

COOPERATION BETWEEN THE INVESTMENT FUND COMPANY AND THE DEPOSITARY – DUTIES, LIABILITY, AND PRACTICAL PROBLEMS

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***Abstract:** The institution of the depositary constitutes one of the fundamental mechanisms for protecting participants in investment funds. Traditionally, its role was primarily associated with the safekeeping of fund assets and the maintenance of accurate records. However, the development of the financial market, the growing complexity of investment instruments, and regulatory changes at the European Union level have led to a significant expansion of this function. Today, the depositary performs not only a technical role, but also supervisory and protective functions.*

Of key importance for the transformation of the legal status of the depositary were Directive 2011/61/EU (AIFMD), Directive 2014/91/EU (UCITS V), and Commission Delegated Regulation (EU) No 231/2013. These regulations extended the depositary's duties to include monitoring cash flows, verifying the fund's compliance with legal provisions and its statute, and determining the rules governing liability for breaches of duty and loss of assets. This shift was subsequently reflected in the Polish Act on Investment Funds and the Management of Alternative Investment Funds. The presentation serving as the starting point for these considerations indicates that the new approach to the depositary's function includes both an extension of its duties and an increased significance of this institution within the system for protecting fund participants.

The doctrine emphasizes that the depositary has ceased to be merely a passive participant in the valuation of assets and has become an entity co-responsible for the proper functioning of an investment fund. At the same time, the extension of its catalog of duties raises significant interpretative and practical doubts, particularly regarding the limits of liability, conflicts of interest, and the admissibility of entrusting certain activities to sub-custodians.

This article aims to analyze the evolution of the investment fund depositary's function following the implementation of the AIFMD and UCITS V regulations into Polish law, with particular emphasis on new duties, liabilities, and the protection of fund participants' interests. The study applies the dogmatic-legal method and functional analysis, thereby enabling assessment of both the scope of normative changes and their practical consequences for the investment fund market.

Keywords: investment fund depositary, investment fund, AIFMD, UCITS V, depositary liability, investor protection, sub-custodian, conflict of interest.

1. Evolution of the Legal Status of the Depositary on the Investment Fund Market

The institution of the depositary is one of the basic elements of an investment fund's legal structure. Its importance stems from the need to ensure the safety of fund assets, the transparency of its operations, and the protection of participants' interests. In the classical approach, the depositary was perceived primarily as an entity responsible for safeguarding fund assets and maintaining appropriate records. However, as the capital market developed and financial products grew more complex, this model proved insufficient. Both the EU legislator and the national legislator began to assign the depositary increasingly broad supervisory, control, and protective functions (Borowski, 2003; Perez & Borowski, 2018; Miziołek, 2022; Glinka, 2017).

The origins of this institution in the Polish legal order are closely linked to the development of the collective investment market. Earlier studies have indicated that an investment fund, as a specific form of capital investment, requires an external entity to the investment fund company to protect assets and limit the risk of manager abuse. The depositary therefore performed a stabilizing function, constituting one of the pillars of trust in the investment fund market. The doctrine also emphasized that its role cannot be reduced solely to technical activities, because the very design of this institution indicates its protective character vis-à-vis the investor (Borowski, 2003; Glinka, 2017; Miziołek, 2022).

European Union law had a significant impact on the evolution of the depositary's legal status. This process unfolded gradually, alongside successive UCITS directives and regulations concerning alternative investment funds. Directive 2009/65/EC, Directive 2011/61/EU, and Directive 2014/91/EU were of particular importance, as the latter clearly strengthened the depositary's function within the system for protecting fund participants. These regulations were supplemented by Commission Delegated Regulation (EU) No 231/2013, which clarified many of the depositary's duties, especially in the areas of cash-flow monitoring, asset safekeeping, and relations with third parties (Directive 2009/65/EC; Directive 2011/61/EU; Directive 2014/91/EU; Regulation 231/2013; Perez & Borowski, 2018; Miziołek, 2022).

The article clearly emphasizes that the evolution of the depositary's role proceeded from a model focused on asset safekeeping to a much more complex model that also includes control and liability functions. It points out that the new understanding of the depositary's function in the Act includes, among other things, an extension of the range of entities authorised to perform this function, clarification of existing duties, comprehensive regulation of the rules for asset safekeeping, monitoring of cash flows, verification of the fund's compliance with the law, its

statute, and the interests of participants, as well as determination of the rules of the depositary's liability for breaches of duty and the loss of the fund's financial instruments. EU regulations constitute direct sources of inspiration for these domestic changes (Directive 2011/61/EU; Directive 2014/91/EU; Regulation 231/2013; Act 2004; Miziołek, 2022).

