



Uwagi Rady Banków Depozytariuszy do projektu dyrektywy zmieniającej dyrektywę 2009/65/WE UCITS

Rada Banków Depozytariuszy bardzo dziękuję za przesłanie projektu dyrektywy zmieniającej dyrektywę 2009/65/WE Parlamentu Europejskiego i Rady w sprawie koordynacji przepisów ustawowych, wykonawczych i administracyjnych odnoszących się do przedsiębiorstw zbiorowego inwestowania w zbywalne papiery wartościowe (UCITS) w zakresie funkcji depozytariusza, polityki wynagrodzeń i sankcji. Pragnęlibyśmy zgłosić następujące uwagi:

Amendment 1

EC proposal	Rada Banków Depozytariuszy proposal
<p>Recital 7 In order to ensure the necessary level of harmonisation of the relevant regulatory requirements in different Member States additional rules should be adopted defining the tasks and duties of depositaries, designating the legal entities that may be appointed as depositaries and clarifying the liability of depositaries in cases UCITS assets are lost in custody or in the case of depositaries' improper performance of their oversight duties. <u>Such improper performance may result in the loss of assets but also in the loss of the value of assets, if, for example, a depositary tolerated investments that were not compliant with fund rules, while exposing the investor to unexpected or anticipated risks.</u> Additional rules should also clarify the conditions under which depositary functions may be delegated.</p>	<p>Recital 7 In order to ensure the necessary level of harmonisation of the relevant regulatory requirements in different Member States additional rules should be adopted defining the tasks and duties of depositaries, designating the legal entities that may be appointed as depositaries and clarifying the liability of depositaries in cases UCITS assets are lost in custody or in the case of depositaries' improper performance of their oversight duties. Such improper performance may result in the loss of assets but also in investments not compliant with fund rules, exposing the investor to unexpected or anticipated risks . Additional rules should also clarify the conditions under which depositary functions may be delegated.</p>

Rada Banków Depozytariuszy comments:

It is the duty and liability of UCITS managers to ensure that investment decisions are carried out in compliance with the investment strategy and, where applicable, risk limits of the UCITS managed.

The oversight duties of the depositary as regards to the compliance of the fund's investment do not substitute to the asset managers' control and are performed after the fact. It would encourage moral hazard from asset managers if the depositary should have to compensate for a loss of value in case of non compliant investments.

Amendment 2

EC proposal	Rada Banków Depozytariuszy proposal
<p>Article 22 – delegation of custody</p> <p>The functions referred to in paragraph 5 may be delegated by the depositary only to a third party which at all time during the performance of the tasks delegated to it:</p> <p>(a) has structures and expertise that are adequate and proportionate to the nature and complexity of the assets of the UCITS or the management company acting on behalf of the UCITS which have been entrusted to it;</p> <p>(b) for custody tasks referred to in point (a) of paragraph 5, is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned;</p> <p>(c) for custody tasks referred to in point (a) of paragraph 5, is subject to an external periodic audit to ensure that the financial instruments are in its possession;</p> <p>(d) segregates 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;</p> <p>(e) 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;</p>	<p>The functions referred to in paragraph 5 may be delegated by the depositary only to a third party which at all time during the performance of the tasks delegated to it:</p> <p>(a) has structures and expertise that are adequate and proportionate to the nature and complexity of the assets of the UCITS or the management company acting on behalf of the UCITS which have been entrusted to it;</p> <p>(b) for custody tasks referred to in point (a) of paragraph 5, is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned;</p> <p>(c) for custody tasks referred to in point (a) of paragraph 5, is subject to an external periodic audit to ensure that the financial instruments are in its possession;</p> <p>(d) segregates 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;</p> <p>option (1) to be deleted</p> <p>(e) 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;</p> <p>option(2) the depositary must assess if 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 inform the asset of the result of its assessment .If for reasons of the applicable law, including in particular the law relating to property or insolvency, assets can not be protected in the event of insolvency of the third party it is to be considered as an external event beyond reasonable control of the depositary , the consequences of which would have been unavoidable despite all reasonable efforts to the contrary pursuant</p>

Rada Banków Depozytariuszy comments:

As UCITS are allowed to invest in a great number of countries it increases the necessity to select and appoint sub-custodians in all these various jurisdictions. We agree that assets managers should not be allowed to invest in countries where it is clearly ascertained that laws of these countries do not recognize the effects of an appropriately implemented segregation. Nevertheless, in some countries where UCITS currently invest, despite legal analysis and opinions, it may be beyond the ability of the depositary to assess and guarantee the consequences of the insolvency of a sub-custodian as the local courts decisions are, by definition, entirely outside the control or influence of the depositary.

We rather suggest that in order to minimize this risk in countries where it is not possible to have a full certainty on the effects of segregation in case of insolvency the depositary should make a disclosure to the UCITS so that this aspect of the custody risk is properly taken into account in the investment decision.

Indeed, UCITS managers have to ensure a high level of diligence in the selection and monitoring of investments. They must have the professional expertise and knowledge of the assets in which UCITS are invested in order to ensure that investment decisions are carried out in compliance with the investment strategy and, where applicable, risk limits of the UCITS managed.

Meeting the requirement (e) would lead to severe limitations for the investments made by UCITS as otherwise depositaries may have to renounce to invest in some countries in order to mitigate the risk involved in the sub-custodian delegation. In the end, this might lead to jeopardize the success of the UCITS brand.

Therefore we propose:

- in option 1 to delete requirement (e) in level 1 text and in level 2 text to require the depositary to assess if the fund's assets are protected in case of insolvency of the sub-custodian and to discharge its liability in case, due to the law relating to property or insolvency, assets can not be protected in the event of insolvency of the third party
- in option 2 to require in the level 1 text the depositary to assess if the fund's assets are protected in case of insolvency of the sub-custodian and to discharge its liability in case, due to the law relating to property or insolvency, assets can not be protected in the event of insolvency of the third party.

Amendment 3

EC proposal	Rada Banków Depozytariuszy proposal
Article 22 – delegation of custody Notwithstanding point (b) of the third 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, and only where: (a) the investors of the relevant UCITS are duly informed that such delegation is required due to legal constraints in the law	To be deleted : Notwithstanding point (b) of the third 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, and only where: (a) the investors of the relevant UCITS are 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; (b) the UCITS, or the management company on behalf of the UCITS, have instructed the depositary to delegate the custody of such financial instruments to such a local entity.	of the third country and of the circumstances justifying the delegation, prior to their investment; (b) the UCITS, or the management company on behalf of the UCITS, have instructed the depositary to delegate the custody of such financial instruments to such a local entity.
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Rada Banków Depozytariuszy comments:

We believe that depositary should not be allowed to appoint sub-custodians in countries where sub-custodians are not submitted to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned. It is not expected that it will reduce significantly the geographical coverage as most of countries where UCITS invest meet the requirement (b).

Warszawa, dnia 30.07.2012