

# CSSF Circular 18/697

relating to organisational arrangements applicable to depositaries of funds which are not subject to Part I of the Law of 17 December 2010 on undertakings for collective investment, and, where applicable, to their branches



Please note that this is a non-official translation drawn up by Arendt & Medernach for information purposes only. In case of discrepancies between the French and the English texts, the French text, as published by the *Commission de Surveillance du Secteur Financier* (CSSF) shall prevail.

Luxembourg, 23 August 2018

To all credit institutions, investment firms, professional depositories of assets other than financial instruments within the meaning of the Law of 5 April 1993 on the financial sector, as amended, established in Luxembourg and to all Luxembourg branches of credit institutions and investment firms established in a Member State of the European Union or a third country which act, or intend to apply for authorisation to act, as a depository of funds which are not subject to Part I of the Law of 17 December 2010.

## **CSSF Circular 18/697**

**Re: Organisations arrangements applicable to depositaries of funds which are not subject to Part I of the Law of 17 December 2010 on undertakings for collective investment, and, where applicable, to their branches;**

**Amendment of CSSF Circular 16/644 concerning provisions applicable to credit institutions acting as UCITS depository subject to Part I of the 2010 Law, where appropriate, represented by their management company; and**

**Amendment of IML Circular 91/75 (as amended by CSSF Circular 05/177) on the revision and recasting of the rules to which Luxembourg undertakings governed by the Law of 30 March 1988 on undertakings for collective investment are subject.**

Ladies and Gentlemen,

This Circular is set in the context of the Law of 12 July 2013 on alternative investment fund managers (the “2013 Law”) and Commission Delegated Regulation (EU) No 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (“Delegated Regulation 231/2013”). These texts provide for a set of requirements concerning the duties of depositaries regarding the safekeeping of assets, oversight obligations and obligations in relation to the monitoring of financial flows and they have introduced a liability regime of depositaries with regard to alternative investment funds and their investors.

This Circular clarifies or provides additional clarification on certain aspects of the 2013 Law and/or Delegated Regulation 231/2013, and to a certain extent, the SIF law and/or the SICAR law, in a Luxembourg context, by laying down the principles of good governance and detailing the CSSF’s requirements in relation to the internal organisation and good practices of Luxembourg entities which perform depositaries services to the following vehicles:

- AIFs which are managed by an IFM,
- undertakings for collective investment established in Luxembourg which are subject to Part II of the 2010 Law (“Part II UC!”), which are managed by an IFM authorised under Chapter 2 of the 2013 Law or Chapter 2 of the AIFM Directive, and which have explicitly stated in

their issuing documents that the marketing of shares or units of the fund to retail investors established in Luxembourg is prohibited,

- Part II UCIs whose managers benefit from and make use of the derogations provided for in Article 3 of the 2013 Law and which have explicitly stated in their issuing documents that the marketing of shares or units of the fund to retail investors established in Luxembourg is prohibited, and
- where applicable, specialised investment funds (“SIFs”) and investment companies in risk capital (“SICARs”) which do not qualify as AIFs, SIFs and SICARs which qualify as AIFs and whose managers benefit from and make use of the derogations provided for in Article 3 of the 2013 Law.

In this Circular, any reference to these vehicles is, where applicable and according to the circumstances, to be understood as a reference to the vehicle and/or to its IFM.

This Circular is addressed to credit institutions, investment firms and professional depositaries of assets other than financial instruments, established in Luxembourg and governed by the Law of 5 April 1993 on the financial sector (“the 1993 Law”) and, for credit institutions and investment firms established in a Member State of the European Union<sup>1</sup>, to their Luxembourg branches<sup>2</sup> which act, or intend to apply for authorisation or approval to act, as depositary (“depositaries” or “depository”) of the vehicles listed above. It is also addressed to these vehicles themselves, where applicable, represented by their IFM, with regard to their interaction with their depositary.

Given that the duties and responsibilities of depositaries may evolve or be clarified, in particular, for AIFs depositaries, by the adoption of new regulations, in particular at European level, or by the publication of guidelines, recommendations or questions and answers of the European Securities and Markets Authority (ESMA), the organisational arrangements described below may be supplemented or amended and are, where applicable, to be read in conjunction with such regulations, guidelines and recommendations.

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<sup>1</sup> As clarified in the 2013 Law, the States that are contracting parties to the Agreement creating the European Economic Area other than the Member States of the European Union, within the limits set forth by this Agreement and related acts, are considered as equivalent to Member States of the European Union.

<sup>2</sup> In relation to SIFs and SICARs which do not qualify as AIFs, Luxembourg branches of credit institutions and investment firms which are established in third countries are also included.

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## Definitions

For the purpose of this Circular the following means:

"1993 Law":	the law of 5 April 1993 on the financial sector, as amended;
"2004 Law":	the law of 15 June 2004 on the investment company in risk capital (SICAR), as amended;
"2007 Law":	the law of 13 February 2007 on specialised investment funds, as amended;
"2010 Law":	the law of 17 December 2010 on undertakings for collective investment, as amended;
"2013 Law":	the law of 12 July 2013 on alternative investment fund managers, as amended;
"AIF":	alternative investment fund within the meaning of Article 1 of the 2013 Law, including European long-term investment funds ("ELTIFs"), European social entrepreneurship funds ("EuSEFs") and the European venture capital funds ("EuVECAs");
"AIFM directive":	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010;
"assets":	the financial instruments that may be held in custody and the other assets in which an AIF is invested at any given time and/or which are owned by an AIF at any given time;
"cash":	cash and bank deposits of an AIF;
"collateral agent"	an agent appointed by the AIF, by the counterparty of the AIF or jointly by both, to be in charge solely of custody (to the exclusion of management and administration) of the guarantees and securities that the AIF is required to give or receive within the context of the performance of its investment policy;
"collateral manager":	an agent appointed by the AIF/IFM, by the counterparty of the AIF or jointly by both, to be in charge of the management and administration of the guarantees and securities the AIF is required to give or receive within the context of the performance of its investment policy. A collateral manager may also in certain cases act as a collateral agent;
"contract appointing the depositary":	the written contract entered into between an AIF or its IFM, where applicable, and an institution which has been approved to act as depositary, through which this institution has been entrusted with the



duty of a depositary. The term “contract appointing the depositary” shall designate the depositary contract as such as well as all of the annexes and amendments to the contract, insofar as such annexes or amendments create contractual obligations between the parties. The contract may be tripartite between the AIF, the IFM and the depositary;

- “CSSF Circular 12/552”: CSSF Circular 12/552 (as amended by CSSF Circulars 13/563, 14/597, 16/642, 16/647 and 17/655) on central administration, internal governance and risk management;
- “CSSF Circular 16/644”: CSSF Circular 16/644 on the provisions applicable to credit institutions acting as UCITS depositary subject to Part I of the 2010 Law, where applicable, represented by their management company;
- “CSSF Circular 17/654”: CSSF Circular 17/654 on IT outsourcing based on a cloud computing infrastructure.
- “CSSF Circular 17/656”: CSSF Circular 17/656 on administrative and accounting organisation; IT outsourcing;
- “credit institution”:
- a credit institution within the meaning of the 1993 Law which has its registered office in Luxembourg, or, where applicable, the branch of an EU credit institution, and which acts, or intends to apply for approval to act, as depositary of AIFs.
- In relation to SIFs and SICARs which do not qualify as AIFs, Luxembourg branches of credit institutions and investment firms which are established in third countries are also included.
- “delegation”:
- delegation of functions in delegation of functions in relation to the safekeeping of AIFs’ assets within the meaning of Article 19(11) of the 2013 law;
- “delegate”:
- a third party appointed by the depositary to whom the depositary delegates the safekeeping functions for the AIF’s assets in accordance with Articles 19(11), 19(12), 19(13) and 19(14) of the 2013 Law and Articles 98 and 99 of Delegated Regulation 231/2013;
- “Delegated Regulation 231/2013”:
- Commission Delegated Regulation (EU) 231/2013 of 19 December 2012 supplementing Directive 2011/61/EC of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision;
- “director”, in relation to a depositary:
- the person(s) who, by law or pursuant to the constitutive documents, represent the depositary or who effectively direct the business of the depositary;
- “escalation procedure”:
- procedure to be put in place as an integral part of the agreement appointing the depositary in which the different successive steps to be

followed upon the intervention of the depositary or of the AIF are specified. This procedure must clearly identify the persons to be contacted at the level of the AIF by the depositary when the latter deems an intervention to be necessary and at the level of the depositary upon the intervention of the AIF;

“external valuation expert”:

a natural or legal person independent of the AIF, the IFM and any other person having close links with the AIF or the IFM, and appointed by the IFM to perform the valuation function in accordance with Article 17 of the 2013 Law. A third party responsible for calculating the net asset value for an AIF shall not be deemed an external valuation expert if he does not carry out valuations of assets on an individual basis, in particular valuations requiring subjective judgement, but includes within the calculation process values provided by the IFM, by pricing services or by an external valuation expert;

“financial instruments that may be held in custody”:

the financial instruments whose custody can be ensured within the meaning of Articles 19(8)(a) of the 2013 Law and 88 of Delegated Regulation 231/2013;

“IF”:

an investment firm within the meaning of the 1993 Law which has its registered office in Luxembourg, or, where applicable, the branch of an EU investment firm, and which acts, or intends to apply for authorisation or approval to act, as depositary of AIFs.

In relation to SIFs and SICARs which do not qualify as AIFs, Luxembourg branches of credit institutions and investment firms which are established in third countries are also covered.

“IFM”:

for the purposes of this Circular, the term IFM refers to:

- Luxembourg management companies subject to Chapter 15 of the 2010 Law and authorised pursuant to Chapter 2 of the 2013 Law,
- Luxembourg management companies subject to Article 125-1 or Article 125-2 of Chapter 16 of the 2010 Law and authorised pursuant to Chapter 2 of the 2013 Law,
- Luxembourg branches of foreign IFMs subject to Chapter 17 of the 2010 Law,
- Managers of AIFs authorised pursuant to Chapter 2 of the 2013 Law or Chapter 2 of the AIFM Directive, as well as
- SMAIFS;

“IML Circular 91/75”:

IML Circular 91/75 (as amended by CSSF Circular 05/177) on the revision and recasting of the rules to which Luxembourg undertakings



	governed by the Law of 30 March 1988 on undertakings for collective investment ("UCI") are subject;
"other assets":	the assets, including cash, other than financial instruments that may be held in custody within the meaning of Articles 19(8)(a) of the 2013 Law and 88 of Delegated Regulation 231/2013;
"outsourcing":	the full or partial transfer of operational functions, activities or provision of (support) services of the depositary to an external service provider , whether or not it is part of the group to which the depositary belongs, other than a delegation;
"outsourcing of a material activity":	the outsourcing of any activity which, when properly not performed, reduces the capacity of the depositary to comply with the regulatory requirements or to carry out its operations, as well as any activity which is necessary for the sound and prudent risk management;
"Part II UCI ":	undertaking for collective investment established in Luxembourg, subject to Part II the 2010 Law;
"PDAOFI":	a professional depositary of assets other than financial instruments within the meaning of Article 26-1 of the 1993 Law;
"person responsible for the depositary business line":	the person(s), whether director(s) or not, of the entity acting as depositary, who is/are in charge at a senior hierarchical level of responsibility of the operational aspects of the institution's depositary business in Luxembourg;
"safekeeping of assets of an AIF in liquidation or without a depositary":	the obligation of the last service provider that acts as a depositary of an AIF to maintain open all of the securities and cash accounts for the different assets of such AIF which are held in custody by such service provider at the time of the removal or withdrawal of the AIF from the official list or at the opening of its liquidation, and until the appointment of a successor or until the closure of the liquidation of such AIF, in accordance with the provisions of points 161 and 162 of this Circular;
"senior management":	the persons who determine <i>de facto</i> the business of the IFM within the meaning of Article 102(1)(c) of the 2010 Law and Article 7(1)(c) of the 2013 Law;
"SIF":	a specialised investment fund within the meaning of the 2007 Law;
"SMAIF":	self-managed alternative investment fund: an AIF internally managed within the meaning of Article 4(1), point b) of the 2013 Law;
"UCITS":	undertaking for collective investment in transferable securities subject to Part I of the 2010 Law;

