary may have its registered office or be established in a Member State other than the UCITS home Member State, to the extent that it falls into the category referred to in paragraph 2, point (b) and has been duly authorised to provide services in other Member States pursuant to Directive 2013/36/EU.';

AIFMD:

(11) Article 21 is amended as follows:

(a) paragraph 3 is amended as follows:

(a) in the first subparagraph, points (a) and (b) are replaced by the following:

'(a) a credit institution having its registered office in the Union and authorised in accordance with Directive 2013/36/EU;

(b) an investment firm having its registered office in the Union, which is authorised in accordance with Directive 2014/65/EU to provide the ancillary service of ***depositary services*** ~~*safe-keeping and administration of financial instruments for the account of clients*~~ *in accordance with Section B, point* ~~*(1)*~~ ***(8)*** *of Annex I to Directive 2014/65/EU; or';*

As the text in para 5 requires a depositary to be established in the particular country of domicile of AIFM, the addition in para 5 is still necessary.

(b) in paragraph 5 the following subparagraph is added:

'By way of derogation from the first subparagraph, point (a), an AIFM may appoint for an AIF it manages a depositary that has its registered office or is established in a Member State other than the home Member State of the AIF, provided that the depositary falls into one of the categories referred to in paragraph 3, points (a) and (b) and has been duly authorised to provide services in other Member States pursuant to Directive 2013/36/EU or Article 6(3) of Directive 2014/65/EU, respectively.';

6. Host–home supervisory powers

While the introduction of a depositary passport under the MISP aims to facilitate the cross-border provision of services, it does not in itself address the allocation of supervisory powers between home and host NCAs in relation to depositary functions.

In particular, where a depositary established in one Member State provides services to an investment fund manager established in another Member State, the authority responsible for supervising the investment fund manager may not have sufficient legal tools to effectively oversee the depositary's performance of its fund-law obligations. Since the role of the depositary encompasses cash-flow monitoring, safekeeping and record-keeping of assets, as well as oversight and verification functions (as mentioned in Section 2), the monitoring and verification of the depositary's performance is of particular relevance for home NCA of the fund in question.

This gap is particularly relevant with regard to:

- the access to information necessary for the supervision of the fund;
- the ability to require corrective measures where deficiencies are identified and not rectified by the depositary's home NCA in a timely manner, including the possibility of an on-site visit of a branch of the depositary; and

- the effective enforcement of depositary obligations in a cross-border setting.

Against this background, it appears necessary to explicitly clarify the role of host NCAs by establishing targeted fund-specific powers in relation to the depositary service performed for funds within their jurisdiction, limited to what is necessary to supervise compliance with AIFMD or UCITS obligations and to protect the interests of the fund investors – of course, without transferring general prudential supervision over the depositary.

The powers of host NCAs to address situations where a credit institution or investment firm is not complying with applicable requirements are addressed in **Article 41 of CRD** and **Article 86 of MiFID II**. As these regimes differ in scope and structure, it would be appropriate to establish a **more unified and fund-specific mechanism under AIFMD and UCITS**, ensuring that NCAs responsible for investment fund managers have effective tools to address issues relating to depositaries. In this context, it would also be appropriate to foresee a role for the **ESMA**, consistent with its mandate in the area of investment funds.

The proposed mechanism below would therefore serve three main purposes: ensuring direct access to information where needed for fund supervision, establishing a clear cooperation and escalation channel between the authorities concerned, and allowing protective measures where the depositary continues to act in a manner prejudicial to the interests of the relevant funds or their investors.

AIFMD:

Article 21 is amended as follows:

***(c) paragraph 5a is replaced by the following**:*

For the purposes of the fifth paragraph second subparagraph, the competent authorities of the home Member State of the AIF shall have the power to request directly from the depositary appointed in accordance with that subparagraph any such information, documents, records and explanations as are necessary for the supervision of the relevant AIF and related to the depositary's performance of its duties under this Directive, and proportionate for the purpose of verifying the depositary's compliance with its obligations under this Article in respect of that AIF.

The competent authority of the home Member State of the AIF shall communicate with competent authority of the depositary of any such a request.

The depositary shall notify without undue delay both its competent authority and the competent authority of the home Member State of the AIF of any material breach, operational incident, failure in safekeeping, unresolved cash-flow discrepancy, valuation or ownership verification issue, or any circumstance that may materially affect the interests of the AIF or its investors.

The competent authority of the home Member State of the fund may ask for information necessary for the supervision of the relevant AIF and related to the depositary's performance of its duties under this Directive the competent authority of the depositary and ask to be included in a joint inspection of the depositary with the competent authority of the depositary. Where the matter concerns the performance of depositary duties for an AIF under the supervision of the different competent authority than depositary, the competent authority of the home Member State of the AIF shall be allowed to participate in the inspection of the depositary and shall receive the relevant findings without undue delay.

Where a depositary authorised in another Member State has established a branch within the territory of home Member State of the AIF, the competent authority of the home Member State of the AIF, in the exercise of its responsibilities and after informing the competent authority of the home Member State of the depositary, may carry out on-site inspections in that branch of the depositary.

Where the competent authority of the home Member State of the AIF has clear and demonstrable grounds for believing that a depositary acting within its territory under the freedom to provide services infringes the obligations arising from the provisions adopted pursuant to this Directive or that a depositary that has a branch within its territory infringes the obligations arising from the provisions adopted pursuant to this Directive which do not confer powers on the competent authority of the home Member State of the AIF, it shall refer those findings to the competent authority of the depositary.

If, despite the measures taken by the competent authority of the depositary within three months or because such measures prove inadequate , the depositary persists in acting in a manner that is clearly prejudicial to the interests of home Member State of the AIFs or investors of the home Member State of the AIF, the following shall apply:

(a) after informing the competent authority of the depositary, the competent authority of the home Member State of the AIF shall take all the appropriate measures needed in order to protect AIFs and investors, which shall include the possibility of preventing the offending depositary from providing any further depositary services within their territories. The Commission and ESMA shall be informed of such measures without undue delay; and

(b) the competent authority of the home Member State of the AIF may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

In urgent cases, where immediate action is necessary to protect the interests of the AIF or its investors, and without prejudice to Article 110c the competent authority of the home Member State of the AIF shall be empowered to adopt temporary precautionary measures without waiting for the expiry of the standard cooperation period, provided that the competent authority of the depositary and ESMA are informed without undue delay.

Similar provision would be added also to **UCITS**.

7. Conclusion

The discussion on the depositary passport under the MISP would benefit from focusing less on the question of whether such a passport is desirable, and more on the question of regulatory and supervisory conditions, under which it can operate effectively. The framework based on existing CRD IV and MiFID II authorisations can provide an appropriate entry point, while AIFMD/UCITS would provide additional supervisory powers for the host NCA in relation to a depositary and home NCA in relation to an AIF.

Without sufficient clarity on the allocation of supervisory responsibilities, cooperation between NCAs and enforcement of depositary obligations, there is a risk that the depositary passport could weaken effective supervision or create legal uncertainty. This non-paper is intended as a contribution towards designing a framework that supports genuine market integration while preserving the integrity of supervision and investor protection.

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