

Chapter 3

Constitution

3.2 The instrument constituting the fund

Application

3.2.1

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This section applies to:

- (1) an *authorised fund manager* of an *AUT*, *ACS* or *ICVC*;
- (2) any other *director* of an *ICVC*;
- (3) a *depository* of an *AUT*, *ACS* or an *ICVC*;
- (4) an *ICVC*; and
- (5) a *nominated partner*;

except ■ **COLL 3.2.8 R** (UCITS obligations), which applies only to an *ICVC* or to the *authorised fund manager* of an *AUT* or *ACS* where the *ICVC*, *AUT* or *ACS* is a *UCITS scheme*.

Relationship between the instrument constituting the fund and the rules

3.2.2

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- (1) The *instrument constituting the fund* must not contain any provision that:
 - (a) conflicts with any applicable *rule*;
 - (b) prevents *units* in the *scheme* being marketed in the *United Kingdom*; or
 - (c) is unfairly prejudicial to the interests of *unitholders* generally or to the *unitholders* of any *class* of *units*.
- (2) Any power conferred by the *rules* on the *ICVC*, the *authorised fund manager*, any other *director* of the *ICVC*, or the *depository*, whether in a sole or joint capacity, is subject to any restriction in the *instrument constituting the fund*.

The trust deed for AUTs

3.2.3

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An *AUT* must be constituted by a *trust deed* made between the *manager* and the *trustee*.

3.2.3A **R** **The contractual scheme deed for ACSs**
An ACS must be constituted by a *contractual scheme deed* made between the *authorised contractual scheme manager* and:

- (1) the *depository*, in the case of a *co-ownership scheme*; or
- (2) the *nominated partner*, in the case of a *limited partnership scheme*.

3.2.4 **R** **Matters which must be included in the instrument constituting the fund**
The statements and provisions required by **COLL 3.2.6 R** (Table: contents of the instrument constituting the fund) must be included in the *instrument constituting the fund*, where appropriate.

3.2.5 **G** **The instrument constituting the fund: OEIC Regulations, Contractual Scheme Regulations and trust law requirements**
(1) Several of the matters set out in **COLL 3.2.6 R** are required to be included in the *instrument constituting the fund* under the *OEIC Regulations*, *Contractual Scheme Regulations* or as a consequence of relevant trust law. In addition, further statements are required if the *scheme* or the *authorised fund manager* are to take advantage of the powers under the *rules* in this sourcebook.
(2) Additional matters which are not contained in **COLL 3.2.6 R** may be required to be included in the *instrument constituting the fund* in order to comply with the *OEIC Regulations*, (particularly Schedule 2 - Instrument of Incorporation), *Contractual Scheme Regulations* and for the purposes of making the *scheme* eligible under relevant tax, pensions, or charities legislation.

3.2.6 **R** **Table: contents of the instrument constituting the fund**
This table belongs to **COLL 3.2.4 R** (Matters which must be included in the instrument constituting the fund).

| Name of scheme | |
|---------------------------------------|--|
| 1 | A statement of: <ul style="list-style-type: none">(1) the name of the <i>authorised fund</i>; and(2) whether the <i>authorised fund</i> is a <i>UCITS scheme</i> or a <i>non-UCITS retail scheme</i>. |
| Investment powers in eligible markets | |
| 2 | A statement that, subject to any restriction in the <i>rules</i> in this sourcebook or the <i>instrument constituting the fund</i> , the <i>scheme</i> has the power to invest in any eligible securities market or <i>deal</i> on any <i>eligible derivatives</i> market to the extent that power to do so is conferred by COLL 5 (Investment and borrowing powers). |
| Unitholder's liability to pay | |
| 3 | A provision that a <i>unitholder</i> in an <i>AUT</i> , <i>ICVC</i> or <i>co-ownership scheme</i> is not liable to make any further payment after he has paid the <i>price</i> of his <i>units</i> and that no further liability can be imposed on him in respect of the <i>units</i> which he holds. |

