

**Investment Services Rules for**

**Retail Collective Investment Schemes**

**Checklist**

**UCITS Depositary Agreement**

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| **Name of applicant** |  |
| **Date of submission of checklist** | 28 December 2016 |

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|  |  | **Applicant** |  | **MFSA** |
|  |  | Clause  **Number** |  |  |
|  | Safekeeping |  |  |  |
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|  | The assets of the UCITS shall be entrusted to the depositary for safekeeping as follows: |  |  |  |
|  | for **financial instruments** that may be held in custody, the depositary shall: |  |  |  |
|  |  |  |  |  |
|  | 1. 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; and |  |  |  |
|  |  |  |  |  |
|  | 1. 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; |  |  |  |
|  |  |  |  |  |
|  | for **other assets**, the depositary shall: |  |  |  |
|  | 1. 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; |  |  |  |
|  |  |  |  |  |
|  | 1. 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. |  |  |  |
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|  | The custodian shall, on a regular basis, provide the UCITS management company or the UCITS with a comprehensive **inventory** of all the assets of the UCITS. |  |  |  |
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|  | **Reuse of Assets** |  |  |  |
|  |  |  |  |  |
|  | The assets held in custody by the depositary shall not be reused[[1]](#footnote-1) by the depositary, or by any third party to which the custody function has been delegated, for their own account. |  |  |  |
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|  | The assets held in custody by the depositary are allowed to be reused only where: |  |  |  |
|  | 1. the reuse of the assets is executed for the account of the UCITS; |  |  |  |
|  | 1. the depositary is carrying out the instructions of the UCITS management company on behalf of the UCITS; |  |  |  |
|  | 1. the reuse is for the benefit of the UCITS and in the interest of the unit holders; and |  |  |  |
|  | 1. the transaction is covered by high-quality and liquid collateral received by the UCITS under a title transfer arrangement |  |  |  |
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|  | The market value of the collateral shall, at all times, amount to at least the market value of the reused assets plus a premium. |  |  |  |
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|  | **Depositary Agreement Particulars** |  |  |  |
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|  | The contract shall include at least the following elements[[2]](#footnote-2): |  |  |  |
|  |  |  |  |  |
|  | 1. a description of the services to be provided by the depositary and the procedures to be adopted by the depositary for each type of assets in which the UCITS may invest and which are entrusted to the depositary; |  |  |  |
|  | 1. a description of the way in which the safekeeping and oversight functions are to be performed depending on the types of assets and the geographical regions in which the UCITS plans to invest, including in respect to the safekeeping duties, country lists and procedures for adding or withdrawing countries from the lists. This shall be consistent with the information provided in the UCITS rules, instruments of incorporation and offering documents regarding the assets in which the UCITS may invest; |  |  |  |
|  | 1. the period of validity and the conditions for amendment and termination of the contract, including the situations which could lead to the termination of the contract and details regarding the termination procedure and the procedures by which the depositary send all relevant information to its successor; |  |  |  |
|  | 1. the confidentiality obligations applicable to the parties in accordance with relevant laws and regulations. Those obligations shall not impair the ability of competent authorities to have access to the relevant documents and information; |  |  |  |
|  | 1. the means and procedures by which the depositary transmits to the management company or the investment company (in the case of a self-managed scheme) all relevant information that it needs in order to perform its duties, including the exercise of any rights attached to assets, and to allow the management company or the investment company to have a timely and accurate overview of the accounts of the UCITS; |  |  |  |
|  | 1. the means and procedures by which the management company or the investment company transmits all relevant information or ensures the depositary has access to all the information it needs to fulfil its duties, including the procedures ensuring that the depositary will receive information from other parties appointed by the management company or the investment company; |  |  |  |
|  | 1. the procedures to be followed when an amendment to the UCITS rules, instruments of incorporation or offering documents is being considered, detailing the situations in which the depositary is to be informed, or where the prior agreement of the depositary is needed to proceed with the amendment; |  |  |  |
|  | 1. all necessary information that needs to be exchanged between the investment company or the management company, or a third party acting on behalf of the UCITS on the one hand, and the depositary, on the other hand, related to the sale, subscription, redemption, issue, cancellation and re-purchase of units of the UCITS; |  |  |  |
|  | 1. all necessary information that needs to be exchanged between the investment company or the management company, or a third party acting on behalf of the UCITS and the depositary related to the performance of the depositary's duties; |  |  |  |
