

Administrative sanction of 23 February 2023 for non-compliance with depositary obligations

Administrative sanction imposed on Intertrust (Luxembourg) S.à r.l.

Luxembourg, 21 March 2024

Administrative decision

On 23 February 2023, the CSSF imposed an administrative fine amounting to EUR 162,500 on the specialised PFS Intertrust (Luxembourg) S.à r.l. (“**PFS**”), among others authorised as professional depositary of assets other than financial instruments according to the provisions of Article 26-1 of the amended Law of 5 April 1993 on the financial sector (“**LFS**”).

Legal framework/motivation

This administrative fine was imposed by the CSSF pursuant to Article 51(1), first and seventh indents, of the amended Law of 12 July 2013 on Alternative Investment Fund Managers (“**AIFM Law**”) read in conjunction with the provisions of Article 19(7), (8), (9), (10) and (11) of the AIFM Law for non-compliance with depositary obligations.

In order to determine the type and amount of the administrative sanction, the CSSF has duly taken into account all the legal and factual elements set out and discussed, the number and degree of severity of the breaches existing at the time of the on-site inspection in accordance with the provisions of Article 51(2) of the AIFM Law, as well as the fact that the PFS has acknowledged the findings and observations and has provided a general action plan and initiated corrective measures during and after the on-site inspection in order to remedy the breaches found.

According to the PFS, the corrective measures have since then been fully implemented.

The depositary obligations in relation to which the breaches were observed are namely quoted in the relevant provisions of

- (i) the AIFM Law,

- (ii) the amended Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (“CDR 231/2013”) and
- (iii) the LFS, more specifically the requirements referred to in the provisions of Article 17(2), as detailed in Circular IML 98/143, as amended, on Internal control and Circular IML 96/126 on Administrative and accounting organisation in their version applicable at the time of the facts.

Legal basis for the publication

The publication is made in accordance with Article 51(2) of the AIFM Law, insofar as, following an assessment of proportionality, the CSSF considered that the present publication on a nominative basis does not seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

Context and major cases of non-compliance with the professional obligations identified

This administrative fine is the result of an on-site inspection (“**inspection**”) carried out by the CSSF on the PFS between August 2021 and February 2022 covering the depositary obligations. During the inspection, the CSSF has identified breaches to the provisions applicable to the depositary function exercised by the PFS which related in particular to the following points:

- the **general organisation of the depositary function**, i.e. having a sound administrative and accounting organisation as well as adequate internal control procedures as required by Article 17(2) of the LFS, was not appropriate. Consequently, the principle of sound and prudent management mentioned in Article 51(1), 7th indent of the AIFM Law was jeopardised. The following elements have been taken into consideration:

1. severity of certain findings raised during the inspection evidenced that the internal control system was not robust;
 2. tasks prepared by external staff were not subject to adequate level of control;
 3. sufficient resources were not allocated to the depositary activities;
 4. information provided throughout the inspection was not complete and reliable.
- the **safekeeping duties for other assets** have not been executed in accordance with Article 19(8)b of the AIFM Law. Specifically, for assets acquired by the Alternative Investment Funds (“AIFs”) prior to September 2021, essentially consisting of investments in private equity or real estate, the PFS was unable to demonstrate that it collected sufficient and reliable evidence to verify the AIFs’ ownership of the assets. The role of the depositary is key in that context, and all information necessary to ensure that the AIFs hold the ownership right of the assets was not obtained. Furthermore, for some AIFs, the PFS was not in a position to provide an inventory of their assets thereby not complying with the obligation to maintain an up-to-date record of the AIFs’ assets. Finally, the PFS had not performed any review of the AIFM’s process in place in relation to AIFs asset registration and any reconciliation of its own record against the records of the AIFM as required under Article 90(3) of the CDR 231/2013.
 - the **safekeeping of financial assets to be held in custody** was not carried out in accordance with the requirements of Article 19(8)(a) on the safekeeping of financial instruments and Article 19(11) on the delegation of such safekeeping obligations, especially because the PFS has not exercised all due skill, care and diligence in the selection and appointment of the delegates for the financial assets held by some AIFs. Specifically, as the PFS is only authorised to act as depositary for assets other than financial instruments, the safekeeping of financial instruments must be delegated to third parties by respecting the conditions applicable for the delegation.

- the **execution of the oversight duties** was not compliant with the requirements of Article 19(9) of the AIFM Law as detailed below:
 1. concerning the general requirements applicable to all oversight duties, the CSSF did not receive evidence that the PFS performed an assessment of the risks inherent to the nature, scale and complexity of the AIFs' strategy and the AIFMs' organisation in order to devise oversight procedures which are appropriate to the AIFs and the assets in which they invest. Further, processes and procedures that are under the responsibility of the AIFM, the AIF or an appointed third party have not been subject to verification as required by Article 92 of the CDR 231/2013;
 2. concerning the duty of verifying the timely settlement of transactions, the PFS' controls were not set up in a way to ensure that transactions settle within the usual time limits as provided by Article 96 of the CDR 231/2013;
 3. concerning the other four oversight duties that concern the subscriptions/redemptions, the valuation of shares/units, the carrying out of the AIFM's instructions and the AIF's income distribution, the PFS was not in a position to explain how the controls were performed for the year 2021.
- the **cash flow monitoring** process was not executed in accordance with requirements of Article 86 of the CDR 231/2013 and Article 19(7) of the AIFM Law. Specifically, it was noted that the reconciliation of cash flow movements was inadequate as the filtering in place excludes some cash flows from the reconciliation process, which is contrary to the regulation requiring to reconcile all movements.