The implementation of the indicated solutions into Polish law led to a clear transformation of the depositary's position. Under the Act on Investment Funds and the Management of Alternative Investment Funds, the depositary not only safekeeps assets or maintains their register, but also ensures proper monitoring of cash flows, acts with the highest degree of due care, and remains obliged to act in the interests of fund participants. As a result, the normative center of gravity shifted from a purely operational function toward a supervisory one. As noted in the literature, this change reflects a broader trend toward strengthening institutional mechanisms for investor protection in capital markets (Act, 2004; Perez & Borowski, 2018; Miziołek, 2022).

The contemporary legal status of the depositary should therefore be understood in a multidimensional manner. On the one hand, it remains the entity responsible for safeguarding fund assets and maintaining registers. On the other hand, it performs functions related to the ongoing control of the legality and correctness of selected fund activities. Thus, the depositary's new duties include, among others, monitoring cash flows, ensuring the accuracy of settlements, controlling compliance with applicable law and the fund statute in the issuance, sale, and redemption of units or investment certificates, and supervising the accuracy of net asset value calculations. In this way, the depositary becomes an entity that co-participates in the system for ensuring that the fund's activities comply with the law (Act, 2004; Regulation 2016/438; ESMA, 2023; Glinka, 2017).

The literature notes that extending the depositary's functions increases the level of protection afforded to fund participants, but also gives rise to new interpretative and practical difficulties. This concerns in particular the limits of the depositary's liability, the issue of conflicts of interest, and relations with sub-custodians. Already at the conceptual level, the question arises whether the depositary should be treated solely as a guardian of the legality of particular transactions, or rather as a broader institution for the protection of fund participants. In this sense, the evolution of its legal status entails not only an extension of the catalog of duties but also a change in the very philosophy of its functioning in the investment fund market (Regulation 231/2013; ESMA, 2016; UKNF, 2021; Glinka, 2017).

In conclusion, the evolution of the depositary's legal status in Poland results from the impact of EU law, the development of the domestic investment fund market, and the growing

importance of investor protection as a systemic value. The contemporary depositary is no longer merely an entity providing technical services to a fund, but a participant in the system of supervision and protection of participants' interests. This change is the starting point for further analysis of the depositary's specific duties, its liability, and the practical problems arising from performing this function (Perez & Borowski, 2018; Miziołek, 2022; Directive 2014/91/EU).

2. Scope of the Depositary's Duties

The implementation of EU regulations on the management of investment funds led to a fundamental change in the depositary's operating model in the Polish legal system. The depositary is no longer perceived solely as an entity responsible for the technical safekeeping of fund assets, but as an institution performing a complex set of duties of a record-keeping, supervisory, organizational, and protective nature. This direction of change follows from the AIFMD, the UCITS V Directive, and Commission Delegated Regulation (EU) No 231/2013, and, in domestic law, is reflected in the Act on Investment Funds and the Management of Alternative Investment Funds. As a starting point for these considerations, it was clearly indicated that the new understanding of the depositary's function includes clarification of existing duties, comprehensive regulation of asset safekeeping, monitoring of cash flows, execution of the fund's instructions, and liability for breaches of duty (Directive 2011/61/EU; Directive 2014/91/EU; Regulation 231/2013; Act, 2004; Miziołek, 2022).

In legal scholarship, the issue of the scope of the depositary's duties most often appears in three basic dimensions: first, as a matter related to the safekeeping and registration of fund assets; second, as an issue of monitoring the legality and correctness of the fund's activities; and third, as an element of the system of investor and fund participant protection. This problem structure already follows from the selection of literature covering the depositary's legal status, its liability, conflicts of interest, asset safekeeping, cash-flow monitoring, and sub-custody agreements. The very breadth of this literature confirms that after the amendment to the Act, the depositary's duties must be analyzed not only functionally, but also systemically (Borowski, 2003; Glinka, 2017; Perez & Borowski, 2018; Miziołek, 2022).

The starting point is the general statutory regulation under which the depositary performs the duties specified in the Act, in particular the safekeeping of assets and the maintenance of the asset register of an investment fund or an alternative investment company, as well as ensuring proper monitoring of those entities' cash flows. The legislator also emphasizes that the depositary is to act diligently, with the highest degree of care befitting the professional nature of its business, in accordance with the principles of fair dealing,

independently of the management company, and in the interests of fund participants. Already at this normative level, an important axiological change is evident: the depositary is not merely to perform operational activities but to co-create a guarantee mechanism that serves investor protection. This direction is also consistent with the broader European approach to corporate governance in financial institutions and the strengthening of internal and external control mechanisms (Act, 2004; Regulation 231/2013; UKNF, 2021).