“SICAR”: investment company in risk capital within the meaning of the 2004 Law;

## Part I: General remarks

1. The organisational aspects applicable in the context of the AIFM depositary regime introduced by the 2013 Law are above all clarified in Delegated Regulation 231/2013 as far as the obligations of depositaries are concerned. Delegated Regulation 231/2013 provides clarification in particular on the content of the contract appointing the depositary between an AIF (and/or its IFM) and its depositary, the escalation procedure of the depositary with regard to the AIF, the tasks to be carried out by the depositary with regard to its monitoring duties established by the 2013 Law and the information to be received by the depositary concerning its obligations with regard to the monitoring of financial flows. Delegated Regulation 231/2013 also provides clarifications regarding the depositary's asset safekeeping obligations with regard to the various types of assets in which AIFs can invest, with particular clarification of the obligations of segregation and due diligence to be put in place at depositary level and at the level of the entities to which a depositary contemplates delegating or has delegated its asset safekeeping obligations. Insofar as this Circular provides additional clarifications on topics also covered by Delegated Regulation 231/2013, reference is made to the relevant article(s) in Delegated Regulation 231/2013.

2. In accordance with the applicable legal provisions, access to the function of depositary of an AIF is reserved:

- to credit institutions within the meaning of the 1993 Law which have their registered office in Luxembourg,
- to IFs which meet the conditions set out in Article 19(3)(i) of the 2013 Law,
- to the Luxembourg branches of credit institutions or IFs which have their registered office in another Member State of the European Union<sup>3</sup>, and
- to entities which have the status of PDAOFI, insofar as the conditions provided for in Article 19(3)(i), fourth sub-paragraph of the 2013 Law have been met.

In accordance with the applicable legal provisions, access to the depositary function of a SIF and a SICAR which does not qualify as an AIF is reserved to credit institutions or to IFs within the meaning of the 1993 Law. The depositary of a SIF and/or SICAR which does not qualify as an AIF must either have its registered office in Luxembourg or be established there, if its registered office is located abroad.

3. The entities listed in the points above can only accept to be appointed as the depositary of an AIF insofar as they comply with the provisions of this Circular which are applicable to them, as set out in Chapters 1. to 5. hereafter.

### Chapter 1: Provisions applicable to credit institutions

4. Credit institutions shall comply with all the provisions of this Circular.

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<sup>3</sup> As clarified in the 2013 Law, the States that are contracting parties to the Agreement creating the European Economic Area other than the Member States of the European Union, within the limits set forth by this Agreement and related acts, are considered as equivalent to Member States of the European Union.

## Chapter 2: Specific features applicable to IFs

5. An IF is only eligible as a depositary to the extent that such IF meets the conditions set out in Article 19(3) of the 2013 Law. An IF which provides, or intends to apply for authorisation to provide ancillary services of safekeeping and administration of financial instruments on behalf of clients, in accordance with annex II, section C, point 1 of the 1993 Law, and which acts, or intends to act as a depositary for its clients, must comply with the provisions of this Circular. As part of the examination of (i) its initial authorisation as an investment firm or (ii) the extension of its activity to include the provision of the ancillary service of safekeeping and administration of financial instruments on behalf of clients, in accordance with annex II, section C, point 1 of the 1993 Law, or where applicable, as part of the notification to the CSSF referred to in Article 19(3)(i), the IF must provide to the CSSF in particular the information referred to in points 34 to 38 hereafter. An IF may act as a depositary for:

- i) AIFs, and
- ii) SIFs and SICARs which do not qualify as AIFs.

(hereafter for the purposes of this chapter, the “clients”).

6. Where it is appointed depositary, an IF is subject to the provisions of this Circular and must comply therewith, to the extent that these provisions are applicable to the duties which they perform for its clients, with the exception of point 56 of this Circular. In this case, any reference to a credit institution hereafter is to be interpreted as a reference to an IF.

7. An IF may perform the functions of safekeeping and administration of financial instruments on behalf of its clients, including custody and related services, such as cash/collateral management, and excluding the provision and central maintenance of securities accounts at the top tier level (“centralised maintenance service”) referred to in section A, point 2 of the annex to Regulation (EU) No 909/2014.

8. It shall ensure that it appoints, in accordance with Article 19(11) of the 2013 Law, a delegate which shall ensure the safekeeping of assets other than its clients’ financial instruments which may be held in custody. In this case, and by derogation from the provisions of point 86 hereafter, the first accounts relating to the assets which may be held in custody and for which safekeeping is delegated must be opened in the name of each client (or where applicable, each of the sub-funds of an AIF having multiple sub-funds) at the level of this delegate.

9. An IF which acts as a depositary must also ensure that one or more entities with which all the cash of the AIF is recorded on the cash accounts is appointed in accordance with Article 19(7) of the 2013 Law.

10. The provisions of this Circular apply to the duties which the IF performs for its clients. It is responsible for ensuring that the provisions of this Circular are complied with, in particular, by:

- i) ensuring that appropriate and consistent procedures are put in place and applied for the valuation of the AIF’s assets, in accordance with point 63 of this Circular,
- ii) applying the due diligences required *vis-à-vis* their delegates pursuant to points 92 to 97 of

this Circular. They must ensure in particular that the accounts opened with their delegates are segregated accounts in accordance with Article 19(8)(a)(ii) of the 2013 Law.

11. The IF shall furthermore keep a register on behalf of each of its clients (or where applicable, for each of the sub-funds of its clients with multiple sub-funds), which records all the assets owned by its clients, in order, in particular, to be able to provide a complete inventory of all the assets of each of its clients, in accordance with points 151 and 152 of this Circular.

12. Subject to compliance in particular with the rules set out in Part III., Chapter 1. of this Circular, an IF acting as depositary of an AIF may also act in the following capacities, provided that, where applicable, it has the necessary authorisations:

- i) agent for receiving and transmitting of orders relating to one or more financial instruments;
- ii) collateral agent;
- iii) collateral manager;
- iv) external valuation expert within the meaning of Article 17(4)(a) of the 2013 Law.

13. The provisions of Part I., Chapter 5. of this Circular apply to the duties which the IF performs for its SIF and SICAR clients which do not qualify as AIFs or for its SIF or SICAR clients which qualify as AIFs and whose IFMs make use of the derogations provided for in Article 3 of the 2013 Law.

### **Chapter 3: Specific features applicable to PDAOFIs**

14. An entity which acts, or intends to apply for authorisation to act, as a PDAOFI must comply with the provisions of this Circular. As part of the examination of this authorisation, the PDAOFI must provide, in particular to the CSSF, the information referred to in points 34 to 38 hereafter. Once it has been authorised by the Ministry responsible for the CSSF, the PDAOFI may act as a depositary for:

- i) AIFs, and
- ii) SIFs and SICARs which do not qualify as AIFs

(hereafter for the purposes of this chapter, the “clients”)

and for which no right of reimbursement may be exercised for a period of five years following the date of the initial investments and which, in accordance with their main investment policy, do not generally invest in assets which must be held in custody in accordance with Article 19, paragraph 8, point (a) of the 2013 Law, or which invest generally in issuers or in non-listed companies in order to subsequently acquire control thereof in accordance with Article 24 of the 2013 Law.

15. Where it is appointed as the depositary of such clients, the PDAOFI is subject to all the provisions of this Circular, to the extent that these provisions are applicable to the duties which it performs for its clients, and with the exception of points 32, 33 and 56 of this Circular. In such

case, any reference to a credit institution hereafter is to be interpreted as a reference to a PDAOFI.

16. A PDAOFI cannot provide a deposit for its clients' cash or financial instruments that may be held in custody. It may however ensure the safekeeping of assets other than assets which may be held in custody, as well as assets other than cash or financial instruments whose safekeeping can be ensured, by delegation for the sole depository of an AIF.

17. It shall ensure that it appoints, in accordance with Article 19(11) of the 2013 Law, a delegate which shall ensure the safekeeping of clients' financial instruments which may be held in custody. In this case, and by derogation from the provisions of point 86 hereafter, the first accounts relating to the assets which may be held in custody and for which safekeeping has been delegated must be opened in the name of each client (or where applicable, each of the sub-funds of a client AIF having multiple sub-funds) at the level of this delegate.

18. A PDAOFI acting as a depository must also ensure that one or more entities with which all the cash of the AIF is recorded on the cash accounts is appointed in accordance with Article 19(7) of the 2013 Law.

19. The provisions of this Circular apply to the duties which the PDAOFI performs for its clients. PDAOFIs are responsible for ensuring that the provisions of this Circular are complied with, in particular, by:

- i) ensuring that appropriate and consistent procedures are put in place and applied for the valuation of the AIF's assets, in accordance with point 63 of this Circular,
- ii) applying the due diligences required *vis-à-vis* their delegates pursuant to points 92 to 97 of this Circular. They must ensure in particular that the accounts opened with their delegates are segregated accounts in accordance with Article 19(8)(a)(ii) of the 2013 Law.

20. The PDAOFI shall furthermore keep a register on behalf of each of its client AIFs (or where applicable, for each of the sub-funds of its clients with multiple sub-funds), which records all the assets which are owned by its clients, in order, in particular, to be able to provide a complete inventory of all the assets of each of its AIF clients, in accordance with points 151 and 152 of this Circular.

21. By derogation from point 42 hereafter, any outsourcing by a PDAOFI shall be carried out in compliance with the principles set out in CSSF Circular 17/654 and CSSF Circular 17/656.

22. The provisions of Part I., Chapter 5. of this Circular apply to the duties which the PDAOFI performs for its SIF and SICAR clients which do not qualify as AIFs or for its SIF or SICAR clients which qualify as AIFs and whose manager makes use of the derogations provided for in Article 3 of the 2013 Law.

#### **Chapter 4: Specific organisational arrangements for entities designated in accordance with Article 37(a) of the 2013 Law**

23. Any entity established in Luxembourg and designated in accordance with Article 37(a) of the 2013 Law is subject to the provisions of this Circular and must comply therewith, to the extent



that these provisions apply to the duties for which it has been designated.

