

## Chapter 6

# Operating duties and responsibilities

6.6B UCITS depositaries

Application

6.6B.1 R This section applies to the *depositary* of a *UCITS scheme* managed by an *authorised fund manager*.

General obligations

6.6B.2 R A *depositary* in carrying out its functions must act:

- (1) honestly, fairly, professionally and independently; and
- (2) solely in the interests of the *UCITS scheme* and its *unitholders*.

[Note: article 25(2) first paragraph of the *UCITS Directive*]

Conflicts of interest: depositaries

6.6B.3 R A *depositary* must not carry out activities with regard to the *UCITS scheme*, or the *authorised fund manager*, acting on behalf of the *scheme*, that may create conflicts of interest between the *scheme*, the *unitholders* in the *scheme* or the *authorised fund manager* and itself, unless:

- (1) the *depositary* has properly identified any such potential conflicts of interest;
- (2) the *depositary* has functionally and hierarchically separated the performance of its *depositary* tasks from its other potentially conflicting tasks; and
- (3) the potential conflicts of interest are properly managed, monitored and disclosed to the *unitholders* of the *scheme*.

[Note: article 25(2) second paragraph of the *UCITS Directive*]

Eligible depositaries for UCITS schemes

6.6B.4 G A *depositary* of a *UCITS scheme* must be a *firm* established in the *United Kingdom* that has the *Part 4A permission* of acting as trustee or depositary of a *UK UCITS*.

6.6B.5 G ■ COLL 6.6A.8R sets out the categories of *firms* that may be appointed by an *authorised fund manager* as the *depositary* of a *UCITS scheme*.

**6.6B.6** G For a *depositary* to be established in the *United Kingdom*, it must have its registered office in the *United Kingdom*.

## Depositories appointed under COLL 6.6A.8R(3) (non-bank depositaries): Capital requirements

**6.6B.7** G A *depositary* appointed in accordance with ■ COLL 6.6A.8R(3) needs to satisfy the capital requirements in either:

- (1) ■ IPRU(INV) 5; or
- (2) MIFIDPRU

**6.6B.8** R [deleted]

[Editor's note: this requirement has been moved to ■ MIFIDPRU 4.4.6R.]

**6.6B.9** G (1) [deleted]

(2) [deleted]

**6.6B.10** G [deleted]

## Depositories appointed under COLL 6.6A.8R(3) (non-bank depositaries): organisational requirements

**6.6B.11** R A *depositary* appointed under ■ COLL 6.6A.8R(3) must:

- (1) ensure that it has the infrastructure necessary to keep in custody *UCITS custodial assets* that can be registered in a *financial instruments* account opened in the *depositary's* books;
- (2) establish adequate policies and procedures sufficient to ensure the compliance of the *depositary*, including its managers and employees, with its obligations under the *regulatory system*;
- (3) have:
  - (a) sound administrative and accounting procedures and internal control mechanisms;
  - (b) effective procedures for risk assessment; and
  - (c) effective control and safeguard arrangements for information processing systems;
- (4) maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest;
- (5) arrange for records to be kept of all services, activities and transactions that it undertakes, which must be sufficient to enable the *competent authority* to monitor the *firm's* compliance with the requirements under the *regulatory system*;

- (6) take reasonable steps to ensure continuity and regularity in the performance of its *depositary* functions by employing appropriate and proportionate systems, resources and procedures to perform its *depositary* activities;
- (7) ensure that all members of its *management body* and senior management at all times:
  - (a) are of sufficiently good repute; and
  - (b) possess sufficient knowledge, skills and experience;
- (8) ensure that its *management body* possesses adequate collective knowledge, skills and experience to be able to understand the *depositary's* activities, including the main risks; and
- (9) require each member of its *management body* and senior management to act with honesty and integrity.

[Note: article 23(2)(c) (second sentence) of the *UCITS Directive*]

- 6.6B.12 G A *firm's* attention is also drawn to the organisational requirements in SYSC. The *rules and guidance* in SYSC apply to a *depositary* appointed under ■ COLL 6.6A.8R(3), in accordance with the application provisions summarised in ■ SYSC 1.1A (Application) and provided in detail in ■ SYSC 1 Annex 1.