- 3A A provision that a *unitholder* in a *limited partnership scheme* is not liable for the debts or obligations of the *limited partnership scheme* beyond the amount of the *scheme property* which is available to the *authorised contractual scheme manager* to meet such debts or obligations, provided that the *unitholder* does not take part in the management of the partnership business.
- 3B A provision that the exercise of rights conferred on *limited partners* by *FCA rules* does not constitute taking part in the management of the partnership business.
- Base currency**
- 4 A statement of the *base currency* of the *scheme*.
- Valuation and pricing**
- 5 A statement setting out the basis for the valuation and pricing of the *scheme*.
- Duration of the scheme**
- 6 If the *scheme* is to be wound up after a particular period expires, a statement to that effect.
- Object of the scheme**
- 7 A statement:
- (1) as to the object of the *scheme*, in particular the types of *investments* and assets in which it and each *sub-fund* (where applicable) may invest; and
 - (2) that the object of the *scheme* is to invest in property of that kind with the aim of spreading investment risk and giving *unitholders* the benefits of the results of the management of that property.
- 7A Where the *authorised fund* is a *qualifying money market fund*, a statement to that effect and a statement that the *authorised fund's* investment objectives and policies will meet the conditions specified in the definition of *qualifying money market fund*.
[deleted]
- Government and public securities: investment in one issuer**
- 8 Where relevant, for a *UCITS scheme*, a statement in accordance with COLL 5.2.12 R (Spread: government and public securities) with the names of the individual states, local authorities or public international bodies issuing or guaranteeing the *transferable securities* or *approved money-market instruments* in which more than 35% in value of the *scheme property* may be invested.
- Classes of unit**
- 9 A statement:
- (1) specifying the *classes* of *unit* that may be issued, and for a *scheme* which is an *umbrella*, the *classes* that may be issued in respect of each *sub-fund*; and
 - (2) if the rights of any *class* of *unit* differ, a statement describing those differences in relation to the differing *classes*.
- Authorised fund manager's charges and expenses**
- 10 A statement setting out the basis on which the *authorised fund manager* may make a charge and recover expenses out of the *scheme property*.
- Issue or cancellation directly through the ICVC or depositary of an AUT or ACS**

11 Where relevant, a statement authorising the *issue* or *cancellation* of *units* to take place through the *ICVC* or *depository* of an *AUT* or *ACS* directly.

In specie issue and cancellation

12 Where relevant, a statement authorising payment for the *issue* or *cancellation* of *units* to be made by the transfer of assets other than cash.

Restrictions on sale and redemption

13 Where relevant, the restrictions which will apply in relation to the *sale* and *redemption* of *units* under COLL 6.2.16 R (Sale and redemption).

Voting at meetings

14 The manner in which votes may be given at a meeting of *unitholders* under COLL 4.4.8 R (Voting rights).

Certificates

15 A statement authorising the *person* responsible for the *register* to charge for issuing any document recording, or for amending, an entry on the *register*, other than on the *issue* or *sale* of *units*.

Income

16 A statement setting out the basis for the distribution or re-investment of income.

Income equalisation

17 Where relevant, a provision for *income equalisation*.

Redemption or cancellation of units on breach of law or rules

18 A statement that where any holding of *units* by a *unitholder* is (or is reasonably considered by the *authorised fund manager* to be) an infringement of any law, governmental regulation or rule, those *units* must be redeemed or cancelled.

ICVCs: larger and smaller denomination shares

19 A statement of the proportion of a *larger denomination share* represented by a *smaller denomination share* for any relevant *unit class*.

ICVCs: resolution to remove a director

20 A statement that the *ICVC* may (without prejudice to the requirements of regulation 21 of the *OEIC Regulations* (The Authority's approval for certain changes in respect of a company), by a resolution passed by a simple majority of the votes validly cast for and against the resolution at a general meeting of *unitholders*, remove a *director* before his period of office expires, despite anything else in the *ICVC's instrument of incorporation* or in any agreement between the *ICVC* and that *director*.

ICVCs: unit transfers

21 A statement that the *person* designated for the purposes of paragraph 4 of Schedule 4 to the *OEIC Regulations* (Share transfers) is the *person* who, for the time being, is the *ACD* of the *ICVC*.