The first group of the depositary's duties consists of duties related to the safekeeping of fund assets and the maintenance of the asset register. The new statutory approach introduces a distinction between assets that can be held in custody and other assets that, by their nature, cannot be kept in the classical sense. Financial instruments constituting securities and dematerialized instruments are recorded in securities accounts maintained by the depositary, whereas other assets are either held or entered in the fund's asset register. At the same time, the depositary is obliged to verify the fund's rights to assets that cannot be held traditionally, on the basis of information and documents provided by the management company or the fund and, where possible, also based on land and mortgage registers, public registers, and other records. In the case of a fund with separate sub-funds, the depositary also maintains sub-registers of the assets of each sub-fund (Act, 2004; Regulation 231/2013; Regulation 2016/438).

This statutory and functional distinction between assets held in custody and registered assets should be regarded as one of the most important consequences of implementing EU regulations. Regulation No 231/2013 specifies the depositary's duties in the area of custody and record-keeping. Also, it indicates that these duties should be considered about intermediary structures and assets held through specific financial or legal structures. This is reflected in the reference to the look-through basis criterion, indicating that duties relating to assets held and registered should also extend to underlying assets held through controlled structures.

The second group of the depositary's duties concerns the monitoring of the fund's cash flows. Under the Act and Regulation No 231/2013, the scope of these duties has been defined in much greater detail than before the amendment. The depositary must therefore ensure that the fund's cash is kept in accounts maintained by authorized entities, in accordance with national law or EU requirements. At the same time, the duty to ensure the segregation of the fund's cash from other funds is emphasized, a fundamental requirement for the safety of participants' property. In addition, under the implementing regulations, the depositary should be informed of all of the fund's cash accounts, obtain access to information on accounts opened with third parties, implement procedures for the daily reconciliation of cash flows,

identification of material flows, and monitoring of inconsistencies revealed during such reconciliations (Act, 2004; Regulation 231/2013; ESMA, 2011; ESMA, 2016).

The expansion of duties related to cash monitoring should be interpreted as a legislative response to risks of loss of control over the fund's liquidity and to the opacity of financial flows. In this sense, the depositary is to act not so much as a passive recipient of information, but as an active entity verifying the correctness of the organization of the fund's cash accounts and cash flows. The very scope of the bibliography confirms the importance of this area, since a separate item is devoted specifically to the depositary's duties concerning cash-flow monitoring. At the same time, issues of market practice were subsequently addressed in UKNF communications and good-practice recommendations. Consequently, cash-flow monitoring should be regarded as one of the central elements of the contemporary depositary's function (Regulation 231/2013; ESMA, 2011; ESMA, 2016; UKNF, 2021).

The third area comprises control duties relating to the fund's compliance with applicable laws and statutes, and the interests of participants. The depositary is required to ensure that the sale and redemption of units, or the issuance, delivery, and redemption of investment certificates, take place in accordance with the law and the fund's statute. Moreover, the depositary is to ensure that settlement of agreements concerning the fund's assets takes place without undue delay, that the net asset value and the net asset value per unit or investment certificate are calculated in accordance with the law and the statute, and that the fund's income is used in a manner consistent with legal provisions and statutory requirements. This catalog is complemented by the execution of the fund's instructions, provided they are not contrary to the law or the statute, and by verification of the fund's compliance with legal regulations in areas other than those expressly indicated in the Act (Act, 2004; Regulation 2016/438; ESMA, 2023).

It is precisely this group of duties that best demonstrates that the depositary has been incorporated into the system of *ex ante* and *ex post* supervision of the investment fund's activities. The issue is no longer only the condition of assets, but also the legality, timeliness, and correctness of particular fund operations. In the literature, this issue is clearly present both in the context of the depositary's supervisory functions and its role as an institution for investor protection. At the same time, it should be noted that this very area of new duties gives rise to the greatest interpretative doubts, especially about the statutory duty of "verifying the compliance of the fund's activities with the law, the statute, and the interests of participants" beyond the cases expressly enumerated. Supervisory practice and scholarship also indicate the risk of an excessively broad or changeable interpretation of this duty by the supervisory authority (Glinka, 2017; Miziołek, 2022; UKNF, 2021; ESMA, 2023).

The fourth group of duties comprises organizational and contractual duties related to the performance of the depositary function. The Act provides that a single depositary is appointed for each fund, and that the detailed manner of performing this function should be set out in an agreement concluded between the management company and the depositary. Accordingly, that agreement should specify the detailed duties of the parties, the rules for the exchange of information necessary for the performance of the depositary's tasks, as well as remuneration and the method of calculating costs charged to the fund. In other respects, the agreement should meet the requirements set out in Article 83 of Regulation No 231/2013. This means that the scope of the depositary's duties is not exhausted by the Act itself, but is also specified at the level of the contractual relationship and operating procedures (Act, 2004; Regulation 231/2013; Regulation 2016/438).