**Chapter 5: Specific organisational arrangements for SIF and/or SICAR depositaries which do not qualify as AIFs, to SIF and/or SICAR depositaries which qualify as AIFs and whose manager benefits from and makes use of the derogations provided for in Article 3 of the 2013 Law, and to Part II UCIs whose managers benefit from and make use of the derogations provided for in Article 3 of the 2013 Law and which have explicitly stated in their issuing documents that the marketing of shares or units of the fund to retail investors established in Luxembourg is prohibited**

24. In accordance with Articles 129(2) of the 2010 Law, 42(2) of the 2007 Law and 12(2) of the 2004 Law, a Part II UCI, a SIF or a SICAR respectively are only authorised if the CSSF approves the choice of depositary. This approval is only given if the depositary proposed can prove that it has the required infrastructure at its disposal, i.e. sufficient human and technical resources to perform all the tasks in relation to its function. Where it is appointed as depositary for entities referred to in this chapter, the depositary is subject to this Chapter 5. as well as the provisions of Chapter 2. of Part II. of this Circular. In this case, any reference to a credit institution in Chapter 2. of Part II. of this Circular is to be interpreted as a reference to a depositary of an entity referred to in this chapter.

25. The depositary of a SIF and/or a SICAR which does not qualify as an AIF is responsible for the safekeeping of the assets of its clients, which requires that this depositary is aware at all times of how the assets of its clients are invested and where and how these assets are available. The same principle applies to the depositary of a SIF and/or SICAR which qualifies as an AIF and whose manager benefits from and makes use of the derogations provided for in Article 3 of the 2013 Law; respectively to the depositary of a Part II UCI whose manager benefits from and makes use of the derogations provided for in Article 3 of the 2013 Law and which has explicitly stated in its issuing documents that the marketing of its shares or units to retail investors established in Luxembourg is prohibited.

26. The general duties of a depositary, for the vehicles referred to in this chapter, is not be understood in relation to their meaning of “safekeeping”, but rather in the meaning of “monitoring”, which requires that the depositary must be aware at all times of how the assets of the Part II UCI, the SIF and/or the SICAR are invested, and where and how these assets are available. In accordance with the meaning given to the concept of safekeeping in this context, the physical deposit of all or part of the assets may be made either with the depositary itself, or with a third party appointed in accordance with the applicable legal provisions. The duty to monitor the assets of the Part II UCI, the SIF and/or the SICAR concerned, and therefore the responsibility for this monitoring, however always remains with the depositary. No clause, if any, of the management regulations or of the articles of association of the Part II UCI, the SIF and/or the SICAR concerned, or any other agreement may exclude or limit this responsibility. This conception of the safekeeping duties of the depositary however does not exclude the use of the mechanism of the fiduciary contract between the depositary and the Part II UCI, the SIF and/or SICAR concerned for deposits of the assets of the latter entities; this solution has significant advantages as a result of the fact that the depositary therefore has substantial powers to perform its functions.

27. The depositary must also ensure the performance of all operations relating to the ongoing administration of the assets of the Part II UCI, the SIF and/or of the SICAR concerned. This means

that the depositary must in particular ensure proper performance of the collection of dividends, interest and securities accrued, the exercise of option rights and, in general, the performance of any other operations in relation to the ongoing administration of securities and liquid assets forming part of the assets of the Part II UCI, the SIF and/or the SICAR concerned. To the extent that such operations relate to assets which are not held in custody by the depositary itself, the depositary may delegate the execution thereof on third parties with which these assets have been effectively deposited. In such case, and in order to comply with its obligation to monitor the assets of the Part II UCI, the SIF and/or the SICAR concerned, the depositary must organise its relations with these third parties in such a manner that it is immediately informed of all operations which these third parties carry out in the context of the ongoing administration of the assets that they have on deposit.

28. Where the depositary delegates to third parties the performance of tasks related to the correct performance of the acts referred to in point 27 above, it must verify the correct performance of such tasks. Thus, for example, it is conceivable that for objective reasons a depositary put in place a structure in which a foreign company assists it with the liquidations of portfolio transactions. In this case, the depositary meets its monitoring obligation when it is convinced from the outset and throughout the duration of the contract that the third party or parties with which the assets of the Part II UCI, the SIF and/or the SICAR are on deposit are reputable and competent and have sufficient financial resources.

29. For all tasks incumbent on the depositary, its monitoring obligation entails liability for the wrongful non-performance or improper performance of the related tasks. The depositary is therefore liable under Luxembourg law towards investors for any loss suffered by them as a result of the wrongful non-performance or improper performance of its obligations.

30. The liability of the depositary is not affected by the fact that it has use the assistance of third parties in the performance of the tasks entrusted to it, or by the fact that it entrusts the performance of these tasks to representatives. It follows therefrom that the depositary may under no circumstances be discharged of its monitoring liability. As a consequence, the depositary cannot notably rely on the fact that the assets of the Part II UCI, the SIF and/or the SICAR concerned were deposited with the general or specific agreement of these entities, as its monitoring obligation must be carried out in respect of third parties with whom the assets of the Part II UCI, the SIF and/or SICAR concerned have been deposited.

## **Part II: Appointment of a depositary of an AIF: eligibility and approval criteria**

### **Chapter 1: Eligibility criteria to act as depositary of an AIF**

31. Credit institutions may only accept to be appointed as the depositary of an AIF to the extent that they have obtained a specific authorisation to act as a depositary, as specified hereafter.

### **Chapter 2: Authorisation procedure to act as depositary of an AIF**

32. A credit institution must submit a file requesting authorisation as depositary of an AIF within the framework of the applicable legal provisions.

33. Those credit institutions which have already been authorised as depositary of UCITS or AIFs as of the date of the entry into force of the Circular are not required to apply for a new authorisation on the basis of the provisions below, but must comply with the obligations described hereafter. Furthermore, credit institutions which have been authorised, after the entry into force of this Circular, to act as the depositary of a UCITS, in accordance with the provisions of CSSF Circular 16/644, will not be required to apply for a new authorisation on the basis of the below provisions to act as an AIF depositary but must comply with the obligations set out hereafter. They will not however be required to appoint a person responsible for the “depositary business line” who is distinct from the person responsible for the “depositary bank” business line appointed in accordance with CSSF Circular 16/644. They shall also notify their AIF depositary activities by sending to the CSSF the information listed in annex I of this Circular which has not already been provided in accordance with annex I of Circular 16/644, within a period of one month following the entry into force of this Circular or the signature of the first AIF depositary contract, or of the depositary contract for SIFs and/or SICARs not qualifying as AIFs.

#### ***Sub-Chapter 2.1: Condition of professional experience and reputation of the directors of the depositary***

34. For a credit institution to obtain authorisation as an AIF depositary its person(s) responsible for the “depositary” business line must have the reputation required.

For a credit institution to obtain authorisation as an AIF depositary its person(s) responsible for the “depositary” business line must also ensure, by having recourse where applicable to persons with the necessary competence, that they have the adequate professional experience with respect notably to the investment strategy of the AIF(s) for which the entity intends to act as depositary. The person(s) concerned must have adequate professional experience by having already carried out similar activities in the field of activity of a depositary of UCITS or AIFs.

For the purposes of this point, the identity of the person(s) responsible for the "depositary" business line, as well as the identity of any person succeeding them in their function, must be notified immediately to the CSSF.

#### ***Sub-Chapter 2.2: Description of human and technical resources***

35. The CSSF must receive a precise and detailed description of the organisation of the human and technical resources that the entity has at its disposal to perform all of the tasks related to the function of the depositary of an AIF. This description must take into account the type of AIFs for which the entity intends to act as depositary, taking into particular account the investment policy that the AIFs concerned intend to pursue.

36. The information to be provided to the CSSF in an application for authorisation as depositary of an AIF must be sent by means of the administrative authorisation application form available on the website of the CSSF. Once it has been authorised, the depositary must provide on a periodic, ad hoc or annual basis to the CSSF the information set out in annex 1 of this Circular. This list of information to be provided to the CSSF is not exhaustive. It may be supplemented by any other item deemed to be appropriate, given the characteristics of the file submitted to the CSSF.

37. The information to be provided has to permit the CSSF to assess whether there is sufficient substance in Luxembourg in view of the applicable legal and regulatory requirements. The analysis of the information will focus particularly on the operational model of the entity (or the model it plans to put in place) with a view to analysing the operational risks inherent in the model. Particular attention will be had, where applicable, to aspects of the delegation of asset safekeeping functions, to aspects of outsourcing and to the monitoring procedures to be put in place by the entity in these areas, in the event that such delegation or outsourcing is envisaged from the time of the initial application for authorisation as an AIF depositary. Regarding the provisions applicable to delegation and outsourcing, reference is made to points 39 to 44 below.

38. Any authorisation as depositary of an AIF remains valid for so long as the elements on the basis of which it was granted remain unchanged. Any entity which acts as depositary of an AIF is required to apply for approval from the CSSF for any fundamental change of the elements which formed the basis of its initial authorisation as depositary of an AIF (including notably any possible change concerning the delegation and outsourcing aspects of a material activity) or in the case of a significant change to its operational model. The elements which appear under annex 1 of this Circular must be kept up-to-date and must be provided to the CSSF in accordance with the frequency indicated therein. Without prejudice to the provisions of point 34 above, the fact that a credit institution becomes an AIF depositary whose investment strategy differs from that of AIFs underlying its initial authorisation shall not be deemed a fundamental change within the meaning of this point. In this case however, the credit institution must send to the CSSF an update of the information listed in annex I of this Circular.

### ***Sub-Chapter 2.3: Specific provisions applicable to outsourcing***

39. Any entity acting as AIF depositary must comply with the provisions of this sub-chapter in the event of outsourcing.

40. The depositary of an AIF shall ensure that the risk management policies and procedures and, where applicable, the risk management function, correctly identify the risks associated with every outsourcing of a material activity. With regard to the risks which have been identified, the depositary must also ensure that efficient risk management and control systems, processes and mechanisms for these risks are in place.

41. Any outsourcing by the depositary shall be documented by a contract between the depositary and its subcontractor according to the principles outlined in Part III., Chapter 2., sub-chapter 2.2. of this Circular. The contract between the depositary and its subcontractor provides for right of access for the depositary to the documentation relating to the operations carried out by the subcontractor as well as to the data relating to the AIFs upon a simple request, even electronic. The subcontractor may reject the request if such request led it to act in breach of the applicable legislation in the country in which the subcontractor is established. The contract put in place between a depositary and its subcontractors must grant a right of direct access of the CSSF to the premises of any entity responsible for carrying out the outsourcing of a material activity.

42. Any outsourcing shall be carried out in compliance with the principles outlined in sub-chapter 7.4. of CSSF Circular 12/552 and CSSF Circular 17/654.

43. Any outsourcing of a material activity requires the prior authorisation of authorisation of the

CSSF. A notification to the CSSF, justifying compliance with the conditions set out in the texts applicable to depositaries, is sufficient when the depositary uses a Luxembourg credit institution or a support professional of the financial sector (PFS) according to Articles 29-1, 29-2, 29-3 and 29-4 of the 1993 Law.

#### ***Sub-Chapter 2.4: Specific provisions applicable to delegation***

44. Concerning the delegation of functions relating to the safekeeping of the assets of AIFs, the rules under Articles 19(11), (12), (13) and (14) of the 2013 Law and Articles 89, 98 and 99 of Delegated Regulation 231/2013 specify the conditions applicable to such a delegation. It should be noted that these delegates must be included on the list of delegates which is to be kept up-to-date and to be provided to the CSSF on an annual basis in accordance with point f) of annex 1 of this Circular. Any delegation by the depositary must be documented by a contract between the depositary and its delegate according to the principles set out in Part III., Chapter 2., sub-chapter 2.2. of this Circular. The contract between the depositary and its delegate provides for a right of access for the depositary to the documentation relating to the operations carried out by the delegate as well as to the data relating to the AIFs upon a simple request, even electronic. The delegate may reject the request if such request led it to act in breach of the applicable legislation in the country in which the delegate is established.