ICVCs and ACSs: Charges and expenses

22 A statement that charges or expenses of the *ICVC* or *ACS* may be taken out of the *scheme property*.

ICVCs: Umbrella schemes - principle of limited recourse

- 22A For an *ICVC* which is an *umbrella*, a statement that the assets of a *sub-fund* belong exclusively to that *sub-fund* and shall not be used to discharge directly or indirectly the liabilities of, or claims against, any other *person* or body, including the *umbrella*, or any other *sub-fund*, and shall not be available for any such purpose.
- Co-ownership schemes: umbrella schemes - principle of limited recourse**
- 22B For a *co-ownership scheme* which is an *umbrella*, a statement that the property subject to a *sub-fund* is beneficially owned by the *participants* in that *sub-fund* as tenants in common (or, in Scotland, is the common property of the *participants* in that *sub-fund*) and must not be used to discharge any liabilities of, or meet any claims against, any *person* other than the *participants* in that *sub-fund*.
- AUTs: governing law for a trust deed**
- 23 A statement that the *trust deed* is made under and governed by the law of England and Wales, Wales or Scotland or Northern Ireland.
- AUTs: trust deed to be binding and authoritative**
- 24 A statement that the *trust deed*:
- (1) is binding on each *unitholder* as if it had been a party to it and that it is bound by its provisions; and
 - (2) authorises and requires the *trustee* and the *manager* to do the things required or permitted of them by its terms.
- AUTs: declaration of trust**
- 25 A declaration that, subject to the provisions of the *trust deed* and all *rules* made under section 247 of the *Act* (Trust scheme rules) and for the time being in force:
- (1) the *scheme property* (other than sums standing to the credit of the *distribution account*) is held by the *trustee* on trust for the *unitholders* according to the number of *units* held by each *unitholder* or, where relevant, according to the number of undivided shares in the *scheme property* represented by the *units* held by each *unitholder*; and
 - (2) the sums standing to the credit of the *distribution account* are held by the *trustee* on trust to distribute or apply them in accordance with COLL 6.8 (Income: accounting, allocation and distribution).
- AUTs: trustee's remuneration**
- 26 Where relevant, a statement authorising payments to the *trustee* by way of *remuneration* for its services to be paid (in whole or in part) out of the *scheme property*.
- AUTs: responsibility for the register**
- 27 A statement identifying the *person* responsible under the *rules* for the maintenance of the *register*.
- ACSs: governing law for a contractual scheme deed**
- 27A A statement that the *contractual scheme deed* is made under and governed by the law of England and Wales, or Scotland or Northern Ireland.
- ACSs: contractual scheme deed to be binding and authoritative**
- 27B A statement that the *contractual scheme deed*:
- (1) is binding on each *unitholder* as if it had been a party to it and that it is bound by its provisions; and

- (2) authorises and requires the *depository* and the *authorised contractual manager* to do the things required or permitted of them by its terms.

ACs: ownership of scheme property

27C A statement that, subject to the provisions of the *contractual scheme deed* and all *rules* made under section 261I of the Act (Contractual scheme rules) and for the time being in force:

- (1) the *scheme property* (other than sums standing to the credit of the *distribution account*) is held by, or to the order of, the *depository* for and on behalf of the *unitholders* according to the number of *units* held by each *unitholder* or, where relevant, according to the number of undivided shares in the *scheme property* represented by the *units* held by each *unitholder*;
- (2) the sums standing to the credit of the *distribution account* are held by the *depository* to distribute or apply them in accordance with COLL 6.8 (Income: accounting, allocation and distribution); and
- (3) the *scheme property* of a *co-ownership scheme* is beneficially owned by the *participants* as tenants in common (or, in Scotland, is the common property of the *participants*).

ACs: responsibility for the register

27D A statement identifying the *person* responsible under the *rules* for the maintenance of the *register*.

ACs: UCITS and NURS eligible investors

27E For an ACS which is a *UCITS scheme* or a *non-UCITS retail scheme*, a statement that *units* may not be *issued* to a *person* other than a:

- (1) *professional ACS investor*;
- (2) *large ACS investor*; or
- (3) *person* who already holds *units* in the *scheme*.

27F A statement that the *authorised contractual scheme manager* must *redeem units* as soon as practicable after becoming aware that those *units* are vested in anyone (whether as a result of subscription or transfer of *units*) other than a *person* meeting the criteria in paragraph 27E.