In this context, the issue of the depositary's independence and the management of conflicts of interest is also of particular importance. Although this problem is the subject of a more in-depth analysis later in the article, it must already be emphasised at the stage of discussing duties that the legislator expressly prohibits the depositary from performing other activities in relation to a given fund or management company if this could lead to a conflict of interest, unless appropriate organisational and technical separation and mechanisms for identifying and monitoring conflicts are implemented. This issue should be understood as one of the elements of the new understanding of the depositary's function. Moreover, academic research, the literature, and market practice, including the works of Cichy (2019) and KNF communications, indicate that this is not a marginal issue, but one of the pillars for assessing the proper performance of the depositary's function (Act, 2004; UKNF, 2021; Glinka, 2017).

Finally, after the amendment, the depositary's duties must also be analyzed from the perspective of the possibility of using sub-custodians. Although this issue is usually discussed separately, the very scope of the statutory duties already shows that even where certain activities are lawfully entrusted to a third party, the depositary's systemic responsibility does not disappear. Such delegation may concern only activities related to the asset safekeeping function and does not extend to the depositary's other duties. At the same time, the depositary must meet several conditions before and after concluding a sub-custody agreement, including an assessment of the legal environment, operational practices, financial standing, and reputation of the sub-custodian, as well as the implementation of procedures for monitoring its activity. The very selection of literature, including separate items devoted to sub-custody agreements and the depositary's liability toward fund participants, confirms that this is an inherent component of the contemporary model of the depositary's duties (Directive 2011/61/EU; Regulation 231/2013; Regulation 2018/1618; ESMA, 2016).

In conclusion, the scope of the depositary's duties after the amendment to the Act is multilayered and goes far beyond the traditional view of this institution as an entity safeguarding the fund's assets. It includes duties related to custody and record-keeping, cash-flow monitoring, control of the compliance of particular operations with the law and the statute, execution of the fund's instructions, organization of information flows, and supervision over activities entrusted to third parties. This model is grounded in both EU and domestic law and aligns with developments in the literature, which view the depositary as one of the key instruments for protecting investment fund participants. At the same time, interpretative and practical problems are already visible at the level of the catalog of duties, which justifies further analysis of the depositary's liability, conflicts of interest, and the limits of permissible delegation of activities (Regulation 231/2013; Regulation 2016/438; UKNF, 2021; Miziołek, 2022).

3. Depositary Liability and Conflicts of Interest as Key Practical Problems

The extension of the depositary's duties following the implementation of the AIFMD and UCITS V regulations inevitably increased the importance of the issue of its liability. The broader the range of tasks entrusted to the depositary, the more important the question of the limits of its legal, organizational, and functional liability becomes. The contemporary model of the depositary is no longer limited to the technical safekeeping of fund assets but also includes monitoring cash flows, controlling compliance of specific activities with applicable laws and statutes, and supervising the performance of selected fund operations. Consequently, the depositary's liability has become a central issue in both market practice and the literature devoted to the protection of investment fund participants (Directive 2011/61/EU; Directive 2014/91/EU; Regulation 231/2013; Miziołek, 2022).

The starting point for the analysis of this liability remains the statutory determination of the standard of conduct required of the depositary. Under the Act on Investment Funds and the Management of Alternative Investment Funds, the depositary is obliged to act reliably, with the highest degree of care resulting from the professional nature of its activity, and in accordance with the principles of fair dealing. At the same time, the management company and the depositary are to act independently and in the interests of fund participants. The very structure of these provisions shows that the depositary's liability cannot be interpreted solely through the prism of failure to perform a single technical act. Rather, it has a broader character and is embedded in the protective function of this institution, as reflected in the literature on the depositary's legal status and its role as an institution that protects investors (Act, 2004; Glinka, 2017; Miziołek, 2022).

The basis of these considerations is the assumption that one of the essential elements of the new understanding of the depositary's function is the "regulation of the depositary's liability for breaches of its duties, including for the loss of the fund's financial instruments." This wording itself indicates that both the national legislator and the EU legislator sought to clearly link the expanded catalog of duties to liability for the consequences of their non-performance or improper performance. This liability is of particular importance in the area of custody, because the safekeeping of assets and ensuring the possibility of identifying them constitutes the traditional core of the depositary's function. At the same time, with the development of the investment fund market, this liability could no longer remain limited solely to the physical or record-based custody of assets (Directive 2011/61/EU; Directive 2014/91/EU; Regulation 231/2013; Regulation 2016/438).

In practice, the distinction between liability for assets subject to safekeeping and liability with respect to assets that are merely registered, or whose existence and belonging to the fund must be verified based on documents, land and mortgage registers, public registers, and other records, is of great importance. It should therefore be clearly indicated that the legislator differentiates the depositary's duties depending on the nature of the assets and additionally imposes on it the duty to verify the fund's rights to particular asset components. Such a construction directly affects the scope of liability, because the grounds for assessing the depositary's due care will differ for assets held in custody and assets entered only in registers.

