

Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast) (Text with EEA relevance)

CHAPTER IV

**OBLIGATIONS REGARDING THE DEPOSITARY**

*[<sup>F1</sup>Article 22*

1 An investment company and, for each of the common funds that it manages, a management company shall ensure that a single depositary is appointed in accordance with this Chapter.

2 The appointment of the depositary shall be evidenced by a written contract.

That contract shall, inter alia, regulate the flow of information deemed to be necessary to allow the depositary to perform its functions for the UCITS for which it has been appointed as depositary, as laid down in this Directive and in other relevant laws, regulations and administrative provisions.

3 The depositary shall:

- a ensure that the sale, issue, repurchase, redemption and cancellation of units of the UCITS are carried out in accordance with the applicable national law and the fund rules or instruments of incorporation;
- b ensure that the value of the units of the UCITS is calculated in accordance with the applicable national law and the fund rules or the instruments of incorporation;
- c carry out the instructions of the management company or an investment company, unless they conflict with the applicable national law, or with the fund rules or the instruments of incorporation;
- d ensure that in transactions involving the assets of the UCITS any consideration is remitted to the UCITS within the usual time limits;
- e ensure that the income of the UCITS is applied in accordance with the applicable national law and the fund rules or the instruments of incorporation.

4 The depositary shall ensure that the cash flows of the UCITS are properly monitored, and, in particular, that all payments made by, or on behalf of, investors upon the subscription of units of the UCITS have been received, and that all cash of the UCITS has been booked in cash accounts that are:

- a opened in the name of the UCITS, of the management company acting on behalf of the UCITS, or of the depositary acting on behalf of the UCITS;
- b opened at an entity referred to in points (a), (b) and (c) of Article 18(1) of Commission Directive 2006/73/EC<sup>(1)</sup>; and
- c maintained in accordance with the principles set out in Article 16 of Directive 2006/73/EC.

Where the cash accounts are opened in the name of the depositary acting on behalf of the UCITS, no cash of the entity referred to in point (b) of the first subparagraph and none of the own cash of the depositary shall be booked on such accounts.

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- 5 The assets of the UCITS shall be entrusted to the depositary for safekeeping as follows:
- a for financial instruments that may be held in custody, the depositary shall:
    - (i) hold in custody all financial instruments that may 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) ensure that all 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 UCITS or the management company acting on behalf of the UCITS, so that they can be clearly identified as belonging to the UCITS in accordance with the applicable law at all times;
  - b for other assets, the depositary shall:
    - (i) verify the ownership by the UCITS, or by the management company acting on behalf of the UCITS, of such assets by assessing whether the UCITS or the management company acting on behalf of the UCITS holds the ownership based on information or documents provided by the UCITS or by the management company and, where available, on external evidence;
    - (ii) maintain a record of those assets for which it is satisfied that the UCITS or the management company acting on behalf of the UCITS holds the ownership and keep that record up to date.
- 6 The depositary shall provide the management company or the investment company, on a regular basis, with a comprehensive inventory of all of the assets of the UCITS.

7 The assets held in custody by the depositary shall not be reused by the depositary, or by any third party to which the custody function has been delegated, for their own account. Reuse comprises any transaction of assets held in custody including, but not limited to, transferring, pledging, selling and lending.

The assets held in custody by the depositary are allowed to be reused only where:

- a the reuse of the assets is executed for the account of the UCITS;
- b the depositary is carrying out the instructions of the management company on behalf of the UCITS;
- c the reuse is for the benefit of the UCITS and in the interest of the unit holders; and
- d the transaction is covered by high-quality and liquid collateral received by the UCITS under a title transfer arrangement.

The market value of the collateral shall, at all times, amount to at least the market value of the reused assets plus a premium.

8 Member States shall ensure that in the event of insolvency of the depositary and/or of any third party located in the Union to which custody of UCITS assets has been delegated, the assets of a UCITS held in custody are unavailable for distribution among, or realisation for the benefit of, creditors of such a depositary and/or such a third party.]

#### Textual Amendments

- F1** Substituted by [Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative](#)

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provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (Text with EEA relevance).

### *f<sup>2</sup>Article 22a*

1 The depositary shall not delegate to third parties the functions referred to in Article 22(3) and (4).

2 The depositary may delegate to third parties the functions referred to in Article 22(5) only where:

- a the tasks are not delegated with the intention of avoiding the requirements laid down in this Directive;
- b the depositary can demonstrate that there is an objective reason for the delegation;
- c the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it intends to delegate parts of its tasks, and continues to exercise all due skill, care and diligence in the periodic review and ongoing monitoring of any third party to which it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it.