|  | 1. where parties to the contract envisage appointing third parties to carry out parts of their respective duties, a commitment to provide, on a regular basis, details of any third party appointed and, upon request, information on the criteria used to select the third party and the steps envisaged to monitor the activities carried out by the selected third party; |  |  |  |
|  | 1. information on the tasks and responsibilities of the parties to the contract in respect of obligations relating to the prevention of money laundering and the financing of terrorism |  |  |  |
|  | 1. Information on all cash accounts opened in the name of the investment company or of the management company acting on behalf of the UCITS and the procedures ensuring that the depositary will be informed when any new account is opened |  |  |  |
|  | 1. details regarding the depositary's escalation procedures, including the identification of the persons to be contacted within the management company or the investment company by the depositary when it launches such a procedure |  |  |  |
|  | 1. a commitment by the depositary to notify that the segregation of assets is no longer sufficient to ensure protection from insolvency of a third party, to whom safekeeping has been delegated in accordance with Article 22a of Directive 2009/65/EC in a specific jurisdiction |  |  |  |
|  | 1. the procedures ensuring that the depositary, in respect of its duties, has the ability to enquire into the conduct of the management company or the investment company and to assess the quality of information received, including by way of having access to the books of the management company or the investment company and by way of on-site visits |  |  |  |
|  | 1. the procedures ensuring that the management company or the investment company are enabled to review the performance of the depositary in respect of the depositary's duties |  |  |  |
|  |  |  |  |  |
|  | Depositary’s Regulatory Obligations |  |  |  |
|  | ***Oversight Duties*** |  |  |  |
|  | Provide that the Depositary must: |  |  |  |
|  | ensure that the sale, issue, repurchase, redemption and cancellation of units of the UCITS are carried out in accordance with the requirements prescribed by the competent authority, if any, applicable to the UCITS and with the constitutional documents of the UCITS; |  |  |  |
|  | ensure that the value of the units of the UCITS is calculated in accordance with the provisions of the constitutional documents of the UCITS; |  |  |  |
|  | carry out the instructions of the UCITS management company or the UCITS, unless they conflict with the requirements prescribed by the competent authority, if any, applicable to the UCITS and with the constitutional documents of the UCITS; |  |  |  |
|  | ensure that in transactions involving the assets of the UCITS any consideration is remitted to the UCITS within the usual time limits; |  |  |  |
|  | ensure that the income of the UCITS is applied in accordance with the constitutional documents of the UCITS. |  |  |  |
|  |  |  |  |  |
|  | An obligation to compile a report on whether the scheme has been managed (a) in accordance with the limitations imposed on the investment and borrowing powers of the scheme by the constitutional documents and by the MFSA; and (b) in accordance with the constitutional documents of the scheme and its Licence Conditions. |  |  |  |
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|  | If the scheme is not managed as indicated in paragraph 4.2 above, the report shall also include the reason and outline the steps which the Depositary has taken to rectify the situation. |  |  |  |
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|  | ***Cash Flow Monitoring*** |  |  |  |
|  | 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: |  |  |  |
|  | 1. opened in the name of the UCITS, of the UCITS management company acting on behalf of the UCITS, or of the depositary acting on behalf of the UCITS; |  |  |  |
|  | 1. opened at one of the following entities:  a central bank;a credit institution authorised in accordance with Directive 2013/36/EU; ora bank authorised in a third country; |  |  |  |
|  | 1. maintained in accordance with the principles set out in Article 16 of Commission 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 paragraph 4.4(b) and none of the own cash of the depositary shall be booked on such accounts. |  |  |  |
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|  | ***Other Duties*** |  |  |  |
|  | The Depositary is responsible for verifying the calculation of any performance fee in terms of the Investment Services Act (Performance Fees) Regulations, if any, and ensuring that such performance fee is payable in accordance with the relevant provisions of the same Regulations. |  |  |  |
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|  | The depositary shall carry out a monitoring function over the activities of the Investment Manager or the management function of a self-managed Scheme. |  |  |  |
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|  | **Delegation** |  |  |  |
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|  | The depositary shall not delegate to third parties the functions referred to in regulations 19 and 20 of the Investment Services Act (Custodians of Collective Investment Schemes) Regulations (“the Regulations”). |  |  |  |
|  |  |  |  |  |
|  | The depositary may delegate to third parties the functions referred to in regulation 21(1) of the Regulations only where: |  |  |  |
|  | 1. the tasks are not delegated with the intention of avoiding the requirements prescribed in the Regulations and in the applicable Investment Services Rules; |  |  |  |
|  | 1. the depositary can demonstrate that there is an objective reason for the delegation; and |  |  |  |
|  | 1. 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. |  |  |  |
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|  | In respect of a delegation referred to in regulation 21(1) of the Regulations, the third party shall at all times during the performance of the tasks delegated to it: |  |  |  |