Closely linked to the issue of liability is the scope of the duty to monitor cash flows. The depositary is obliged to ensure that the fund's cash is kept in accounts maintained by authorized entities and that those accounts are properly identified, segregated, and covered by reconciliation and cash-flow monitoring procedures. The depositary should have knowledge of all of the fund's cash accounts, obtain information about new accounts, and receive relevant data from third parties maintaining such accounts. In addition, it is to implement procedures for daily cash-flow reconciliation, identification of material flows, and monitoring of discrepancies identified during such reconciliations. This model means that the depositary's liability covers not only the loss of cash itself, but also the organization of a control system that enables irregularities to be detected sufficiently early. For this reason, in the literature and supervisory practice, cash-flow monitoring is treated as one of the most sensitive elements of the depositary's function (Regulation 231/2013; ESMA, 2011; ESMA, 2016; UKNF, 2021).

Particularly problematic, however, remains the scope of the depositary's liability for the fund's compliance with the law, its statute, and the interests of participants. Interpretative doubts must be clearly signaled here. It is pointed out that the new duty consisting in verifying

whether the fund's activity complies with the legal provisions governing investment funds or with the statute, while also duly taking into account the interests of participants, may give rise to serious practical problems. The lack of sufficiently detailed regulation at the level of the implementing regulation, doubts about how to perform this duty, and the risk of arbitrary and inconsistent interpretation by the supervisory authority have all been emphasized. The question has also been explicitly posed as to whether the depositary will be responsible for verifying compliance with the law, the statute, and the interests of participants in the fund's investment activity (Act of 27 May 2004; Regulation 2016/438; ESMA, 2024; UKNF, 2021).

It is precisely at this point that the tension between the protective function and the practical feasibility of the depositary's duties becomes apparent. On the one hand, the legislator seeks to ensure the broadest possible protection of fund participants by assigning the depositary the role of guardian of the legality of particular acts. On the other hand, an overly broad understanding of liability could lead to the de facto transfer to the depositary of part of the managerial or supervisory functions that by their nature belong to the investment fund company or the public supervisory authority. Consequently, the central problem becomes determining whether the depositary is only to control the formal compliance of selected activities with the law and the statute, or whether it is to be responsible for a broader result in the form of the proper functioning of the fund (Glinka, 2017; Miziołek, 2022; UKNF, 2021; ESMA, 2022).

The second key practical problem is the conflict of interest. The modern model of the financial market is characterized by the increasing complexity of relationships among entities that provide services to investment funds. In such a reality, preserving the depositary's actual independence from the management company and other market participants becomes of fundamental importance. The national legislator has provided that the depositary of an investment fund may not perform other activities relating to that fund or management company that could give rise to a conflict of interest between itself, the fund, the management company, or fund participants; in particular, it may not act as a prime broker unless specified organizational and informational conditions are met. This reflects the clear need for organizational and technical separation of the depositary function from other activities that may give rise to conflicts of interest, as well as for proper identification, monitoring, and management of conflicts, and informing fund participants of cases in which they occur (Act, 2004; Directive 2014/91/EU; Regulation 2016/438).

The importance of conflicts of interest follows from the very essence of the depositary's function. Since it is to act in the interests of fund participants and perform a protective function, it cannot remain entangled in economic or organizational relations that would weaken its ability

to independently assess the activities of the fund or the management company. This problem is not purely theoretical. In practice, it may arise both at the level of capital-group structures and in connection with the simultaneous provision of multiple services by the same entity to the fund or its environment. The validity of distinguishing conflicts of interest as a separate research issue is also confirmed by documents concerning corporate governance and market good practices (European Commission, 2010; Glinka, 2017; UKNF, 2021).

In the context of conflicts of interest, the depositary's independence is of particular importance not only in the formal-legal sense, but also in the operational sense. A mere declaration of independence is insufficient without appropriate organizational procedures, information flows, decision-making mechanisms, and a separation of functions within the institution concerned. In performing this duty, the issue is not limited to the prohibition of certain relationships but also extends to the necessity of managing conflicts of interest. In this sense, the depositary's liability also includes responsibility for creating internal conditions that enable the proper performance of its statutory duties. This is consistent with the broader European approach to corporate governance in financial institutions and the strengthening of compliance and internal control mechanisms (European Commission, 2010; UKNF, 2021; ESMA, 2022).