3 The functions referred to in Article 22(5) may be delegated by the depositary to a third party only where that third party at all times during the performance of the tasks delegated to it:

- a has structures and expertise that are adequate and proportionate to the nature and complexity of the assets of the UCITS or the management company acting on behalf of the UCITS which have been entrusted to it;
- b for custody tasks referred to in point (a) of Article 22(5), is subject to:
  - (i) effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned;
  - (ii) an external periodic audit to ensure that the financial instruments are in its possession;
- c segregates the assets of the clients of the depositary from its own assets and from the assets of the depositary in such a way that they can, at any time, be clearly identified as belonging to clients of a particular depositary;
- d takes all necessary steps to ensure that in the event of insolvency of the third party, assets of a UCITS held by the third party in custody are unavailable for distribution among, or realisation for the benefit of, creditors of the third party; and
- e complies with the general obligations and prohibitions laid down in Article 22(2), (5) and (7) and in Article 25.

Notwithstanding point (b)(i) of the first subparagraph, where the law of a third country requires that certain financial instruments be held in custody by a local entity and no local entities satisfy the delegation requirements laid down in that point, the depositary may delegate its functions to such a local entity only to the extent required by the law of that third country, only for as long as there are no local entities that satisfy the delegation requirements, and only where:

- a the investors of the relevant UCITS are duly informed, prior to their investment, of the fact that such a delegation is required due to legal constraints in the law of the third country, of the circumstances justifying the delegation and of the risks involved in such a delegation;
- b the investment company, or the management company on behalf of the UCITS, has instructed the depositary to delegate the custody of such financial instruments to such a local entity.

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The third party may, in turn, sub-delegate those functions, subject to the same requirements. In such a case, Article 24(2) shall apply *mutatis mutandis* to the relevant parties.

4 For the purposes of this Article, the provision of services as specified by Directive 98/26/EC of the European Parliament and of the Council<sup>(2)</sup> by securities settlement systems as designated for the purposes of that Directive or the provision of similar services by third-country securities settlement systems shall not be considered to be a delegation of custody functions.]

#### Textual Amendments

**F2** Inserted by Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (Text with EEA relevance).

#### Article 23

1 A depositary shall either have its registered office or be established in the UCITS home Member State.

[<sup>F12</sup> The depositary shall be:

- a a national central bank;
- b a credit institution authorised in accordance with Directive 2013/36/EU; or
- c another legal entity, authorised by the competent authority under the law of the Member State to carry out depositary activities under this Directive, which is subject to capital adequacy requirements not less than the requirements calculated depending on the selected approach in accordance with Article 315 or 317 of Regulation (EU) No 575/2013 of the European Parliament and of the Council<sup>(3)</sup> and which has own funds not less than the amount of initial capital under Article 28(2) of Directive 2013/36/EU.

A legal entity as referred to in point (c) of the first subparagraph shall be subject to prudential regulation and ongoing supervision and shall satisfy the following minimum requirements:

- a it shall have the infrastructure necessary to keep in custody financial instruments that can be registered in a financial instruments account opened in the depositary's books;
- b it shall establish adequate policies and procedures sufficient to ensure compliance of the entity, including its managers and employees, with its obligations under this Directive;
- c it shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment and effective control and safeguard arrangements for information processing systems;
- d it shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest;
- e it shall arrange for records to be kept of all services, activities and transactions that it undertakes, which shall be sufficient to enable the competent authority to fulfil its supervisory tasks and to perform the enforcement actions provided for in this Directive;
- f it shall take reasonable steps to ensure continuity and regularity in the performance of its depositary functions by employing appropriate and proportionate systems, resources and procedures including to perform its depositary activities;
- g all members of its management body and senior management, shall, at all times, be of sufficiently good repute, possess sufficient knowledge, skills and experience;

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- h its management body shall possess adequate collective knowledge, skills and experience to be able to understand the depositary's activities, including the main risks;
- i each member of its management body and senior management shall act with honesty and integrity.

3 Member States shall determine which of the categories of institutions referred to in the first subparagraph of paragraph 2 shall be eligible to be depositaries.

4 Investment companies or management companies acting on behalf of the UCITS that they manage, which, before 18 March 2016, appointed as a depositary an institution that does not meet the requirements laid down in paragraph 2, shall appoint a depositary that meets those requirements before 18 March 2018.]

F<sup>3</sup><sub>5</sub> .....

F<sup>3</sup><sub>6</sub> .....

**Textual Amendments**

- F1** Substituted by [Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities \(UCITS\) as regards depositary functions, remuneration policies and sanctions \(Text with EEA relevance\).](#)
- F3** Deleted by [Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities \(UCITS\) as regards depositary functions, remuneration policies and sanctions \(Text with EEA relevance\).](#)

*[<sup>F1</sup> Article 24*

1 Member States shall ensure that the depositary is liable to the UCITS and to the unit-holders of the UCITS for the loss by the depositary or a third party to whom the custody of financial instruments held in custody in accordance with point (a) of Article 22(5) has been delegated.

