

Directive 2011/61/EU of the European Parliament and of the Council of
8 June 2011 on Alternative Investment Fund Managers and amending
Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No
1060/2009 and (EU) No 1095/2010 (Text with EEA relevance)

CHAPTER III

OPERATING CONDITIONS FOR AIFMs

SECTION 4

Depositary

Article 21

Depositary

1 For each AIF it manages, the AIFM shall ensure that a single depositary is appointed in accordance with this Article.

2 The appointment of the depositary shall be evidenced by written contract. The contract shall, inter alia, regulate the flow of information deemed necessary to allow the depositary to perform its functions for the AIF for which it has been appointed as depositary, as set out in this Directive and in other relevant laws, regulations or administrative provisions.

3 The depositary shall be:

- a a credit institution having its registered office in the Union and authorised in accordance with Directive 2006/48/EC;
- b 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; or
- c another category of institution that is subject to prudential regulation and ongoing supervision and which, on 21 July 2011, falls within the categories of institution determined by Member States to be eligible to be a depositary under Article 23(3) of Directive 2009/65/EC.

For non-EU AIFs only, and without prejudice to point (b) of paragraph 5, the depositary may also be a credit institution or any other entity of the same nature as the entities referred to in points (a) and (b) of the first subparagraph of this paragraph provided that the conditions in point (b) of paragraph 6 are met.

In addition, Member States may allow that in relation to AIFs which have no redemption rights exercisable during the period of 5 years from the date of the initial investments and which, in accordance with their core investment policy, generally do not invest in assets

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that must be held in custody in accordance with point (a) of paragraph 8 or generally invest in issuers or non-listed companies in order to potentially acquire control over such companies in accordance with Article 26, the depositary may be an entity which carries out depositary functions as part of its professional or business activities in respect of which such entity is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct and which can provide sufficient financial and professional guarantees to enable it to perform effectively the relevant depositary functions and meet the commitments inherent in those functions.

4 In order to avoid conflicts of interest between the depositary, the AIFM and/or the AIF and/or its investors:

- a an AIFM shall not act as depositary;
- b a prime broker acting as counterparty to an AIF shall not act as depositary for that AIF, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as prime broker and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF. Delegation by the depositary to such prime broker of its custody tasks in accordance with paragraph 11 is allowed if the relevant conditions are met.

5 The depositary shall be established in one of the following locations:

- a for EU AIFs, in the home Member State of the AIF;
- b for non-EU AIFs, in the third country where the AIF is established or in the home Member State of the AIFM managing the AIF or in the Member State of reference of the AIFM managing the AIF.

6 Without prejudice to the requirements set out in paragraph 3, the appointment of a depositary established in a third country shall, at all times, be subject to the following conditions:

- a the competent authorities of the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, in so far as different, of the home Member State of the AIFM, have signed cooperation and exchange of information arrangements with the competent authorities of the depositary;
- b the depositary is subject to effective prudential regulation, including minimum capital requirements, and supervision which have the same effect as Union law and are effectively enforced;
- c the third country where the depositary is established is not listed as a Non-Cooperative Country and Territory by FATF;
- d the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, in so far as different, the home Member State of the AIFM, have signed an agreement with the third country where the depositary is established which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements;
- e the depositary shall by contract be liable to the AIF or to the investors of the AIF, consistently with paragraphs 12 and 13, and shall expressly agree to comply with paragraph 11.

Where a competent authority of another Member State disagrees with the assessment made on the application of points (a), (c) or (e) of the first subparagraph by the competent authorities of the home Member State of the AIFM, the competent authorities concerned may refer the matter to the ESMA which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

On the basis of the criteria referred to in point (b) of paragraph 17, the Commission shall adopt implementing acts, stating that prudential regulation and supervision of a third country have the same effect as Union law and are effectively enforced. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 59(2).

7 The depositary shall in general ensure that the AIF's cash flows are properly monitored, and shall in particular ensure that all payments made by or on behalf of investors upon the subscription of units or shares of an AIF have been received and that all cash of the AIF has been booked in cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the depositary acting on behalf of the AIF at an entity referred to in points (a), (b) and (c) of Article 18(1) of Directive 2006/73/EC, or another entity of the same nature, in the relevant market where cash accounts are required provided that such entity is subject to effective prudential regulation and supervision which have the same effect as Union law and are effectively enforced and 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 AIF, no cash of the entity referred to in the first subparagraph and none of the depositary's own cash shall be booked on such accounts.

8 The assets of the AIF or the 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) the depositary shall keep its record up-to-date.

9 In addition to the tasks referred to in paragraphs 7 and 8, the depositary shall:

- a ensure that the sale, issue, re-purchase, redemption and cancellation of units or shares of the AIF are carried out in accordance with the applicable national law and the AIF rules or instruments of incorporation;

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- b ensure that the value of the units or shares of the AIF is calculated in accordance with the applicable national law, the AIF rules or instruments of incorporation and the procedures laid down in Article 19;
- c carry out the instructions of the AIFM, unless they conflict with the applicable national law or the AIF rules or instruments of incorporation;
- d ensure that in transactions involving the AIF's assets any consideration is remitted to the AIF within the usual time limits;
- e ensure that an AIF's income is applied in accordance with the applicable national law and the AIF rules or instruments of incorporation.

10 In the context of their respective roles, the AIFM and the depositary shall act honestly, fairly, professionally, independently and in the interest of the AIF and the investors of the AIF.