The depositary's liability also becomes apparent in relations with sub-custodians. Although a detailed analysis of sub-custody agreements is a separate issue, it should already be emphasized at this stage that entrusting certain activities to a third party does not eliminate the depositary's systemic responsibility for the proper organization of the asset safekeeping function. Accordingly, before concluding a sub-custody agreement, the depositary should assess the regulatory and legal framework, practices, rules, and internal controls; the financial standing; reputation; and operational and technological capacity of the sub-custodian. After agreeing, it should implement procedures for monitoring the sub-custodian, conduct periodic risk reviews, ensure an appropriate standard of care, and prepare contingency plans for individual markets. Duties of this kind confirm that the depositary's liability is continuous and does not end at the moment a delegation agreement is concluded (Regulation 231/2013; Regulation 2018/1618; ESMA, 2016).

In practice, this leads to a significant increase in the costs of the depositary's activity and to the need to build extensive compliance, control, and monitoring systems. Thus, adapting depositaries' activities to new EU and domestic regulations entails higher operating costs, a broader scope of liability, and the need for comprehensive verification of sub-custody agreements, especially for entities established outside the European Union. The depositary's

liability, therefore, has not only a strictly legal dimension, but also an economic and organizational one. It requires maintaining such human, technological, and procedural resources as will enable the depositary to perform its protective function in a real rather than merely declaratory manner. This, in turn, raises the question whether every institution formally authorized to act as a depositary will, in practice, be capable of meeting such a broad range of duties (Directive 2011/61/EU; Regulation 231/2013; UKNF, 2021).

In conclusion, the depositary's liability after the amendment to the Act should be regarded as an integral element of the extension of its protective and supervisory function. It includes liability for the performance of duties related to asset safekeeping, maintenance of registers, cash-flow monitoring, control of compliance of specific fund activities with applicable laws and statutes, and organization of cooperation with sub-custodians. At the same time, the broader the scope of this liability, the greater the importance of practical problems relating to its limits and to maintaining the depositary's actual independence. Conflicts of interest remain particularly important, as they may weaken the depositary's protective function and undermine trust in the entire investment fund system. For this reason, liability and conflicts of interest should be treated not as secondary issues but as key axes for assessing the effectiveness of the contemporary depositary model in the investment fund market (Act, 2004; Regulation 231/2013; UKNF, 2021; Miziołek, 2022).

4. Sub-Custody Agreements and Practical Problems in Performing the Depositary Function

One of the most complex issues in the performance of the depositary function is the possibility of entrusting certain activities to third parties, namely, sub-custodians. This issue is of considerable practical importance because the contemporary investment fund market operates in a cross-border, multi-level, and technologically complex environment, which means that without specialized intermediaries, the performance of the asset safekeeping function would, in many cases, be significantly more difficult. On the other hand, every delegation of activities raises questions about the limits of the solution's admissibility, the scope of the depositary's liability, and the impact of this model on the level of protection afforded to fund participants. This issue is clearly reflected in both EU and domestic regulations, as well as in the literature on liability, asset safekeeping, and sub-custody (Directive 2011/61/EU; Regulation 231/2013; Regulation 2018/1618; Miziołek, 2022).

The Act on Investment Funds introduced a comprehensive regulation of the issue of entrusting the performance of the depositary's duties to third parties. It states that, as a general

rule, the depositary may, by means of a written agreement, entrust an undertaking or a foreign undertaking with the performance of activities related to the asset-safekeeping function of a fund or an alternative investment company, subject to Articles 98 and 99 of Regulation No 231/2013. At the same time, it is emphasized that only activities within the scope of the asset safekeeping function may be delegated. In contrast, the performance of the depositary's other duties may not be entrusted to third parties. This limitation itself is of considerable systemic importance. It means that delegation may not lead to a complete "hollowing out" of the depositary function or deprive it of its essential protective role (Act, 2004; Regulation 231/2013; Regulation 2018/1618).

Such an approach should be regarded as a consequence of the general logic of EU law. Both the AIFMD and the implementing acts to that directive allow the depositary to use third parties, but at the same time subject that possibility to numerous conditions and preserve the depositary's responsibility for the proper organization of the asset safekeeping system. In this sense, sub-custody is not a departure from the protective model, but one of its elements, albeit burdened with increased organizational and jurisdictional risk. For that reason, the national and EU legislators do not treat the entrustment of activities as an ordinary business decision of the depositary, but as an action requiring special care and ongoing supervision. A sub-custody agreement may be concluded only where the delegation of activities is not intended to circumvent the provisions of the Act, the depositary can objectively justify the need to entrust the performance of a given activity and the scope of that delegation, and the choice of the undertaking or foreign undertaking has been made with due care. This set of premises should be interpreted restrictively. First, the legislator expressly excludes the instrumental use of a sub-custodian in order to limit statutory rigors. Second, the requirement of an objective justification for the need to delegate means that the depositary must be able to demonstrate the rationality and necessity of such a solution, rather than merely its organizational convenience. Third, the criterion of due care in selecting a third party indicates that the depositary's responsibility begins already at the stage preceding the conclusion of the agreement (Directive 2011/61/EU; Regulation 231/2013; ESMA, 2016; Directive (EU) 2024/927).