#### **Chapter 3: The contract appointing the depositary**

45. A single and unique depositary must be appointed for each AIF under the terms of Articles 19(1) of the 2013 Law. For AIFs with multiple sub-funds, one and the same depositary must be appointed for all of the sub-funds of an AIF having multiple sub-funds.

With the entry into force of the contract appointing the depositary, the depositary is vested with the duties of a depositary of the AIF with whom the contract has been concluded.

46. The definitions and details of the written contract (contract appointing the depositary) to be put in place between the depositary, on the one hand, and an AIF on the other hand, are specified in Chapter IV of Delegated Regulation 231/2013. Article 83 of Delegated Regulation 231/2013 lists the items that this contract must at least include.

47. Every contract appointing the depositary is subject to the general principle of freedom of contract, subject to compliance with the applicable legal, regulatory and administrative provisions. The law applicable to the contract must be specified. In all cases the applicable law must be Luxembourg law. It is also recommended to provide for between the contracting parties that any litigation shall be subject to the exclusive jurisdiction of the Luxembourg courts.

48. The depositary may, on the condition of specific contractual provisions, benefit from a general or specific pledge on the assets of the AIF on deposit. The provisions concerning this general or special pledge must, where applicable, specify the exceptions to this general or special pledge, either in the form of specific provisions in the contract appointing the depositary, or in the form of an amendment agreement to the contract appointing the depositary.

49. Any provisions concerning the pledge of the depositary shall specify the extent to which the depositary benefits from a right to use the assets pledged in its favour.

50. The parties may agree to a clause which permits the depositary to invoke a right of set-off between the various credit/debit balances of the accounts opened in its books on behalf of an AIF or, where applicable, on behalf of each of the different sub-funds of an AIF having multiple sub-funds.

### **Part III: Clarifications relating to governance and organisation**

#### **Chapter 1: Conflicts of interest**

51. Pursuant to Articles 11(1) and 19(10) of the 2013 Law, the IFM and the depositary of an AIF shall act honestly, fairly, professionally, independently and act solely in the interests of the AIF and its investors. Articles 18(2), 18(5), 19(4) and 19(10) of the 2013 Law clarify more specifically the requirement of independence between the depositary and the IFM. In this context it should be noted that Delegated Regulation 231/2013 structures this requirement of independence with regard to a functional and hierarchical separation, as opposed to a legal or structural independence.

52. The obligation for the depositary to act honestly, fairly, professionally, independently and in the interest of the AIF and the investors of the AIF requires that the activity of depositary of an AIF must be managed and organised in such a way as to minimise any potential conflicts of interest.

53. In order to avoid any risk of conflicts of interest, in accordance with Article 18(2)(a) of the 2013 Law, no delegation or sub-delegation of the principal function of investment management can be accepted by the depositary.

54. The prohibition in relation to the delegation or sub-delegation of the principal function of investment management also applies to any delegate and in general to any entity below a delegate in the custody chain of an asset. The prohibition according to which no mandate relating to the principal function of investment management can be given to a depositary or to a delegate and in general to any entity below a delegate in the custody chain of an asset shall not prohibit the delegation of the principal function of investment management to an entity related to the depositary by common management or control.

55. Neither the depositary nor one of the delegates to whom all or part of the assets of a given AIF has been entrusted can accept the delegation of the risk management function from the AIF or from its IFM. The depositary or a delegate may however be entrusted with the performance of certain support tasks related to the risk management function.

56. Subject to compliance with the rules set out above, a credit institution acting as depositary of an AIF may in particular act in the following capacities, provided that, where applicable, it benefits from the necessary authorisations:

- i) entity granting credit and/or financing;
- ii) agent for reception and transmission of orders relating to one or more financial instruments;
- iii) counterparty to the transactions carried out by the AIFs;
- iv) administrative agent and/or registrar agent;



- v) collateral agent;
- vi) collateral manager;
- vii) tax or reporting service provider;
- viii) prime broker;
- ix) currency hedging agent;
- x) external valuation expert within the meaning of Article 17(4)(a) of the 2013 Law.

57. When a depositary of an AIF wishes to act in capacities other than its capacity of depositary, it is required (i) to establish, implement and maintain operational an effective conflicts of interest policy, (ii) to establish a functional and hierarchical separation between the performance of its depositary functions of an AIF and the performance of other tasks, (iii) to proceed with the identification as well as the management and adequate disclosure of potential conflicts of interest and (iv) where applicable, to put in place a contractual separation. It should be noted that every entity acting as the depositary of an AIF should, where applicable, be able to provide proof of the adequate management of potential conflicts of interest, proof that can notably be provided by reference to the conflicts of interest policy put in place, in the case where all or part of the services other than that of depositary are provided to the AIF by the legal entity of the depositary or by entities related to the depositary by a common management or control.

58. A depositary is permitted to be a direct or an indirect shareholder of an IFM when it is acting as depositary of an AIF managed by that IFM or to have a qualifying holding in such IFM. In the case of a qualifying holding, the IFM must identify the conflicts of interest which could result from this holding and must strive to eliminate them in accordance with the procedures foreseen by the conflicts of interest policy of the IFM. By analogy, the depositary must in this case also establish a procedure relating to the policy and to the management of potential conflicts of interest.

59. Furthermore, the principle of independence of the depositary in relation to an AIF or to the IFM of an AIF precludes the possibility of members of the senior management of the IFM being employed by the depositary.

## **Chapter 2: Internal procedures and written procedures or contracts with external persons relating to the AIF depositary function**

60. The depositary shall establish internal written procedures relating to the acceptance and the performance of a contract appointing the depositary of an AIF and establish written procedures or contracts with the external persons with whom the depositary is required to work in so far as the performance of each of its AIF depositary mandates is concerned. "External persons" within the meaning of this chapter, shall mean all persons with whom a depositary will work in the performance of its duties as an AIF depositary (i.e. those external persons who are not appointed by the depositary itself, such as, for example, the registrar agent of an AIF, as well as those external persons who are appointed by the depositary itself, for example a delegate or a subcontractor of the depositary). The internal procedures must, alongside the procedure for the acceptance of the appointment as AIF depositary, document the stages and the operational

process relating to the performance of the contracts appointing the depositary, namely the performance of the different tasks related to the depositary function at the level of the depositary itself. The written procedures or contracts with the external persons shall cover the organisation of any relationships with third parties with whom the depositary is required to work within the context of the provision of services of an AIF depositary. These internal procedures and written procedures or contracts with external persons shall cover in an appropriate manner all of the aspects relating to the function of an AIF depositary and take into account the specific characteristics of the AIFs for whom the entity is acting as depositary. The written procedures or contracts with the external persons may be established between the depositary and the external person directly, or may be covered by the written procedures or contracts between the AIF and/or its IFM and the external persons concerned.

61. It is the responsibility of the internal audit function or of the internal control department of the depositary to verify the existence and appropriateness of these internal procedures and written procedures or contracts with external persons as well as ensuring their periodic update and at least once per year. The internal audit function or the internal control department shall also verify the effective application of the internal procedures and written procedures or contracts with external persons. This requirement applies in particular to the internal procedures and written procedures or contracts with the delegates and subcontractors of the depositary.

### ***Sub-Chapter 2.1: Internal procedures***

62. The internal procedures which shall be established by the depositary must in particular:

- i) describe in a general manner the type of AIF (on the basis of the legal nature, the investment strategy and policy of the AIFs and on the basis of the nature of the assets in which the AIF is invested) for which the entity can and is disposed to act as depositary;
- ii) ensure the implementation of a preliminary control, either through adequate procedures, where applicable in accordance with sub-chapter 7.3. of CSSF Circular 12/552 and/or an approval committee for the appointment as depositary of an AIF, with the aim of ensuring that for any new appointment as the depositary of an AIF, the entity identifies and examines, in relation to every AIF presented, the specific characteristics of the AIF, particularly in terms of operational and legal risks. Through this preliminary control, it shall be ensured that the entity accepts to act as depositary in full knowledge and having taken into account the risk profile and operational complexities of a given AIF;
- iii) indicate the director(s) of the depositary, and where applicable, the person(s) responsible for the “depositary” business line;
- iv) describe in a general manner how the depositary will perform its duty as depositary of an AIF, taking into account the different types of AIFs in particular on the basis of their investment policy (a description of the general operational model) and the specific AIFs where the internal operational model for certain AIFs differs from that of the general operational model (description of the specific operational model for one or more AIFs);
- v) generally describe the human and technical resources put in place for the performance of the duties as depositary of an AIF; and

- vi) document in a detailed manner the due diligence criteria applied by the entity.

### ***Sub-Chapter 2.2: Written procedures or contracts with external persons***

63. In addition to the internal procedures, the depositary of an AIF shall also establish written procedures (with the external persons who have not been appointed by the depositary itself such as, for example, a registrar agent, an external valuation expert, a prime broker) or contracts (with the external persons who have been appointed by the depositary itself, such as, for example, a delegate or a subcontractor of the depositary) with all the persons with whom the depositary is required to work in the performance of its duties as depositary of an AIF. The implementation of these written procedures or contracts shall ensure that the operational stages of the interaction of the depositary with each given third party, which are necessary for the proper performance of the obligations related to the depositary's mandate, are adequately documented. These written procedures or contracts may take the form of operating memoranda or service level agreements. These written procedures or contracts with external persons must in particular provide for a procedure with the administrative agent of the AIF and, where applicable, the registrar agent of the AIF, the contracts and procedures to be put into place with the delegates as well as the contracts and procedures with the subcontractors of the depositary. The depositary must determine the external persons with whom it is necessary to establish such a procedure or contractual documentation and the form and the complexity of each of these. The depositary must in particular ensure implementation of the written procedures or contracts which are necessary for the performance of its duties, and in particular of its obligations under Article 94 of Delegated Regulation 231/2013, with the IFM or any other person responsible for the valuation function in accordance with Article 17(4) of the 2013 Law. In accordance with Article 94 of Delegated Regulation 231/2013, the depositary must in particular:

- i) verify on an ongoing basis that appropriate and consistent procedures are established and applied for the valuation of the AIF's assets in accordance with Article 19 of the AIFM directive and its implementing measures as well as the constitutive documents of the AIF, and
- ii) ensure that the valuation procedures and policies are effectively implemented and periodically reviewed.

The depositary shall apply these procedures at a frequency which is in compliance with the frequency provided for the valuation policy of AIFs as defined in Article 19 of the AIFM Directive and in its implementing measures. Where a depositary considers that the calculation of the value of the shares or units of the AIF has not been made in accordance with the applicable law or the constitutive documents of the AIF or Article 17 of the 2013 Law, such depositary shall inform the IFM or to the AIF and ensure that rapid corrective measures are undertaken in the best interests of the AIF's investors. Furthermore, where an external valuation expert has been appointed, the depositary shall verify that this appointment is in accordance with Article 17 of the 2013 Law and its implementing measures.

64. The objective of the contracts and written procedures with the external persons to be established by the depositary as referred to in sub-chapter 2.2. is to document the operational procedure(s) between the depositary and the third parties, which, where applicable, have been formally appointed by the AIF. In this regard, the requirement that the depositary must put in place

contracts and written procedures with external persons is without prejudice to the obligation applicable to the AIF to put in place a contract with those of the service providers which have been appointed by the AIF.