In the case of a loss of a financial instrument held in custody, Member States shall ensure that the depositary returns a financial instrument of an identical type or the corresponding amount to the UCITS or the management company acting on behalf of the UCITS without undue delay. The depositary shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.

Member States shall ensure that the depositary is also liable to the UCITS, and to the investors of the UCITS, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations pursuant to this Directive.

2 The liability of the depositary referred to in paragraph 1 shall not be affected by any delegation as referred to in Article 22a.

3 The liability of the depositary referred to in paragraph 1 shall not be excluded or limited by agreement.

4 Any agreement that contravenes paragraph 3 shall be void.

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5 Unit-holders in the UCITS may invoke the liability of the depositary directly or indirectly through the management company or the investment company provided that this does not lead to a duplication of redress or to unequal treatment of the unit-holders.]

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**Textual Amendments**

- F1** Substituted by [Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities \(UCITS\) as regards depositary functions, remuneration policies and sanctions \(Text with EEA relevance\).](#)

*[<sup>F1</sup>Article 25*

1 No company shall act as both management company and depositary. No company shall act as both investment company and depositary.

2 In carrying out their respective functions, the management company and the depositary shall act honestly, fairly, professionally, independently and solely in the interest of the UCITS and the investors of the UCITS. In carrying out their respective functions, the investment company and the depositary shall act honestly, fairly, professionally, independently and solely in the interest of the investors of the UCITS.

A depositary shall not carry out activities with regard to the UCITS or the management company on behalf of the UCITS that may create conflicts of interest between the UCITS, the investors in the UCITS, the management company and itself, unless the depositary has functionally and hierarchically separated the performance of its depositary tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the UCITS.]

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**Textual Amendments**

- F1** Substituted by [Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities \(UCITS\) as regards depositary functions, remuneration policies and sanctions \(Text with EEA relevance\).](#)

*[<sup>F1</sup>Article 26*

1 The law or the fund rules of the common fund shall lay down the conditions for the replacement of the management company and of the depositary and rules to ensure the protection of unit-holders in the event of such a replacement.

2 The law or the instruments of incorporation of the investment company shall lay down the conditions for the replacement of the management company and of the depositary and rules to ensure the protection of unit-holders in the event of such a replacement.]

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**Textual Amendments**

- F1** Substituted by [Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities \(UCITS\) as regards depositary functions, remuneration policies and sanctions \(Text with EEA relevance\).](#)

### *F<sup>2</sup> Article 26a*

The depositary shall make available to its competent authorities, on request, all information which it has obtained while performing its duties and that may be necessary for its competent authorities or for the competent authorities of the UCITS or of the management company.

If the competent authorities of the UCITS or of the management company are different from those of the depositary, the competent authorities of the depositary shall without delay share the information received with the competent authorities of the UCITS and of the management company.

#### **Textual Amendments**

- F2** Inserted by [Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities \(UCITS\) as regards depositary functions, remuneration policies and sanctions \(Text with EEA relevance\).](#)

### *Article 26b*

The Commission shall be empowered to adopt delegated acts in accordance with Article 112a specifying:

- (a) the particulars that need to be included in the written contract referred to in Article 22(2);
- (b) the conditions for performing the depositary functions pursuant to Article 22(3), (4) and (5), including:
  - (i) the types of financial instrument to be included in the scope of the custody duties of the depositary in accordance with point (a) of Article 22(5);
  - (ii) the conditions subject to which the depositary is able to exercise its custody duties over financial instruments registered with a central depositary;
  - (iii) the conditions subject to which the depositary is to safekeep the financial instruments issued in a nominative form and registered with an issuer or a registrar, in accordance with point (b) of Article 22(5);
- (c) the due diligence duties of depositaries pursuant to point (c) of Article 22a(2);
- (d) the segregation obligation pursuant to point (c) of Article 22a(3);
- (e) the steps to be taken by the third party pursuant to point (d) of Article 22a(3);
- (f) the conditions subject to which and circumstances in which financial instruments held in custody are to be considered to be lost for the purpose of Article 24;
- (g) what is to be understood by external events beyond reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary, pursuant to Article 24(1);
- (h) the conditions for fulfilling the independence requirement referred to in Article 25(2).]

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### Textual Amendments

- F2** Inserted by [Directive 2014/91/EU](#) of the European Parliament and of the Council of 23 July 2014 amending [Directive 2009/65/EC](#) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (Text with EEA relevance).



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- (1) [<sup>F1</sup>Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 241, 2.9.2006, p. 26).]
- (2) [<sup>F2</sup>Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).]
- (3) [<sup>F1</sup>Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No648/2012 (OJ L 176, 27.6.2013, p. 1).]

#### Textual Amendments

- F1** Substituted by Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (Text with EEA relevance).
- F2** Inserted by Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (Text with EEA relevance).