#### Written contract

- 6.6B.13 R
- (1) A *depositary* must ensure that its appointment as *depositary* of a *UCITS scheme* is evidenced by a written contract.
  - (2) The contract must regulate the flow of information deemed necessary to allow the *depositary* to perform its functions for the *scheme*.

[Note: article 22(2) of the *UCITS Directive*]

- 6.6B.14 G The written contract referred to in ■ COLL 6.6B.13R may cover more than one *UCITS scheme*.

- 6.6B.15 G Article 2 of the *UCITS level 2 regulation* sets out the minimum information that must be included in the written contract between the *authorised fund manager* and the *depositary*.

#### Depositary functions: oversight

- 6.6B.16 R The *depositary* must, for each *UCITS scheme* for which it is appointed:
- (1) ensure that the *sale, issue, repurchase, redemption and cancellation* of *units* of the *scheme* are carried out in accordance with:
    - (a) the applicable national law;
    - (b) the *instrument constituting the fund*;
    - (c) the *prospectus*; and
    - (d) ■ COLL 6.2 (Dealing);

- (2) ensure that the price of the *units* of the *UCITS* is calculated in accordance with:
  - (a) the applicable national law;
  - (b) the *instrument constituting the fund*;
  - (c) the *prospectus*; and
  - (d) ■ [COLL 6.3](#) (Valuation and pricing);
- (3) carry out the instructions of the *authorised fund manager*, unless they conflict with:
  - (a) the applicable national law; or
  - (b) the *instrument constituting the fund*; or
  - (c) the *prospectus*; or
  - (d) ■ [COLL 5](#) (Investment and borrowing powers);
- (4) ensure that, in transactions involving the assets of the *UCITS scheme*, any consideration is remitted to the *scheme* within the usual time limits; and
- (5) ensure that the income of the *UCITS scheme* is applied in accordance with:
  - (a) the applicable national law;
  - (b) the *instrument constituting the fund*;
  - (c) the *prospectus*; and
  - (d) ■ [COLL 6.8](#) (Income: accounting, allocation and distribution).

[Note: article 22(3) of the *UCITS Directive*]

### Depository functions: cash monitoring

6.6B.17

**R**

The *depository* must ensure that the cash flows of each *UCITS scheme* are properly monitored and that:

- (1) all payments made by, or on behalf of, investors upon the subscription of *units* of the *scheme* have been received;
- (2) all cash of the *scheme* has been booked in cash accounts which are:
  - (a) opened in the name of:
    - (i) the *scheme*; or
    - (ii) the *authorised fund manager*, acting on behalf of the *scheme*; or
    - (iii) the *depository* acting on behalf of the *scheme*; and
  - (b) at:
    - (i) a central bank; or
    - (ii) a *CRD credit institution*; or
    - (iii) a bank authorised in a country other than an *EEA State*; and

6.6B.18

**R**

(c) maintained in accordance with the principles in article 2 (safeguarding of client financial instruments and funds) of the *MiFID Delegated Directive*; and

(3) where cash accounts are opened in the name of the *depositary* acting on behalf of the *scheme* in accordance with (2)(a)(iii), the *depositary* must ensure that no cash of the entity referred to in (2)(b), and none of the *depositary's* own cash, is booked on such accounts.

[Note: article 22(4) of the *UCITS Directive*]

### Depositary functions: safekeeping of financial instruments

(1) The *depositary* of a *UCITS* scheme must hold in custody all *UCITS* custodial assets of the *scheme*.

(2) The *depositary* must ensure that all *UCITS* custodial assets that can be registered in a *financial instruments* account:

(a) are registered in the *depositary's* books within segregated accounts opened in the name of:

(i) the *UCITS* scheme; or

(ii) the *authorised fund manager*, acting on behalf of the *scheme*; and

(b) can be clearly identified as belonging to the *UCITS* scheme at all times in accordance with:

(i) the applicable law; and

(ii) the applicable provisions in ■ CASS 6.