The depositary's duties before concluding a sub-custody agreement are particularly important. They include, among other things, an assessment of the regulatory and legal framework in which the sub-custodian operates; an assessment of its practices, rules, and internal controls; an assessment of its financial standing and reputation; and an assessment of its operational and technological capacity. This catalog of requirements shows that the depositary may not limit itself to a formal verification of the counterparty. It should conduct an

in-depth due diligence analysis covering legal, organizational, and economic aspects. In practice, this means the depositary must have an adequate background in expertise, procedures, and technology. This is also one of the reasons why extending regulations concerning sub-custody leads to higher costs of performing the depositary function (Regulation 231/2013; Regulation 2018/1618; UKNF, 2021).

No less important are the depositary's duties after the conclusion of a sub-custody agreement, which include, among other things, implementing a procedure for monitoring the sub-custodian, monitoring its performance, ensuring conduct in accordance with high standards of care, conducting periodic risk reviews, implementing contingency plans for each market in which a sub-custody agreement has been concluded, and ensuring that the sub-custodian fulfils its obligations regarding the segregation of the fund's assets. It follows clearly that agreeing does not end the depositary's responsibility, but opens a stage of ongoing supervision over the third party. Such a model remains consistent with the concept of the depositary's protective liability: since the fund participant has no direct influence on the choice of the sub-custodian, the risk associated with that decision cannot be completely detached from the responsibility of the depositary itself (Regulation 231/2013; Regulation 2018/1618; ESMA, 2016).

In this context, the issue of jurisdiction becomes crucial, especially when the sub-custodian operates outside the European Union. One potential problem is the issue of jurisdictions that do not recognize asset segregation when the sub-custody function is entrusted to an entity established outside the EU. This is a matter of particular practical significance, because the effectiveness of the protection of fund assets depends not only on the content of the agreement and the quality of procedures, but also on the legal environment in which the third party operates. Even the best-designed control system may prove insufficient if local regulations do not guarantee adequate asset separation or provide an effective means of enforcing claims. In such cases, the depositary's liability assumes not only a contractual and organizational dimension, but also a strategic one, because it includes the decision whether it is at all permissible and reasonable to use a given market or partner (Regulation 231/2013; Regulation 2018/1618; Directive (EU) 2024/927).

The issue of sub-custody also reveals a broader tension between market efficiency and the security of fund participants. On the one hand, investment funds operating on international markets require efficient access to foreign settlement, safekeeping, and record-keeping systems. On the other hand, each additional layer of intermediation increases the risk of losing control over assets, informational delays, dilution of responsibility, or difficulties in enforcing obligations. Therefore, sub-custody should be perceived not as an ordinary outsourcing

instrument, but as an exceptional solution requiring particularly careful justification and ongoing supervision (Directive 2011/61/EU; ESMA, 2016; Miziołek, 2022).

For entities providing depositary services in Poland, a comprehensive review of sub-custody agreements will be necessary, particularly for those established outside the EU, as well as the implementation of mechanisms to perform the duties specified in the AIFMD. This means that the change in the legal model is not limited to the normative level but also forces profound changes in the practices of depositary institutions. These include, among other things, the development of compliance procedures, risk-management systems, operational documentation, audit mechanisms, and the continuous monitoring of counterparties. From the market's perspective, this means greater professionalization, but also higher operating costs and greater entry barriers for entities seeking to provide depositary services (UKNF, 2021; Regulation 231/2013; Directive (EU) 2024/927).

It is precisely this economic and organizational dimension of the new regulations that should be regarded as one of the most significant practical problems. The new duties mean higher operating costs and the need to adapt depositaries' activities to the new regulations within a relatively short time. In practice, this means the need to invest simultaneously in human resources, IT systems, and control procedures. The depositary must not only meet formal requirements, but also genuinely demonstrate the capacity to perform supervisory, monitoring, and record-keeping duties on an ongoing basis. Otherwise, its protective function remains illusory (UKNF, 2021; ESMA, 2016; ESMA, 2022).

From a practical point of view, reconciling three aims appears particularly difficult: full regulatory compliance, operational efficiency, and maintaining an acceptable cost level. The more extensive the duties in the area of monitoring sub-custodians, risk reviews, contingency plans, and verification of legal frameworks, the more the depositary's function approaches the model of an advanced operator of operational supervision. This may lead to a situation in which the depositary becomes not only a guardian of assets, but also a central node of the fund's risk-control system. On the one hand, this strengthens the protection of participants; on the other hand, it raises questions about the limits of reasonably burdening the depositary with responsibility and the scope of its tasks (Regulation 231/2013; Directive (EU) 2024/927; ESMA, 2016).