|  | 1. have structures and expertise that are adequate and proportionate to the nature and complexity of the assets of the UCITS or the UCITS management company acting on behalf of the UCITS which have been entrusted to it; |  |  |  |
|  | 1. for the custody tasks referred to in regulation 21(1)(a) of the Regulations, is subject to: |  |  |  |
|  | 1. effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned; |  |  |  |
|  | 1. an external periodic audit to ensure that the financial instruments are in its possession; |  |  |  |
|  | 1. segregate 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; |  |  |  |
|  | 1. take 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 |  |  |  |
|  | 1. complies with the general obligations and prohibitions prescribed in regulations 5, 21(1), 18 and 22 of the Regulations. |  |  |  |
|  |  |  |  |  |
|  | Notwithstanding point (b)(i) of paragraph 5.3, 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: |  |  |  |
|  | 1. 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; |  |  |  |
|  | 1. the investment company, or the UCITS management company on behalf of the UCITS, has instructed the depositary to delegate the custody of such financial instruments to such a local entity. |  |  |  |
|  |  |  |  |  |
|  | The third party may in turn sub-delegate the safe-keeping functions subject to the same requirements. In such a case, the provisions of regulation 24(4) shall apply *mutatis mutandis* to the relevant parties. |  |  |  |
|  |  |  |  |  |
|  | For the purposes of regulation 23 of the Regulations, the provision of services as specified by 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, 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[[3]](#footnote-3). |  |  |  |
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|  | **Liability** |  |  |  |
|  | The depositary shall be 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 regulation 21(a) of the Regulations has been delegated. |  |  |  |
|  |  |  |  |  |
|  | In the case of a loss of a financial instrument held in custody, the depositary shall return 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. |  |  |  |
|  |  |  |  |  |
|  | The depositary shall also be 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 the provisions of the Investment Services Act, the Regulations and the applicable Investment Services Rules. |  |  |  |
|  |  |  |  |  |
|  | The liability of a depositary referred to in paragraphs 6.1 to 6.4 shall not be affected by any delegation as referred to regulation 23 of the Regulations. |  |  |  |
|  |  |  |  |  |
|  | Unit-holders in the UCITS may invoke the liability of the depositary directly or indirectly through the UCITS management company or the UCITS itself provided that this does not lead to a duplication of redress or to unequal treatment of the unit-holders. |  |  |  |
|  |  |  |  |  |
|  | **Termination of Appointment** |  |  |  |
|  |  |  |  |  |
|  | Disclose that without prejudice to any requirements as may be prescribed by the MFSA, the Depositary Agreement may be terminated by the Scheme, the Fund Manager, the Depositary or by order of the MFSA. Provided that the fund manager may terminate the Depositary Agreement in the case where it is party to the agreement and it has been granted termination rights. |  |  |  |
|  |  |  |  |  |
|  | The Depositary shall proceed with the conveyance of the assets held for the scheme as stipulated in the custody agreement or as instructed by the scheme. |  |  |  |
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|  | The termination of the appointment of the Depositary in accordance with the provisions of regulations 7 and 8 of the Regulations |  |  |  |
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|  | Where the scheme, the fund manager on behalf of the scheme or the Depositary serves notice to terminate the appointment of the Depositary, it shall simultaneously notify the MFSA of the intended termination of the appointment of the Depositary and of the transitional period specified in sub-regulation (1) of Article 8 of the CCIS Regulations. |  |  |  |
|  |  |  |  |  |
|  | In the case where following the lapse of the transitional period, the scheme, or the fund manager on behalf of the scheme, fails to find a replacement for the outgoing custodian, the scheme, or the fund manager on behalf of the scheme shall immediately notify the competent authority |  |  |  |
|  |  |  |  |  |
|  | Following an assessment of the case, the outgoing custodian shall, in accordance with the directions given by the competent authority, provide the monitoring, safekeeping and oversight functions as the case may be in relation to the assets of the scheme: |  |  |  |
|  |  |  |  |  |
|  | In the event of insolvency of the custodian and, or of any third party located in any Member State or EEA State to which custody of assets has been delegated, the assets of the scheme held in custody shall not be available for distribution among, or realisation for the benefit of, the creditors of such a custodian and, or such third party. |  |  |  |

I hereby confirm that the Depositary Agreement conforms to the requirements prescribed in Directive 2009/65/EC of the European Parliament and of the Council as amended by Directive 2014/91/EU.

Applicant’s Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. Reuse comprises any transaction of assets held in custody including, but not limited to, transferring, pledging, selling and lending (2009/65/EC Article 22(7)) [↑](#footnote-ref-1)
2. The details of the means and procedures set out in points (a) to (p) shall be described in the contract appointing the depositary and any subsequent amendment [↑](#footnote-ref-2)
3. Entrusting the custody of securities of the UCITS to any CSD, or to any third-country CSD should be considered to be a delegation of custody functions. [↑](#footnote-ref-3)