[Note: article 22(5)(a) of the *UCITS Directive*]

### Depositary functions: safekeeping of other assets

6.6B.19

**R**

The *depositary* must, for *UCITS* scheme property other than *UCITS* custodial assets:

(1) verify that the *UCITS* scheme or the *authorised fund manager*, acting on behalf of the *scheme*, is the owner of the assets based:

(a) on information or documents provided by the *authorised fund manager*; and

(b) where available, on external evidence; and

(2) maintain, and keep up to date, a record of those assets for which it is satisfied that the *UCITS* scheme or the *authorised fund manager*, acting on behalf of the *scheme*, is the owner.

[Note: article 22(5)(b) of the *UCITS Directive*]

### Inventory of assets

- 6.6B.20** **R** The *depositary* must provide a comprehensive inventory of all the assets comprising the *scheme property* of the *UCITS scheme* to the *authorised fund manager* on a regular basis.

[Note: article 22(6) of the *UCITS Directive*]

### Re-use of assets

- 6.6B.21** **R**
- (1) The *depositary* must not re-use *UCITS custodial assets* except:
    - (a) where permitted under **COLL 5.4** (stock lending); and
    - (b) when carrying out the instructions of the *authorised fund manager* on behalf of the *scheme*.
  - (2) Re-use of the *UCITS custodial assets* comprises any transaction in relevant *scheme property* including, but not limited to, transferring, pledging, selling and lending.

[Note: article 22(7) first paragraph of the *UCITS Directive*]

### Limitation on delegation

- 6.6B.22** **R** A *depositary* must not delegate its oversight function in **COLL 6.6B.16R** or its cash monitoring function in **COLL 6.6B.17R** to a third party.

[Note: article 22a(1) of the *UCITS Directive*]

- 6.6B.23** **G** The use of services provided by securities settlement systems, as specified in the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, or similar services provided by securities settlement systems in other countries, does not constitute a delegation by the *depositary* of its functions for the purposes of **COLL 6.6B.22R**.

[Note: article 22a(4) of the *UCITS Directive*]

- 6.6B.24** **G**
- (1) (a) If a *depositary* performs part of its functions through a *branch* in an *EEA State*, this is not a delegation by the *depositary* of its functions to a third party.
  - (b) This is because 'third party' in **COLL 6.6B.22R** means any party that is not part of the same legal entity as the *depositary*.
  - (2) [deleted]
  - (3) (a) A *depositary* that performs part of its functions through a *branch* in an *EEA State* should ensure that those arrangements do not impede the *depositary's* ability to meet the *threshold conditions*.
  - (b) (i) In particular, the arrangements should not impede the *FCA's* ability to supervise the *depositary* effectively.
  - (ii) For example, the *FCA's* ability to supervise the *depositary* might be impeded if the *depositary* performed tasks other than administrative and supporting tasks from its *branch* in an *EEA State*.

## Delegation: safekeeping

6.6B.25

**R**

A *depositary* may delegate the functions in ■ COLL 6.6B.18R and ■ COLL 6.6B.19R to one or more third parties if:

- (1) the tasks are not delegated with the intention of avoiding the requirements of the *UCITS Directive*, as implemented in this chapter;
- (2) the *depositary* can demonstrate that there is an objective reason for the delegation;
- (3) the *depositary*:
  - (a) has exercised all due skill, care and diligence in the selection and appointment of any third party to whom it intends to delegate parts of its tasks; and
  - (b) continues to exercise all due skill, care and diligence in the periodic review and ongoing monitoring:
    - (i) of any third party to whom it has delegated parts of its tasks; and
    - (ii) of the arrangements of that third party in respect of the matters delegated to it; and
- (4) the *depositary* ensures that the third party delegate meets the following conditions at all times:
  - (a) the third party has structures and expertise that are adequate and proportionate to the nature and complexity of the assets of the *UCITS scheme* that have been entrusted to it;
  - (b) (subject to ■ COLL 6.6B.26R) for custody tasks in relation to *UCITS custodial assets*, the third party is subject to:
    - (i) effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned; and
    - (ii) an external periodic audit to ensure that the *financial instruments* remain in its custody;
  - (c) 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*;
  - (d) the third party takes all necessary steps to ensure that in the event of insolvency of the third party, *UCITS custodial assets* held in custody by the third party are unavailable for distribution among, or realisation for the benefit of, creditors of the third party; and
  - (e) the third party complies with the general obligations and prohibitions relating to the *depositary* in:
    - (i) ■ COLL 6.6B.2R (General obligations);
    - (ii) ■ COLL 6.6B.3R (Conflicts of interests: depositaries);
    - (iii) ■ COLL 6.6B.13R (Written contract);
    - (iv) ■ COLL 6.6B.18R (Depositary functions: safekeeping of financial instruments);