A depositary shall not carry out activities with regard to the AIF or the AIFM on behalf of the AIF that may create conflicts of interest between the AIF, the investors in the AIF, the AIFM 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 AIF.

The assets referred to in paragraph 8 shall not be reused by the depositary without the prior consent of the AIF or the AIFM acting on behalf of the AIF.

11 The depositary shall not delegate to third parties its functions as described in this Article, save for those referred to in paragraph 8.

The depositary may delegate to third parties the functions referred to in paragraph 8 subject to the following conditions:

- a the tasks are not delegated with the intention of avoiding the requirements of 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 wants to delegate parts of its tasks, and keeps exercising all due skill, care and diligence in the periodic review and ongoing monitoring of any third party to whom it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it; and
- d the depositary ensures that the third party meets the following conditions at all times during the performance of the tasks delegated to it:
 - (i) the third party has the structures and the expertise that are adequate and proportionate to the nature and complexity of the assets of the AIF or the AIFM acting on behalf of the AIF which have been entrusted to it;
 - (ii) for custody tasks referred to in point (a) of paragraph 8, the third party is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned and the third party is subject to an external periodic audit to ensure that the financial instruments are in its possession;
 - (iii) the third party segregates the assets of the depositary's clients 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;

- (iv) the third party does not make use of the assets without the prior consent of the AIF or the AIFM acting on behalf of the AIF and prior notification to the depositary; and
- (v) the third party complies with the general obligations and prohibitions set out in paragraphs 8 and 10.

Notwithstanding point (d)(ii) of the second 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 the third country and only for as long as there are no local entities that satisfy the delegation requirements, subject to the following requirements:

- a the investors of the relevant AIF must be duly informed that such delegation is required due to legal constraints in the law of the third country and of the circumstances justifying the delegation, prior to their investment; and
- b the AIF, or the AIFM on behalf of the AIF, must instruct the depositary to delegate the custody of such financial instruments to such local entity.

The third party may, in turn, sub-delegate those functions, subject to the same requirements. In such a case, paragraph 13 shall apply *mutatis mutandis* to the relevant parties.

For the purposes of this paragraph, the provision of services as specified by Directive 98/26/EC 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 a delegation of its custody functions.

12 The depositary shall be liable to the AIF or to the investors of the AIF, 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 paragraph 8 has been delegated.

In the case of such a loss of a financial instrument held in custody, the depositary shall return a financial instrument of identical type or the corresponding amount to the AIF or the AIFM acting on behalf of the AIF 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.

The depositary shall also be liable to the AIF, or to the investors of the AIF, 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.

13 The depositary's liability shall not be affected by any delegation referred to in paragraph 11.

Notwithstanding the first subparagraph of this paragraph, in case of a loss of financial instruments held in custody by a third party pursuant to paragraph 11, the depositary may discharge itself of liability if it can prove that:

- a all requirements for the delegation of its custody tasks set out in the second subparagraph of paragraph 11 are met;
- b a written contract between the depositary and the third party expressly transfers the liability of the depositary to that third party and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against the third party in respect

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of the loss of financial instruments or for the depositary to make such a claim on their behalf; and

- c a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, expressly allows a discharge of the depositary's liability and establishes the objective reason to contract such a discharge.

14 Further, where the law of a third country requires that certain financial instruments are held in custody by a local entity and there are no local entities that satisfy the delegation requirements laid down in point (d)(ii) of paragraph 11, the depositary can discharge itself of liability provided that the following conditions are met:

- a the rules or instruments of incorporation of the AIF concerned expressly allow for such a discharge under the conditions set out in this paragraph;
- b the investors of the relevant AIF have been duly informed of that discharge and of the circumstances justifying the discharge prior to their investment;
- c the AIF or the AIFM on behalf of the AIF instructed the depositary to delegate the custody of such financial instruments to a local entity;
- d there is a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, which expressly allows such a discharge; and
- e there is a written contract between the depositary and the third party that expressly transfers the liability of the depositary to that local entity and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against that local entity in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf.

15 Liability to the investors of the AIF may be invoked directly or indirectly through the AIFM, depending on the legal nature of the relationship between the depositary, the AIFM and the investors.

16 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 the competent authorities of the AIF or the AIFM. If the competent authorities of the AIF or the AIFM are different from those of the depositary, the competent authorities of the depositary shall share the information received without delay with the competent authorities of the AIF and the AIFM.

17 The Commission shall adopt, by means of delegated acts in accordance with Article 56 and subject to the conditions of Articles 57 and 58, measures specifying:

- a the particulars that need to be included in the written contract referred to in paragraph 2;
- b general criteria for assessing whether the prudential regulation and supervision of third countries as referred to in point (b) of paragraph 6 have the same effect as Union law and are effectively enforced;
- c the conditions for performing the depositary functions pursuant to paragraphs 7, 8 and 9, including:
 - (i) the type of financial instruments to be included in the scope of the depositary's custody duties in accordance with point (a) of paragraph 8;
 - (ii) the conditions subject to which the depositary is able to exercise its custody duties over financial instruments registered with a central depositary; and
 - (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 paragraph 8;

- d the due diligence duties of depositaries pursuant to point (c) of paragraph 11;
- e the segregation obligation pursuant to point (d)(iii) of paragraph 11;
- f the conditions subject to which and circumstances in which financial instruments held in custody are to be considered as lost;
- 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 paragraph 12;
- h the conditions subject to which and circumstances in which there is an objective reason to contract a discharge pursuant to paragraph 13.