65. Where a prime broker is required to hold assets in custody which are owned by the AIF, the prime broker shall be deemed to be acting as delegate of the depositary of the related AIF. The depositary has a right of refusal concerning the choice and appointment of a prime broker made by the AIF or its IFM where the prime broker is required, in the performance of its duties, to hold assets in custody which are owned by the AIF. The IFM must provide the depositary, in a timely manner, with all information relevant relating to the prime broker to enable the depositary to perform its duties.

### **Chapter 3: Right of access to information**

66. The depositary must, at any time, have a right of access, as soon as possible, to all relevant information which the depositary needs to fulfil its legal obligations. The right of access to the information referred to in point 153 of this Circular must enable the depositary to have access to information which is available notably from a delegate, clearing broker, broker, registrar or transfer agent, prime broker or counterparty, which is necessary for the depositary as regards transactions and asset positions. The obligation to have a right of access to information is notably considered to be fulfilled when the depositary has a right to access the reporting system by means of access to a website (e.g. concerning positions in target UCIs held with the registrar agent or transfer agent of the target UCIs or with regard to the assets of an AIF held for all or part by the entity acting as broker, or concerning financial derivative instruments agreements).

67. In relation to guarantees and securities, this right of access to information must also exist against any entity with whom collateral given to an AIF can be found, such as in particular every collateral agent (e.g. upon the transfer of legal ownership as guarantee to the AIF in the books of a collateral manager acting as collateral agent, as against this collateral manager).

68. With regard more particularly to the safekeeping obligations of other assets, it should be noted that the depositary must also ensure that procedures are in place so that the registered assets can only be assigned, transferred, exchanged or delivered if the depositary itself or the third party to whom the safekeeping has been delegated has been informed.

### **Chapter 4: Escalation procedure between the depositary and the AIF and/or its IFM**

69. According to Article 90(4) of Delegated Regulation 231/2013, the depositary shall establish and implement one or more escalation procedures to be followed by the AIF depositary in the event of the detection of a potential discrepancy or irregularity which, without prejudice to the obligations applicable to the AIF and/or its IFM, notably provides for the notification of the situation to the AIF and/or its IFM and to the competent authorities if the situation cannot be rectified.

70. In a similar manner and without prejudice to the obligations applicable to the depositary, one or more escalation procedure(s) shall also be put in place and implemented by the AIF and/or its IFM regarding the procedures to be followed by the AIF and/or its IFM in case of the detection of a potential discrepancy or irregularity, which provides notably for the notification of the situation to the depositary and to the competent authorities if the situation cannot be clarified or rectified.

71. The escalation procedure(s) concerning the intervention of the depositary in relation to the AIF shall identify the persons working for the AIF whom the depositary must contact when it launches such a procedure and must provide for an obligation on the part of the AIF to inform the depositary of the measures it has taken following an intervention by the depositary, where applicable, to remedy a breach of the rules applicable to the AIF. This or these procedure(s) must also provide that in the case that the AIF fails to take appropriate measures within a reasonable period of time, the depositary must inform the CSSF thereof. These elements apply by analogy to the escalation procedure(s) concerning the intervention of the AIF in relation to the depositary. This or these escalation procedure(s) shall form part of the contract appointing the depositary (the contract or its annexes). It is permissible for the contract appointing the depositary or its annexes to contain the principles of the escalation procedure(s) and for the details to be described in other more easily modifiable documents (such as for example, a service level agreement or an operating memorandum).

72. Any notification by or to the AIF shall be made by or to the IFM for those AIFs in contractual form (common funds). For AIFs in corporate form (investment companies) having appointed an IFM, the notifications to an AIF shall be made to the IFM at the same time as they are made to the investment company. Notifications to self-managed investment companies shall be made by or to the investment company. Notifications to the depositary shall be performed by the AIF or its IFM, where applicable.

## **Chapter 5: Organisational arrangements to be put in place in relation to the assets of an AIF**

73. The 2013 Law and the Delegated Regulation 231/2013 contain important provisions concerning the duties of the AIF depositary, and in particular the organisational measures to be put in place by the depositary with regard to the assets of an AIF. These provisions revolve primarily around (i) a division of assets into two categories, namely (a) the category of financial instruments that may be held in custody and (b) the category of other assets, and (ii) a precise definition of the tasks to be accomplished by the depositary with regard to these categories and sub-categories of assets. This is how the 2013 Law and the Delegated Regulation 231/2013 define the organisational measures to be put in place with regard to the keeping of accounts and records (Articles 89 and 99 of the Delegated Regulation), the segregation rules at the different levels of a custody chain (Articles 89 and 99 of Delegated Regulation 231/2013), the rules concerning the delegation by the depositary of tasks related to these assets (Articles 19(11) to (14) of the 2013 Law and Articles 98 and 99 of Delegated Regulation 231/2013) and rules concerning cash monitoring (Articles 85 and 86 of Delegated Regulation 231/2013). These provisions are combined with a liability regime for the depositary according to the category of assets (Articles 19(12) to (14) and section 4 of chapter IV of Delegated Regulation 231/2013), with an obligation of restitution of lost financial instruments that may be held in custody as regards the AIF and investors and a more general liability regime based on negligence or intentional improper performance with regard to its other obligations under the 2013 Law.

74. The 2013 Law and Delegated Regulation 231/2013 have also amended the depositary regime by introducing a Community definition of the concept of safekeeping of assets. The concept of safekeeping is thus defined as the obligation of custody with regard to financial instruments that may be held in custody (Article 19(8)(a) of the 2013 Law), as the requirement to register and verify the ownership for other assets (Article 19(8)(b) of the 2013 Law) and as the obligation of cash flow

monitoring (Article 19(7) of the 2013 Law). Delegated Regulation 231/2013 clarifies the organisational measures which apply to the monitoring of financial flows (cash) in Articles 85 and 86, the safekeeping duties for financial instruments that may be held in custody in Article 89 and concerning the safekeeping duties regarding the ownership verification and recording of other assets in Article 90.

75. It is recognised that the depositary may use the registers and accounts opened in its books for each AIF (or each sub-fund in the case of an AIF having multiple sub-funds), the registers and accounts opened in the accounting books of an AIF with an administrative agent and extracts of accounts (e.g. the extracts of the collateral agent's statements) produced by third parties. At the level of the registers and accounts of the AIF in the accounting books of the administrative agent, this requires that the depositary has access to the accounting data of the administrative agent which enables it to know at any moment the assets reflected in the books of the administrative agent for the account of the AIF or for each of the sub-funds of the AIF for AIFs with multiple sub-funds, and that the depositary performs due diligence on the administrative agent and/or any other third party which includes the accounting system used and from which it can be concluded that a correct and exhaustive accounting of all of the assets has been carried out by the administrative agent and/or other third party or ensures that the review of the accounting system is subject to a control of the type ISAE 3402/SSAE16.

#### ***Sub-Chapter 5.1: Accounting and proper monitoring of financial flows***

76. The depositary is required to ensure effective and proper monitoring of cash flows according to Article 19(7) of the 2013 Law and Articles 85 and 86 of Delegated Regulation 231/2013.

77. Where the depositary holds cash belonging to AIF clients, the depositary must take appropriate measures in order to maintain the rights of its AIF clients. The depositary is, in this case, required to comply with the rules provided for in Article 37-1(8) of the 1993 Law as well as the implementing measures contained in section 2 of the Grand Ducal Regulation of 30 May 2018 on the protection of clients' financial instruments and funds, product governance obligations and the rules governing the granting or collection of fees, commissions or any monetary or non-monetary benefits.

78. Concerning the deposit of cash of an AIF with the depositary or with a third party, the depositary, the AIF and/or, where applicable, the third party may use the mechanism of a fiduciary arrangement.

79. The accounts opened in relation to the execution of issues (and redemptions) of units, in which the amounts to be received (or paid) by the AIF are or will be received pending payment to the AIF or, where applicable, to the investors (collection accounts), must be opened with the entities as defined in Article 19(7) of the 2013 Law.

#### **Section 5.1.1: Obligations of the depositary in relation to subscriptions**

80. The depositary shall ensure that the IFM or the AIF provides it, in accordance with Article 87 of Delegated Regulation 231/2013, with the information on all the payments made by the investors or on their behalf during the subscription of units or shares of an AIF at the close of each



business day during which the IFM, the AIF or any third party acting on its behalf, for example a transfer agent, receives such payments or an order from an investor. Once all the relevant information required by the depositary has been received, it shall ensure that the payments are recorded on the cash accounts opened in the name of the AIF, in the name of the IFM acting on behalf of the AIF or in the name of the depositary, in accordance with the provisions of Article 19(7) of the 2013 Law.

## ***Sub-Chapter 5.2: Safekeeping obligations for assets held in custody***

### **Section 5.2.1: Financial instruments**

81. As a reminder, the financial instruments to be held in custody are the financial instruments as defined in Article 88 of Delegated Regulation 231/2013. The depositary must ensure that they are held in custody in accordance with the provisions of Article 19(8)(a)(ii) of the 2013 Law and Articles 89 and 99 of Delegated Regulation 231/2013.

82. The financial instruments belonging to the AIF or the IFM acting on behalf of the AIF and which may be delivered physically to the depositary still fall within the scope of the safekeeping functions of the depositary.

83. The financial instruments provided as collateral to a third party or by a third party for the benefit of the AIF must also be held in custody by the depositary itself or by a third party to whom the functions of safekeeping have been delegated, to the extent that they are owned by the AIF or the IFM acting on behalf of the AIF.

### **Section 5.2.2: Obligations in respect of keeping accounts**

84. The entity acting as depositary must comply with the rules provided for in Article 37-1(7) of the 1993 Law as well as the implementing measures contained in section 2 of the Grand Ducal Regulation of 30 May 2018 on the protection of clients' financial instruments and funds, product governance obligations and the rules governing the granting or collection of fees, commissions or any monetary or non-monetary benefits. The depositary must account for the securities and other fungible financial instruments held on deposit or registered in an account separately from its own assets and off-balance sheet. With regard to the deposit of the assets of an AIF with the depositary, the depositary and the AIF may use a fiduciary arrangement between the depositary and the AIF.

### **Section 5.2.3: Segregation obligations**

85. It is the responsibility of the depositary to ensure that the assets which may be held in custody of an AIF may at all times be clearly identified as belonging to the AIF (or to a sub-fund for AIFs with multiple sub-funds) in accordance with the applicable legislation.

*A. Segregation obligation to be put in place by an entity at the first level of the custody chain (appointed depositary)*

86. A segregation by AIF (or by sub-fund for AIFs with multiple sub-funds) must in all cases be

implemented at the first level of the custody chain (i.e. at the level of the depositary appointed), even where the depositary subsequently delegates its safekeeping functions.

87. With reference to the assets which the depositary itself ensures the custody of, the depositary must open in its books, in the name of the AIF, or in the name of the AIFM acting on behalf of the AIF, or where applicable, in that of each of the sub-funds of an AIF having multiple sub-funds, one or more segregated accounts in which are recorded all the assets which are owned by the AIF, in accordance with Article 19(8)(a)(ii) of the 2013 Law.