Against this background, the relationship between formal compliance with regulations and the actual effectiveness of protection becomes important as well. Not every procedure, audit, or contractual clause automatically translates into the real safety of assets. In practice, the quality of the depositary's performance is also determined by the competence of its personnel,

the speed of response to irregularities, the quality of communication with the investment fund company, the ability to identify cross-border risks, and the organizational culture of the entity. Therefore, the issue of sub-custody and the practical difficulties of performing the depositary function should be analyzed not only from a formal-legal perspective but also from a functional and institutional perspective (European Commission, 2010; UKNF, 2021; ESMA, 2022).

In conclusion, sub-custody agreements are among the most demanding aspects of the depositary function. Their admissibility has been limited by the legislator to activities connected with asset safekeeping, while at the same time being made subject to numerous conditions concerning the need for delegation, due care in selection, and continuous monitoring of the sub-custodian. This regulation is intended to reconcile market-efficiency requirements with the need to maintain a high level of protection for fund participants. In practice, however, it leads to increased operating costs, intensified organizational duties, and the emergence of new risks, especially in cross-border relations. For this reason, the issues of sub-custody and the practical difficulties of performing the depositary function constitute an important test of the effectiveness of the contemporary model for the protection of investment fund participants (Regulation 231/2013; Regulation 2018/1618; UKNF, 2021; Miziołek, 2022).

Conclusion

The analysis confirms that the contemporary model of cooperation between the investment fund company and the depositary goes far beyond the traditional understanding of this relationship as being based solely on the safekeeping of the fund's assets. The implementation of the AIFMD and UCITS V regulations, followed by their reflection in the Polish Act on Investment Funds and the Management of Alternative Investment Funds, led to a significant extension of the depositary's function. The depositary has become not only an entity responsible for the safekeeping or registration of assets, but also a participant in the system of control over the legality, correctness, and security of the investment fund's operations. It should therefore be emphasised that the new understanding of the depositary's function includes, among other things, the monitoring of cash flows, verification of the fund's compliance with the law, its statute, and the interests of participants, as well as more developed rules of liability and cooperation with sub-custodians (Miziołek, 2022; Directive 2011/61/EU; Directive 2014/91/EU; Act, 2004).

The analysis of the provisions and the achievements of legal scholarship leads to the conclusion that the direction of legislative changes was primarily subordinated to strengthening the protection of investment fund participants. The depositary has been positioned as one of the

key elements of the security system in the collective investment market, performing protective, supervisory, and stabilizing functions. In this sense, its role has been significantly strengthened, and its relationship with the investment fund company has become more complex and, at the same time, more responsible. It is no longer a purely technical relationship but rather a cooperative relationship based on a statutorily defined division of competences, organizational independence, and the duty to act in the interests of fund participants (Perez & Borowski, 2018; Glinka, 2017; Miziołek, 2022).

At the same time, it must be stated that extending the catalog of the depositary's duties has not removed all interpretative and practical problems. The scope of the duty raises particular doubts to verify the fund's compliance with the law, its statute, and the interests of participants, because the limits of this function have not been defined in a completely unequivocal manner. In practice, this may lead to difficulties in distinguishing the depositary's control activities from the managerial functions performed by the investment fund company, as well as to the risk of excessive extension of the depositary's liability. Similar difficulties arise in the areas of conflicts of interest and relations with sub-custodians, especially when activities are entrusted to entities operating in other jurisdictions (Act, 2004; Regulation 231/2013; UKNF, 2021).

There is no doubt, however, that the contemporary depositary constitutes an important institution for the protection of investment fund participants. The effectiveness of this protection depends not only on the wording of the provisions themselves, but also on the quality of market practice, organizational standards, compliance procedures, and the depositary's actual independence from the investment fund company and other market participants. For this reason, the effectiveness of the adopted model should be assessed not only from the perspective of formal compliance with regulations, but also from the point of view of its operational feasibility and its ability to genuinely reduce risks on the fund's side (Glinka, 2017; European Commission, 2010; UKNF, 2021).

Consequently, it should be recognized that the regulatory changes strengthened the depositary's position and increased the level of formal protection for investment fund participants, but also created new interpretative, organizational, and cost-related challenges. It therefore seems justified to further clarify the limits of the depositary's liability, develop market good practices, and standardize the rules of cooperation between investment fund companies and depositaries. Only then will it be possible to fully realize the potential of this institution as a real, rather than merely formal, mechanism for protecting investment fund participants (Directive (EU) 2024/927; UKNF, 2021; ESMA, 2022).

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