(v) ■ COLL 6.6B.19R (Depositary functions: safekeeping of other assets); and

(vi) ■ COLL 6.6B.21R (Reuse of assets).

[Note: article 22a(2) and (3) of the *UCITS Directive*]

### Delegation: third countries

6.6B.26

**R**

A *depositary* may delegate custody tasks in relation to *UCITS custodial assets* to an entity in another country even though that entity does not satisfy the conditions in ■ COLL 6.6B.25R(4)(b)(i) if:

- (1) the law of that country requires those *UCITS custodial assets* to be held in custody by a local entity;
- (2) no local entity satisfies the conditions in ■ COLL 6.6B.25R(4)(b)(i);
- (3) the *depositary* delegates its functions to such a local entity only:
  - (a) to the extent required by the law of that country; and
  - (b) for as long as there is no local entity that satisfies the delegation conditions in ■ COLL 6.6B.25R(4)(b)(i);
- (4) the investors of the relevant *UCITS scheme* are informed before their investment:
  - (a) that such delegation is required due to legal constraints in the other country;
  - (b) of the reasons as to why the delegation is necessary; and
  - (c) of the risks involved in such a delegation; and
- (5) the *authorised fund manager*, acting on behalf of the *UCITS scheme*, has consented to the delegation arrangements before they become effective.

[Note: article 22a(3) of the *UCITS Directive*]

### Delegation: sub-delegation

6.6B.27

**R**

A *depositary* must ensure that a third party to whom the *depositary* has delegated functions under ■ COLL 6.6B.25R does not, in turn, sub-delegate those functions unless the delegate complies with the same requirements that apply to the *depositary*, with any necessary changes, in relation to the delegation by the *depositary* of its functions in ■ COLL 6.6B.25R and ■ COLL 6.6B.26R.

[Note: article 22a(3) third paragraph of the *UCITS Directive*]

### Delegation: omnibus account

6.6B.28

**G**

A *depositary* may delegate the safekeeping of assets to a third party that maintains an omnibus account for multiple *UCITS schemes*, provided it is a segregated common account that is segregated from the third party's own assets.

[Note: recital 22 of the *UCITS Directive*]

6.6B.29	G	<b>Provision of information</b>
		The requirements of ■ SUP 2 (Information gathering by the FCA or PRA on its own initiative) apply to the <i>depositary</i> , under which it must enable the <i>FCA</i> to obtain, on request, all information that the <i>depositary</i> has obtained while discharging its duties and that the <i>FCA</i> considers necessary.  [Note: article 26a first paragraph of the <i>UCITS Directive</i> ]
		<b>Reporting of breaches</b>
6.6B.30	R	A <i>depositary</i> must have appropriate procedures for its employees to report internally, through a specific, independent and autonomous channel, potential or actual breaches of those national provisions which implemented the <i>UCITS Directive</i> before <i>IP completion day</i> .  [Note: article 99d(5) of the <i>UCITS Directive</i> ]
		<b>Subordinate measures</b>
6.6B.31	G	■ SYSC 18 (Guidance on Public Interest Disclosure Act: Whistleblowing) contains further <i>guidance</i> on the effect of the Public Interest Disclosure Act 1998 in the context of the relationship between <i>firms</i> and the <i>FCA</i> .
6.6B.32	G	Articles 3 to 17 of the <i>UCITS level 2 regulation</i> provide detailed rules supplementing this section.