*B. Segregation obligation to be put in place by an entity situated directly below the depositary in the custody chain*

88. In the context of the depositary regime put in place by the 2013 Law and Delegated Regulation 231/2013, the use of delegates by the depositary qualifies technically as a delegation of the safekeeping of assets (Article 19(11) of the 2013 Law) according to the categorisation of assets established by these texts and Delegated Regulation 231/2013. It should be noted that according to Article 19(11)(b) of the 2013 Law, the depositary must demonstrate that there is an objective reason for the delegation.

89. It is the responsibility of the depositary to ensure that the third party segregates the clients' assets so that they may be clearly identified at any time as belonging to its clients, and in accordance with Article 99 of Delegated Regulation 231/2013. The depositary may at any time deem it necessary to open several accounts other than those listed in Article 99(1)(a) of Delegated Regulation 231/2013 in order to minimise the risk of loss or reduction of the value of the financial instruments of its clients.

*C. Segregation obligations to be put in place by entities below the delegate in the custody chain (sub-delegates)*

90. By analogy to the qualification of the use of delegates by the depositary as being a delegation of the safekeeping of assets (Article 19(11) of the 2013 Law), the regime put in place by the 2013 Law and Delegated Regulation 231/2013 with regard to the use of entities below the delegates in the custody chain qualifies as a sub-delegation of the safekeeping of assets (Article 19(11) of the 2013 Law and Articles 98(4) and 99(3) of the Delegated Regulation 231/2013). As with delegation, there must be an objective reason for any sub-delegation.

91. With regard to the structuring of accounts with sub-delegates, the provisions of points 88 and 89 above shall apply *mutatis mutandis* to accounts opened or maintained with entities below the delegate in the custody chain of an asset.

#### **Section 5.2.4: Due diligence required in the case of delegation of safekeeping functions to third parties**

92. In case of delegation of the functions of safekeeping of assets which may be held in custody, the depositary shall ensure in particular that an appropriate and documented due diligence procedure is implemented and applied according to the provisions of Article 19(11)(c) of the 2013 Law and Article 98 of Delegated Regulation 231/2013.

93. In particular, the due diligence procedure aims to assess whether the requirements for segregation of accounts as described in section 5.2.3 above are met and are sufficient to minimise the risk of loss or reduction of the value of the financial instruments of AIFs which are clients of the depositary.

94. If the depositary finds that the segregation of assets is not sufficient to guarantee the protection of the assets and the rights of the AIF against insolvency of the third party, as a result of the legislation of the country in which the third party is located, it shall inform the IFM thereof without delay.

95. The due diligence procedure must be re-examined regularly, at least once per year, and is to be made available to the CSSF upon request. It is the responsibility of the internal audit function or of the internal control department of the depositary to monitor the existence, periodic update and effective application of this procedure.

96. The organisational measures applicable under the 2013 Law and Delegated Regulation 231/2013 shall be applied effectively at all times and shall not be considered as exhaustive, namely that they neither establish in detail the way in which a depositary shall exercise the necessary skill, care and diligence, nor fix all the measures to be taken by the depositary under the applicable regulatory provisions. It is for the depositary to adapt the criteria on the basis of which it fulfils its duties, particularly in terms of due diligence, depending on particular situations that may arise, for example on the basis of the specific features applicable to the custody chain of a given asset or the specific features applicable to each of the delegates or specific rules applicable in the jurisdiction where the delegate is established, or possible exceptional circumstances which may arise.

97. The depositary must ensure that each delegate applies at its level the rules relating to due diligence and segregation, by analogy, with regard to each entity immediately below this delegate.

The depositary must, in relation to each delegate, benefit from the rights of access to information as referred to in Part III., Chapter 3. above, to ensure that it can exercise its obligations relating to the assets of a AIF. It is for the AIF to ensure that the depositary benefits from such rights, in particular, in the case that the related accounts are opened, or the registration is in the name of the AIF or of a sub-fund of an AIF. The existence of these rights and the means by which the depositary can exercise them must be documented in an appropriate manner.

### ***Sub-chapter 5.3: Obligations relating to assets which are not subject to safekeeping***

#### **Section 5.3.1: Assets which may not be held in custody**

98. In accordance with Article 88 of Delegated Regulation 231/2013, financial instruments which, in accordance with applicable national law, are only registered directly in the name of the AIF with the issuer itself or its agent, such as a registrar or a transfer agent, are included in the category of assets which cannot be held in custody.

99. Physical assets which are not considered financial instruments within the meaning of the AIFM Directive and which may not be physically delivered to the depositary, financial contracts such as derivatives, deposits of cash or investments in non-listed companies and interests in

partnerships also fall into the category of assets which cannot be held in custody.

### **Section 5.3.2: General obligations regarding ownership verification and record-keeping and account keeping**

100. The depositary shall at all times have a comprehensive overview of all the assets of an AIF, including all cash and assets other than assets which may be held in custody, in particular for the purpose of drawing up the inventory of all the asset positions as referred to in points 151 and 152.

101. Assets other than assets which may be held in custody are subject to an obligation to verify ownership and record-keeping, in accordance with Article 90 of Delegated Regulation 231/2013.

102. The depositary shall maintain a register of all assets for which it is satisfied that the AIF is the owner. To meet this obligation, the depositary shall:

- i) register in its record, in the name of the AIF, assets for which it is satisfied that the AIF or the IFM acting on behalf of the AIF holds the ownership, including their value, using the most appropriate form of measurement with respect to the nature of the assets concerned (for example notional amounts, nominal value or net asset value);
- ii) be able to provide at any time a comprehensive and up-to-date inventory of the assets of the AIF including their respective notional amounts.

103. The depositary must in particular be able to know at all times:

- i) which assets belong to the fund,
- ii) where these assets are located or held.

104. In order to comply with its obligations ownership verification and record-keeping obligations, the depositary should take into account the nature of the assets in which the AIF is invested (or the sub-fund for AIFs with multiple sub-funds). Sufficient, reliable information and documentary evidence enabling the depositary to be satisfied of the ownership of the AIF or the IFM acting on behalf of the AIF over the assets may vary depending how the AIF invests in these assets and the regulatory framework applicable to the related assets. Furthermore, to meet its verification of ownership and record-keeping obligations, the depositary must take into account how the AIF invests and the jurisdiction in which the asset is located.

105. The depositary and the AIF or the IFM acting on behalf of the AIF shall agree in particular on a written procedure detailing the type of transactions to be expected with regard to the AIF's investment policy, as well as the cash flows to be expected during the acquisition or sale, be it direct or indirect, of one or more assets by the AIF or the IFM acting on behalf of the AIF. This procedure notably provides for the conditions under which the cash may be released by the depositary, where applicable. The procedure provides for a list of documents and other documentary evidence which must be sent by the AIF or the IFM acting on behalf of the AIF to the depositary without undue delay so that the depositary can meet its verification of ownership and record-keeping obligations taking into account the nature of the assets concerned. This list provides that the depositary shall at least receive:

- i) The decision of the AIF or of the IFM acting on behalf of the AIF to proceed with the acquisition / sale of the asset(s) concerned, and
- ii) the legal documentation relating to the acquisition or sale of the asset(s) concerned.

The written procedure provided for in this point provides that the AIF or the IFM acting on behalf of the AIF shall send to the depositary as soon as possible any other relevant document taking into account the nature of the asset(s) concerned, the manner in which the AIF makes the investment and the jurisdiction in which the asset(s) concerned (is) are located, including, where applicable, a legal opinion which confirms the AIF's direct or indirect ownership of the asset(s) concerned and confirms compliance with the applicable regulations in this respect.

106. The depositary shall ensure that there are procedures in place so that the registered assets cannot be assigned, transferred, exchanged or delivered without the depositary itself or the third party to whom the safekeeping has been delegated in accordance with Article 19 of the 2013 Law having been informed thereof. The depositary must have access without undue delay, at the third party concerned, to the documentary evidence of each transaction and each position. The AIF or the IFM acting on behalf of the AIF shall ensure that the depositary receives the information and documentary evidence without undue delay every time there is a sale or acquisition of assets, as well as throughout the life of the AIF.

107. After each transaction and at least once per year, the depositary shall verify that the assets remain the property of the AIF or the IFM acting on behalf of the AIF, provided that it has not been informed that the assets have been assigned, transferred, exchanged or delivered in accordance with point 107 above. The written procedure referred to in point 105 above provides that the AIF or the IFM acting on behalf of the AIF shall send to the depositary the documents necessary for such verification.

108. In this context, the depositary shall ensure that the IFM puts in place and implements appropriate procedures to verify that the assets acquired by the AIF it manages are appropriately registered in the name of the AIF or the IFM acting on behalf of the AIF and to check the consistency between the positions in the IFM's records and the assets for which the depositary is satisfied that the AIF or the IFM acting on behalf of the AIF holds the ownership. The IFM shall ensure that all instructions and relevant information related to the AIF's assets are sent to the depositary without undue delay so that the depositary is able to perform its own verification and reconciliation procedures after the execution of each transaction but also throughout the life of the AIF.

109. The escalation procedure to be put in place under Chapter 4. of Part III. of this Circular shall provide for the procedure to be followed for situations where an anomaly is detected in the implementation of this section 5.3.2. as well as the notification of the situation to the IFM and to the competent authorities if the situation cannot be clarified or rectified.

110. All depositary's safekeeping duties as referred to in this chapter shall apply on a look-through basis to the underlying assets held by financial or legal structures, in order to invest in the related assets, by the AIF or the IFM acting on behalf of the AIF and controlled directly or indirectly by one of them. To this end, the AIF or the IFM shall promptly inform the depositary of the nature of the underlying asset(s) and of any change in the financial or legal holding structure of the related

asset(s). The requirement referred to in this point does not apply to fund of funds structures or to master-feeder structures where the target funds have a depositary which performs the functions of ownership verification and record-keeping for their assets.

111. In the event of delegation of the safekeeping functions in respect of assets which may not be held in custody, the depositary must ensure that an appropriate and well-documented due diligence procedure is implemented. The due diligence procedure aims in particular to assess whether the ownership verification and registration and record-keeping obligations as detailed in Chapter 5.3. are met.

### **Section 5.3.3: Specific obligations depending on the nature of the assets in which the AIF is invested**

112. To achieve a sufficient level of certainty that the AIF or the IFM acting on behalf of the AIF is indeed the owner of an asset, the depositary must receive all the information it deems necessary to be satisfied that the AIF or the IFM acting on behalf of the AIF holds the ownership of that asset. This documentary evidence may vary depending on the nature of the assets in which the AIF is invested or how the investment is made. In this regard, section 5.3.3. provides certain non-exhaustive details with regard to a certain number of specific investment strategies.

113. In all cases, and irrespective of the AIF's investment strategy, it is the responsibility of the depositary to ensure compliance with the provisions provided for in sub-chapter 5.3. is sufficient to enable it to fulfil its verification of ownership and registration obligations and in particular to achieve the required level of certainty required as to the right of ownership over a particular asset of the AIF or of the IFM acting on behalf of the AIF. Otherwise, the depositary must request additional evidence from the AIF, IFM or where applicable from the third party to whom custody has been delegated in accordance with Article 19 of the 2013 Law.

#### *A. Specific obligations where the AIF is invested in real estate*

114. To meet its obligations in relation to AIFs investing in real estate (e.g. a real estate fund), the depositary must take into account how the AIF invests and the jurisdiction in which the property is situated. Real estate shall be understood, in particular buildings, land and rights providing for long-term enjoyment of real estate such as surface rights and emphyteutic leases.

