



## Luxembourg newflash

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### Level 2 measures for UCITS V: an overview

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On 24 March 2016, the European Commission Delegated Regulation EU 2016/438 (the “**Delegated Regulation**”) supplementing the UCITS V Directive with regard to obligations of depositaries was published in the Official Journal of the European Union. The long-awaited so-called level 2 measures for Directive 2014/91/EU of 23 July 2014 as regards depositary functions, remuneration policies and sanctions (“**Directive UCITS V**”) provide for the following:

- **Written contract appointing the depositary (Article 2).** The Delegated Regulation sets out the minimum requirements for the written agreement to be entered into between the investment company or the management company for each of the common funds that the management company manages on the one hand and the depositary on the other hand.
- **Obligations of the depositary (Articles 3 to 17).** Further details are provided in the Delegated Regulation relating to oversight duties, cash monitoring, safekeeping duties with regard to assets held in custody and other assets, due diligence when selecting and appointing third parties, segregation and insolvency protection of UCITS assets when delegating custody functions. With the exception of the insolvency protection which is a new requirement, all other obligations are largely identical to those set out in the frame of the Alternative Investment Fund Managers Directive (“**AIFMD**”).

If the depositary entrusts a UCITS’ assets to a third party located in a third country, the depositary is now required to ensure, notably on the basis of independent legal advice, that in the event of insolvency of that third party, the assets of the UCITS held by the latter in custody will be unavailable for distribution among, or realisation for the benefit of, creditors of that third party.

- **Loss of financial instruments and liability discharge (Articles 18 and 19).** The Delegated Regulation specifies the conditions and circumstances under which financial instruments held in custody are considered to be lost and how the depositary can escape its liability in case of a force majeure event. These conditions are the same as those applicable under AIFMD.

- **Independence requirements for management companies, investment companies, and depositaries (Articles 20 to 24).** The Delegated Regulation clarifies the independence requirements. These requirements are specific to UCITS and impose strict rules as to the composition of the management body of the management company or the investment company on the one hand and the depositary and its delegates on the other hand. Specific rules apply in case of two-tier structures and additional requirements exist

when a group link exists between the management company or the investment company and the depositary.

In addition thereto, management companies or investment companies are required to put in place a decision-making process for choosing and appointing the depositary, based on objective pre-defined criteria and meeting the sole interest of the UCITS and the investors of the UCITS.

The text of the Delegated Regulation as published does not depart from the text adopted by the European Commission on 17 December 2015. The Delegated Regulation comes into force on 12 April 2016 and will apply from 13 October 2016.

Considering the guidance provided earlier this year by ESMA, as published on 1 February 2016 in its UCITS Q&A, the revision of the depositary agreements should be finalised promptly and in accordance with the requirements outlined in the Delegated Regulation once the Luxembourg legislator has adopted the law implementing Directive UCITS V. According to our latest information, the respective parliamentary vote should take place in April 2016.

[The Delegated Regulation in its English version may be downloaded here.](#)

We remain at your disposal for any further questions.

This publication is intended to provide information on recent legal developments and does not cover every aspect of the topics with which it deals. It was not designed to provide legal or other advice and it does not substitute for the consultation with legal counsel before any actual undertakings.

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