ACs: UCITS and NURS transfer of units

- 27G
- (1) A statement whether the transfer of *units* in the ACS *scheme* is either:
 - (a) prohibited; or
 - (b) allowed
 - (2) Where transfer of *units* is allowed in accordance with (1)(b), a statement that *units* may only be transferred in accordance with the conditions specified by *FCA rules*, including that *units* may not be transferred to a *person* other than a:
 - (a) *professional ACS investor*;
 - (b) *large ACS investor*; or
 - (c) *person* who already holds *units* in the *scheme*.
 - (3) For a *co-ownership scheme* which is an *umbrella*, a statement in accordance with (1)(a) or (1)(b) and, where appropriate, a statement in accordance with (2), must also be made for the *sub-funds*. Where individual *sub-funds* have differing policies in relation to transfer of *units*, separate statements are required.

Co-ownership schemes: constitution

- 27H For a *co-ownership scheme*, a statement that the arrangements constituting the *scheme* are intended to constitute a *co-ownership scheme* as defined in section 235A(2) of the Act.

Co-ownership schemes: operator's powers

- 27I A statement that the *operator* of a *co-ownership scheme* is authorised to:
- (1) acquire, manage and dispose of the *scheme property*; and
 - (2) enter into contracts which are binding on *unitholders* for the purposes of, or in connection with, the acquisition, management or disposal of *scheme property*.

Co-ownership schemes: winding-up

- 27J A statement that the *operator* and *depository* of a *co-ownership scheme* are required to wind up the *scheme* if directed to do so by the FCA in exercise of its power under section 261X (Directions) or section 261Z (Winding up or merger of master UCITS) of the Act.

Limited partnership schemes: participants

- 27K A statement that the *limited partners*, other than the *nominated partner*, are to be the *participants* in the *scheme*.

Limited partnership schemes: resignation of limited partners

- 27L A statement that the *scheme* is not dissolved on any *person* ceasing to be a *limited partner* or *nominated partner* provided that there remains at least one *limited partner*.

Limited partnership schemes: inability to operate as an umbrella

- 27M A statement that the *limited partnership scheme* prohibits pooling as is mentioned in section 235(3)(a) of the Act in relation to separate parts of the *scheme property*, with the effect that the *scheme* cannot be an *umbrella*.

Investment in overseas property through an intermediate holding vehicle

- 28 If investment in an overseas immovable is to be made through an *intermediate holding vehicle* or a series of *intermediate holding vehicles*, a statement that the purpose of that *intermediate holding vehicle* or series of *intermediate holding vehicles* will be to enable the holding of overseas immovables by the *scheme*.

Transfers to a dormant asset fund operator

- 29
- (1) Where relevant, a statement that the *authorised fund manager* and (if applicable) the *depository* may transfer an *eligible CIS amount* which is a *dormant asset* to a *dormant asset fund operator*, specifying the particular types of *eligible CIS amounts* which may be so transferred.
 - (2) Where relevant, a statement detailing the power of the *authorised fund manager* and (if applicable) the *depository* to convert one or more *units* into a right to payment of an amount for transfer to a *dormant asset fund operator*, and a description of a *person's* right to make a *repayment claim* in relation to the amount transferred.
 - (3) Where relevant, a statement that the *authorised fund manager* and (if applicable) the *depository* may transfer *unwanted asset money* to a *dormant asset fund operator*, and a description of the circumstances in which such *money* may be transferred.

[Note: In relation to transfers to a *dormant asset fund operator*, see COLL 3.2.6AR.]

| | | |
|--------|---|---|
| | | Transfers to a dormant asset fund operator |
| 3.2.6A | R | If the <i>authorised fund manager</i> or (where relevant) the <i>depository</i> intends to make transfers of <i>eligible CIS amounts</i> that are <i>dormant assets</i> or <i>unwanted asset money</i> to a <i>dormant asset fund operator</i> , or intends to take a power of the type referred to in ■ COLL 3.2.6R(29)(2), the applicable statements in ■ COLL 3.2.6R(29)(1), ■ (2) and ■ (3) must be included. |
| 3.2.7 | R | [deleted] |
| | | UCITS obligations |
| 3.2.8 | R | (1) The instrument constituting a <i>UCITS scheme</i> may not be amended in such a way that it ceases to be a <i>UCITS scheme</i> . (2) [deleted] (3) [deleted] |