115. Where the AIF is invested in real estate, the list of documents and other documentary evidence which must be provided by the AIF or the IFM acting on behalf of the AIF to the depositary in accordance with point 105 above must also include at least a detailed organisation chart of the holding structure of the real estate concerned by the AIF. The IFM must also ensure that the depositary has the right to visit on a regular basis, by itself or through an intermediary, the premises of the IFM or the premises where the AIF's property is located to verify the existence of the assets. The IFM must ensure that the depositary is entitled to carry out or to cause such visits to be conducted at least once per year, in accordance with the national legislation applicable in the jurisdiction of the property concerned. In order to minimise the risks of conflicts of interest, where the depositary chooses to appoint a person to carry out the on-site visits referred to in this paragraph, it shall ensure that this person is neither an employee nor a member of the senior management or of the body performing the monitoring duties of the AIF or of its IFM, that such person is not an employee of any other undertakings belonging to the same group and is not



bound by any business, family or other relationship to the AIF or its IFM or any other undertaking within the group which would give rise to a conflict of interests that would compromise its judgement.

116. Where the AIF invests in rights providing long-term enjoyment of real estate, the provisions of points 114 and 115 above must, where applicable, be understood as relating to the real estate underlying the rights in which the AIF invests.

117. Where the investment is made by means of interests in real estate companies (as well as claims on such companies) the objective and main purpose of which are the acquisition, realisation and sale as well as the leasing and land leasing, the requirements provided for in point 110 above shall apply.

#### *B. Specific obligations where the AIF is invested in target funds*

118. To meet its obligations in relation to AIFs investing in other target funds (i.e. funds of funds), the depositary must take into account how the AIF makes the investment, i.e. how the registration of the investment is carried out with the issuer or its agent, such as a registrar agent or a transfer agent. Fund of funds, within the meaning of this section, shall be understood to be AIFs whose target assets consist of units or shares in other vehicles for collective investment, i.e. AIFs or UCITS.

119. The requirements provided for in point 110 above shall apply to AIFs investing in other target funds.

120. Regarding more specifically the registration of the investments of an AIF in target funds is concerned, it is possible that the registration of such investment with a target fund or with an agent of the latter may be made directly in the name of the investing AIF, provided that the national law of the target fund does not require a different registration. The investment of an AIF in a target entity may also be registered in the name of the depositary with an indication that the assets belong to the depositary's clients, in the name of the depositary with an indication of the name of the investing AIF or the name of the sub-fund concerned in the case of an AIF having multiple sub-funds or only in the name of the investing AIF or of a sub-fund of the latter in the case of an AIF having multiple sub-funds, this last option only being available only when permitted or required by the national law of the target fund. In this latter case, the depositary shall ensure that procedures are in place so that the assets cannot be assigned, transferred, exchanged or delivered unless the depositary itself or its delegate has been informed thereof and so that they have access without undue delay to those documents which evidence each transaction and each position. The provisions under this point also apply to AIFs which qualify as feeder funds within master-feeder structures.

#### *C. Specific obligations where the AIF is invested in issuers or non-listed companies within the meaning of Article 1(63) of the 2013 Law*

121. To meet its obligations in relation to AIFs investing in issuers or non-listed companies within the meaning of Article 1(63) of the 2013 Law, the depositary must take into account how the AIF makes the investment, i.e. how the registration of the investment is carried out with the issuer or its agent, such as a registrar agent or a transfer agent.



122. Where the AIF is invested in issuers or non-listed companies within the meaning of Article 1(63) of the 2013 Law, the list of documents and other documentary evidence which must be provided by the AIF or the IFM acting on behalf of the AIF to the depositary in accordance with point 105 above must also include at least a detailed organisation chart of the holding structure, by the AIF, of the asset(s) concerned.

123. Where the investment is made through intermediaries companies or through a specialised intermediary (other than the registrar, the issuer or the non-listed company) with whom the investments are held on behalf of the AIF, the requirements provided for in point 110 above shall apply.

#### *D. Specific obligations where the AIF is invested in intangible rights*

124. To meet its obligations in relation to AIFs investing in intangible rights (e.g. the exploitation of patents, trademarks or image rights), the depositary must take into account how the AIF makes the investment, i.e. how the acquisition of the related intangible right must be structured and how the AIF is to be registered as the holder of this intangible right.

125. It is the responsibility of the depositary to ensure that the AIF or the IFM on behalf of the AIF puts in place the necessary procedures to ensure that the rights of the AIF are registered in such a manner that its ownership and operating rights are ensured. To this end, the depositary shall obtain from the IFM, which is ultimately responsible for performing the necessary measures required, an independent legal opinion confirming the registration of the right of ownership of the AIF in relation to the rights concerned and the possibility for the AIF to enjoy such rights.

126. Where the investment is made through intermediaries companies or through a specialised intermediary with whom the investments are held on behalf of the AIF, the requirements provided for in point 110 above shall apply.

#### *E. Specific obligations where the AIF is invested in financial derivative instruments*

127. In the case where an AIF invests in financial derivative instruments, the AIF or the IFM acting on behalf of the AIF must ensure that the depositary can monitor the following aspects with regard to the transactional aspect of an investment in a financial derivative instrument and in order to enable the depositary to meet its legal obligations in relation to the safekeeping of the assets and its monitoring duties:

- i) know every AIF's positions in such financial derivative instruments, in particular in relation to the positions held with clearing brokers or with a central counterparty. In order to fulfil this obligation, it is notably accepted that the depositary may use the registers and accounts opened in the AIF's accounting books with its administrative agent, rely on reconciliations carried out by the latter or use accounts statement produced by third parties as specified under point 75 of this Circular (subject to the conditions set out herein;
- ii) monitor on a daily basis the exposure in relation to initial margin deposits carried out by the AIF with an intermediary (e.g. a broker) and together with the variation margin in the context of financial derivative instruments traded in on a regulated market or OTC financial derivative instruments. The depositary may notably, in this context, rely on the broker statements received from the brokers involved in a given transaction or on reconciliations

carried out by the administrative agent.

*F. Specific obligations where the AIF is invested in movable assets*

128. To fulfil its obligations in respect of the verification of ownership and registration of movable assets, the depositary shall ensure that safekeeping is entrusted to an undertaking specialised in the safekeeping of such asset, and that the undertaking appointed has at its disposal the technical and material resources to ensure the preservation of the value and integrity of the said assets. Such undertaking does not necessarily have to be located in Luxembourg. It is possible to appoint several specialised undertakings to ensure that not all the AIF's movable assets are held in custody in the same place. Movable assets within the meaning of sub-section F are not to be understood as financial instruments that may be held in custody as defined in this Circular.

129. To this end, the depositary shall obtain from the IFM, which has the ultimate responsibility for appointing the specialised undertaking(s), a report setting out the due diligences performed by the IFM within the framework of the selection process.

130. The IFM must ensure that the depositary has the right to visit on a regular basis, by itself or through an intermediary, the premises of the IFM or the premises where the AIF's property is located in order to verify the existence of the assets. The IFM must furthermore ensure that the depositary is entitled to carry out or to cause such visits to be conducted at least once per year, in accordance with the national legislation applicable in the jurisdiction of the property concerned. In order to minimise the risks of conflicts of interest, where the depositary chooses to appoint a person to carry out the on-site visits referred to in this paragraph, it shall ensure that this person is neither an employee nor a member of the senior management or of the body performing the monitoring duties of the AIF or of its IFM, that such person is not an employee of any other undertakings belonging to the same group and is not bound by any business, family or other relationship to the AIF or its IFM or any other undertaking within the group which would give rise to a conflict of interests that would compromise its judgement.

131. The AIF shall ensure that the depositary obtains, on first request, a copy of the contract entered into between the AIF or the IFM acting on behalf of the AIF and the specialised undertaking(s).

132. The contracts set out safekeeping measures which shall be put in place to ensure adequate preservation, maintenance and protection of the assets. In addition to the disclosure requirements provided for in points 66 to 68 of this Circular, the contract provides that the undertaking appointed shall provide the depositary with statements listing each asset held in custody by the undertaking appointed on behalf of the AIF or of the IFM acting on behalf of the AIF, as well as the respective notional amount of each asset in the AIF's reference currency. Such statements shall be provided for each transaction relating to one or more AIF's movable property, at least once a year, and on the request of the depositary at any time.

133. The contract also provides that for each transaction relating to one or more AIF's movable assets, at least once per year, the appointed undertaking shall provide the depositary, with a statement indicating the movements of all the assets entrusted to it for safekeeping over the period since the previous statement.

134. The depositary shall use the statements provided for in points 132 and 133 above to carry

out the reconciliation measures provided for in points 142 to 144 for each transaction relating to one or more AIF's movable assets, and at least once per year. The reconciliation measures are carried out more frequently when required by the nature of the assets concerned and the frequency of the transactions performed by the AIF.

135. The relations with any third party responsible for providing transport or restoration or renovation works are subject to the provisions of points 128 to 134 above, which shall apply "*mutatis mutandis*".

136. The requirements provided for in point 110 above shall apply.

***Sub-Chapter 5.4: Specific organisational arrangements with regard to guarantees or security arrangements in the form of financial instruments or cash, including in the case of recourse to a collateral agent***

137. To the extent that an AIF uses techniques or invests in instruments which give rise to guarantees or securities in the form of financial instruments or cash by one or the other party to a transaction, the depositary must be able to determine whether or not the collateral provided to or by a third party for the benefit of the AIF is owned by the AIF.

138. The assets of an AIF which are given by the AIF as a guarantee to a third party, or which are received as a guarantee by the AIF from a third party, are safekept by the depositary for so long as such assets are owned by the AIF. The custody of these assets may in this case be structured according to one of the following three plans: (1) the collateral taker is the depositary of the AIF or is appointed by the depositary or the AIF as custodian of the collateralised assets of the AIF; (2) the depositary of the AIF appoints a delegate who acts on behalf of the collateral taker; or (3) the collateralised assets remain with the depositary of the AIF and are indicated as collateralised in favour of the collateral taker.

139. In its assessment of whether or not the collateral given to a third party or by a third party for the benefit of the AIF is owned by the AIF, the depositary must take into account the legal nature, and/or the legal, regulatory or contractual provisions which are applicable to the transaction which gave rise to the establishment of this guarantee or security. The AIF must ensure that the depositary receives all necessary information to this effect.

140. Without prejudice to the responsibility of the AIF in the matter, when guarantees or security arrangements are put in place for the benefit of the AIF (be it in the form of a transfer of the legal ownership or by means of a pledge), the depositary is:

- i) in the context of securities lending transactions, required to ensure that the security arrangements to be received by the AIF are received prior to or at the latest on the same day as the transfer of the securities lent and that at the end of the securities lending transaction, the security will be remitted at the same time or after the return of the securities lent;
- ii) required to verify that the security arrangements to be received comply with the legal and regulatory provisions in force.

