

Directive (EU) 2016/2341 of the European Parliament and of the Council
of 14 December 2016 on the activities and supervision of institutions for
occupational retirement provision (IORPs) (recast) (Text with EEA relevance)

TITLE III

CONDITIONS GOVERNING ACTIVITIES

CHAPTER 3

Depository

Article 33

Appointment of a depository

1 In the case of an occupational pension scheme where members and beneficiaries fully bear the investment risk, the home Member State may require the IORP to appoint one or more depositaries for the safe-keeping of assets and oversight duties in accordance with Articles 34 and 35. The host Member State may require such IORPs to appoint one or more depositaries for the safe-keeping of assets and oversight duties in accordance with Articles 34 and 35 when carrying out cross-border activity in accordance with Article 11, provided that the appointment of a depository is required under its national law.

2 For occupational pension schemes in which the members and beneficiaries do not fully bear the investment risk, the home Member State may require the IORP to appoint one or more depositaries for safe-keeping of assets or for safe-keeping of assets and oversight duties in accordance with Articles 34 and 35.

3 Member States shall not restrict IORPs from appointing depositaries established in another Member State and duly authorised in accordance with Directive 2013/36/EU or Directive 2014/65/EU, or accepted as a depository for the purposes of Directive 2009/65/EC or Directive 2011/61/EU.

4 Member States shall take the necessary steps to enable competent authorities under their national law to prohibit, in accordance with Article 48, the free disposal of assets held by a depository or custodian located within their territory at the request of the competent authority of the IORP's home Member State.

5 The depository shall be appointed by means of a written contract. The contract shall stipulate the transmission of the information necessary for the depository to perform its duties as set out in this Directive and in other relevant laws, regulations or administrative provisions.

6 When carrying out the tasks laid down in Articles 34 and 35, the IORP and the depository shall act honestly, fairly, professionally, independently and in the interest of the scheme's members and beneficiaries.

7 A depository shall not carry out activities with regard to the IORP which may create conflicts of interest between the IORP, the scheme's members and beneficiaries and itself, unless the depository has functionally and hierarchically separated the performance of its depository tasks from its other potentially conflicting tasks, and the potential conflicts of

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interest are properly identified, managed, monitored and disclosed to the scheme's members and beneficiaries and to the administrative, management or supervisory body of the IORP.

8 Where no depositary is appointed, IORPs shall make arrangements to prevent and resolve any conflict of interest in the course of tasks otherwise performed by a depositary and an asset manager.

Article 34

Safekeeping of assets and depositary liability

1 Where the assets of an IORP relating to a pension scheme consisting of financial instruments which can be held in custody are entrusted to a depositary for safekeeping, the depositary shall hold in custody all financial instruments which can be registered in a financial instruments account opened in the depositary's books and all financial instruments which can be physically delivered to the depositary.

For those purposes, the depositary shall ensure that the financial instruments which 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 rules laid down in Directive 2014/65/EU, opened in the name of the IORP, so that they can be clearly identified as belonging to the IORP or the pension scheme's members and beneficiaries at all times.

2 Where the assets of an IORP relating to a pension scheme consist of other assets than those referred to in paragraph 1, the depositary shall verify that the IORP is the owner of the assets and shall maintain a record of those assets. The verification shall be carried out on the basis of information or documents provided by the IORP and, where available, on the basis of external evidence. The depositary shall keep its record up-to-date.

3 Member States shall ensure that a depositary is liable to the IORP and the members and beneficiaries for any loss suffered by them as a result of its unjustifiable failure to perform its obligations or its improper performance of them.

4 Member States shall ensure that a depositary's liability, as referred to in paragraph 3, shall not be affected by the fact that it has entrusted to a third party all or some of the assets in its safe-keeping.

5 Where no depositary is appointed for the safe-keeping of assets, IORPs shall, at least be required to:

- a ensure that financial instruments are subject to due care and protection;
- b keep records that enable the IORP to identify all assets at all times and without delay;
- c take the necessary measures to avoid conflicts of interest in relation to the safe-keeping of assets;
- d inform the competent authorities, upon request, about the manner in which assets are kept.

Article 35

Oversight duties

1 In addition to the tasks referred to in Article 34(1) and (2), the depositary appointed for oversight duties shall:

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- a carry out instructions of the IORP, unless they conflict with national law or the IORP's rules;
- b ensure that in transactions involving the assets of an IORP relating to a pension scheme any consideration is remitted to the IORP within the usual time limits; and
- c ensure that income produced by assets is applied in accordance with the rules of the IORP.

2 Notwithstanding paragraph 1, the home Member State of the IORP may establish other oversight duties to be performed by the depositary.

3 Where no depositary is appointed for oversight duties, the IORP shall implement procedures which ensure that the tasks, otherwise subject to oversight by depositaries, are being duly performed within the IORP.