141. In the case where guarantees or security arrangements are transferred by the AIF or delivered to the AIF by a counterparty to a collateral manager (who is also acting as collateral agent) or to a collateral agent and to the extent permitted, a tripartite agreement between the AIF, this collateral manager or collateral agent, as well as the depositary shall be put in place. In this case the entity in charge of the management and administration of the guarantees and security arrangements which the AIF is required to give or receive (in principle the collateral manager) must ensure that an adequate level of guarantees and security arrangements exists in the pool of assets used as guarantees and securities. The collateral manager must also ensure that any substitution of assets in this pool of guarantees and security arrangements is carried out according to the rules defined by the parties within the framework of the agreement put in place. The depositary must, in this context, benefit from the right of access to information in accordance with points 66 to 68 of this Circular, and benefit from a real time and online access to a reporting tool of this collateral manager (who also acts as collateral agent) or of this collateral agent or to daily reports made available to the depositary by the collateral manager (who also acts as collateral agent) or of this collateral agent, concerning all the information which is necessary to allow the depositary to fulfil its obligations. Where this collateral manager or collateral agent can act as delegate of the depositary in relation to the safekeeping of assets of an AIF, the depositary benefits from a right of refusal concerning the choice and appointment of this collateral manager or collateral agent as far as the delegation of safekeeping of assets is concerned. It should be noted that this right of refusal of the depositary shall apply more generally to any third party appointed by the AIF which, in the context of services provided to the AIF, is vested with the safekeeping of the assets of that AIF.

## **Chapter 6: Organisational arrangements relating to reconciliations**

142. It is the responsibility of the depositary of an AIF to establish procedures which cover all of the reconciliations and reconciliation methods (including the reconciliations used by depositaries that have been carried out by third parties) to be put in place by the depositary in accordance with Articles 86(b) to (f), 89(1)(c) and 92(2), 93(1)(iii) and 99(1)(c) of the Delegated Regulation 231/2013, to effectively apply such procedures and to review such procedures periodically. These procedures must not only cover the details of the reconciliation processes to be established, but must also clarify the measures to be taken by the depositary in order to ensure the resolution of any differences in the reconciliation within a reasonable period of time.

143. It is the responsibility of the internal audit function or of the internal control department of the depositary to monitor the existence, the regular update and effective application of these reconciliation procedures and to ensure the resolution within a reasonable period of time of any discrepancies in reconciliations identified.

144. Regarding the reconciliation procedures, particular attention must be paid to the following aspects:

- i) the procedures to be established must cover all of the assets and transactions relating to the assets of the AIF;
- ii) in accordance with Article 90(2)(c)(ii) of Delegated Regulation 231/2013, the depositary is obliged to produce an inventory of all the asset positions of an AIF (or where applicable of each sub-fund of an AIF having multiple sub-funds) in which the AIF is invested at the close of the financial year. This implies that any differences in reconciliation identified by the

depository or a third party are justified at the moment of the production of an inventory of all the asset positions of an AIF.

## **Chapter 7: Obligation to put in place a contingency plan**

145. In accordance with Article 98(6) of Delegated Regulation 231/2013 and with the objective of ensuring the continuity of the activities of a depository in case of events likely to interrupt the ability of the depository to provide its depository services with regard to its AIF clients, every depository must put in place a contingency plan.

146. The depository shall develop a contingency plan with respect to each market in which the depository appoints a third party to which safekeeping functions are delegated.

## **Part IV: Specific obligations of the depository**

### **Chapter 1: Obligations relating to the ongoing administration of assets**

147. The depository shall fulfil all operations concerning the ongoing administration of the assets of an AIF in its custody.

148. This means that the depository must in particular cash in dividends, interest and securities due, exercise rights over securities and, in general, carry out any other operations concerning the ongoing administration of securities and liquid assets belonging to the AIF.

149. To the extent that the operations referred to above relate to assets which are not held in custody by the depository itself, the latter may, on a contractual basis and pursuant to the applicable provisions, confer the performance thereof to delegates with whom the assets are effectively held in custody. In such case, and in order to satisfy its oversight duty relating to the assets of the AIF, the depository must organise its relations with the delegates in such a manner that it is immediately informed of all operations which these delegates carry out in the context of the ongoing administration of the assets that they have on deposit.

### **Chapter 2: Oversight and control duties**

150. The depository is vested with oversight and control duties on the basis of Article 19(9) of the 2013 Law and Articles 93 to 97 of Delegated Regulation 231/2013. The 5 types of oversight duties are carried out with regard to all the AIFs which are managed by an IFM, whatever their legal structure. Delegated Regulation 231/2013 provides certain clarifications on the tasks to be fulfilled by the depository in order to be discharged from its obligations with regard to its oversight duties. Regarding these oversight and control duties, it is the responsibility of the internal audit function or of the internal control department of the institution acting as depository to control the existence, periodic update and effective application of the procedures connected with the control duties.

### **Chapter 3: Inventory obligations**

151. In accordance with Article 90(2)(c)(ii) of Delegated Regulation 231/2013, the depositary must regularly provide the IFM or the AIF with a full inventory of all the AIF's assets. The production of an inventory of all the asset positions of an AIF or, where applicable, of each of the sub-funds of an AIF having multiple sub-funds in which the AIF is invested, is mandatory in relation to the closing date of the financial year of an AIF with a view to, where applicable, the audit of the annual accounts.

152. The inventory of all the asset positions of an AIF must include all guarantees or security arrangements which belong to an AIF or to a given sub-fund of an AIF having multiple sub-funds.

### **Part V: Information obligations of the depositary applicable to the AIF**

153. The AIF shall ensure that the depositary has access, without undue delay, upon its appointment and on an ongoing basis, to all relevant information which it needs to comply with its obligations in relation to the depositary activity for a given AIF.

154. Where the IFM of an AIF is not established in the Grand Duchy of Luxembourg, the depositary shall sign a written agreement with the said IFM regulating the flow of information deemed necessary to allow it to perform its functions, particularly in relation to the safekeeping of the assets and in relation to monitoring and in general in relation to legislative, regulatory or administrative provisions applicable to the depositary.

155. The parties to the contract appointing the depositary may agree to send electronically all or part of the information which is to be communicated.

### **Part VI: Disclosure requirements of the depositary vis-à-vis the AIF**

156. In order to ensure that every AIF is informed of any element affecting the assets of an AIF which is known to or comes to the attention of the depositary in the performance of its functions, the depositary must ensure that the AIF, or, where applicable, its IFM, is informed without undue delay of any element relating to the assets of the AIF, to the extent that the depositary has knowledge of it, and in particular concerning all events affecting the life of the assets.

157. The disclosure requirements applicable to the depositary vis-à-vis the UCITS are to be read in conjunction with the obligations applicable under the escalation procedure in accordance with Chapter 4. of Part III. of this Circular.

### **Part VII: Disclosure requirements applicable to the depositary vis-à-vis the authorities**

158. The depositary is required to provide the CSSF, upon request, with all the information which the depositary has obtained in the performance of its functions and which may be necessary to enable the CSSF to supervise compliance with the laws and regulations applicable to the depositary as well as to AIFs for which it acts as depositary.

159. If the CSSF is not the competent authority for the supervision of the IFM, it shall



communicate the information received to the respective competent authorities.

160. In the context of the escalation procedure to be implemented on the basis of Chapter 4. of Part III. of this Circular, the depositary may be required to notify the CSSF of any event disclosed/notified by the depositary to the AIF in the context of this escalation procedure, when the AIF has failed to take adequate measures within a reasonable period of time.

### **Part VIII: Specific provisions where a contract appointing a depositary is terminated during the life of an AIF**

161. In the event that a contract appointing a depositary is terminated during the life of an AIF without a new contract appointing a depositary being in place and in force at the end of the notice period applicable to a termination, it is necessary to ensure that the assets of the AIF are subject to an adequate safekeeping, according to the nature of these assets, in the interests of the AIF and its investors (measures for safekeeping of assets). These safekeeping measures are generally necessary in the event of the liquidation of an AIF and/or in case there is no longer an appointed depositary. It is the responsibility, where applicable, of each AIF and/or the IFM to inform its supervisory authority of all cases where measures for the safekeeping of the AIF's assets must be put in place.

162. As regards this function of safekeeping the assets of an AIF in liquidation or without a depositary, the entity that last acted as depositary is responsible for keeping open all the securities and cash accounts for the different assets of that AIF which are held in custody by this institution at the moment of the removal or withdrawal of the AIF and until the appointment of a new depositary or until the closure of the liquidation of the AIF.

### **Entry into force and miscellaneous provisions**

163. This Circular enters into force on 1 January 2019.

164. Chapter E of IML Circular 91/75, as amended by CSSF Circular 05/177, is repealed, with effect from the date stated in point 163 above.

165. The scope of CSSF Circular 16/644 shall be amended, with effect from the date indicated in point 163 above, in the sense that it is broadened to apply also to Part II UCIs whose issue documents allow for the marketing of their units with retail investors on the territory of Luxembourg, independently of their status of IFM/manager. In this case, any reference to a UCITS, or to its management company, in CSSF Circular 16/644 is to be interpreted as a reference to a Part II UCI or to its IFM/manager.

166. Annex 1 of CSSF Circular 16/644 is also amended in that it is replaced by annex 1 of this Circular with effect from the date stated in point 163 above.

**Annex 1: List of information concerning the functions of a depositary which must be kept up-to-date and sent to the CSSF on a punctual, periodic or annual basis<sup>4</sup> (see the points below)**

In accordance with the provisions of this Circular, the information listed below must be kept up-to-date and provided to the CSSF on a punctual, periodic or annual basis:

- a) name and title of the directors of the depositary, and, where applicable, the person(s) responsible for the "depositary" business line (at the time of the appointment of the person(s) responsible), if there are several persons in charge, please indicate the reasons for and the decision-making process;
- b) internal organisation chart of the institution, in particular of the services involved in the context of the depositary function of the type of fund concerned for the purpose of monitoring the sufficiency and adequacy of the structures necessary for the performance of the general and specific duties (on an annual basis), if the institution also acts in the context of the central administration function, please specify the services concerned and indicate the tasks performed by each of the services mentioned;
- c) the number of employees hired to ensure the depositary function of the type of funds concerned (on an annual basis), please indicate the number of full-time equivalent employees by department or service;
- d) CV(s) of the person(s) responsible for the "depositary" business line (at the time of the appointment of the person(s) responsible), please specify the date of entry into service, professional experience, education, date and place of birth of the persons concerned;
- e) information on the technical resources (of the unit in charge of the depositary function within the credit institution, including a description of the IT system (hardware and software) used) (on an annual basis);
- f) a list of delegates appointed by the depositary for the safekeeping of financial instruments that may be held in custody (on an annual basis), and a list of prime brokers or collateral agents; or information on the website on which such up-to-date lists are available;
- g) a list of sub-contractors assisting the depositary in its duties and a description of the links with these subcontractors, the operating mode of the depositary and the interaction with the delegates and subcontractors shall be explained, where appropriate, on the basis of one or more diagrams (on an annual basis);
- h) a list of the agents, description of the possible group relationship with the administrative agent and, if different, the registrar agent, if the administrative agent/registrar agent is the same legal entity as the depositary, a description of the elements ensuring the required functional and hierarchical separation, as indicated under point b) in annex 1 (on an annual basis);

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<sup>4</sup> *The annual information must be sent no later than 2 months after the closure of the financial statements of the depositary.*

- i) written confirmation signed by the person responsible for the “depository” business line that the contracts appointing the depository include all the different elements that must be covered under the applicable legislation depending on the type of fund concerned;
- j) a list of procedures with an indication of the topic covered and the date of the last update covering the various aspects of the depository function of the type of fund concerned (on an annual basis);
- k) a description of the types of funds (depending on their legal form as well as their investment policy) for which the depository intends to accept to act as a depository (on an annual basis).



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