

Administrative sanction of 10 January 2025 for non-compliance with the professional obligations concerning the depositary function

Luxembourg, 07 March 2025

Administrative decision

On 10 January 2025, the CSSF imposed an administrative fine amounting to EUR 127,500 (“one hundred twenty-seven thousand and five hundred euros”) on a supervised entity (the “Entity”) further to an on-site inspection on the professional obligations concerning the depositary function.

Legal framework/motivation

This administrative fine was imposed by the CSSF pursuant to Article 51(1), 1st, 6th and 7th 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), and (11) of the AIFM Law for non-compliance with the professional obligations concerning the depositary function.

In order to determine the type and amount of the administrative sanction, the CSSF duly took into account all the facts and relevant circumstances of the case, in particular 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 Entity has acknowledged the findings and observations and has provided a general action plan and initiated corrective measures after the on-site inspection in order to remedy the breaches found.

The professional obligations of the depositary 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) Circular CSSF 18/697 on organisational arrangements applicable to fund depositaries which are not subject to Part I of the Law of 17 December 2010 relating to undertakings for collective investment, and, where appropriate, to their branches (hereafter the “**Circular CSSF 18/697**”), the purpose of which is to clarify the depositary regime provided for in the AIFM Law and in the CDR 231/2013.

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 the necessity and the proportionality of the publication of the sanctions and after having taken into account the Entity's detailed observations and arguments, both understood and accepted, the CSSF considered that the publication on a nominative basis would cause disproportionate damage to the Entity. The decision is therefore published on an **anonymous basis**.

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

This administrative fine is the result of an on-site inspection carried out by the CSSF on the Entity between November 2022 and March 2023 covering the professional obligations regarding the depositary function. During the on-site inspection, the CSSF identified breaches to the provisions applicable to the depositary function exercised by the Entity which related in particular to the following points:

- The **safekeeping duties for other assets** have not been executed in accordance with Article 19(8), letter (b) of the AIFM Law.

Specifically, the overall ownership verification process was not set up in a way that makes the Entity capable of maintaining and delivering at any time a comprehensive and up-to-date inventory of assets owned by the Alternative Investment Funds ("**AIFs**") according to the look-through principle. In addition, ownership documentation in some instances either was not available or could not be considered as reliable evidence. Finally, the Entity had not performed any review of the AIFMs' process in place in relation to AIFs asset registration and any reconciliation of its own record against the records of the AIFMs as required under Article 90(3) of the CDR 231/2013.

- The **safekeeping of financial assets to be held in custody** has not been carried out in accordance with the requirements of Article 19(11) of the AIFM Law as the Entity did not exercise all due skill, care and diligence in the appointment and periodic monitoring of the delegates in order to ensure that entrusting financial instruments to these delegates provide an adequate standard of protection. Furthermore, the Entity did not maintain records for assets held in custody at prime brokers according to the requirements set out under Article 89(1) and (2) of the CDR 231/2013.
- 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 Entity did not properly assess the risks associated with the AIFs' strategy and AIFMs' organisation for the purpose of defining oversight processes and controls as required under Article 92(1) of the CDR 231/2013;

2. the Entity did not perform relevant controls providing assurance that the subscription and redemption process of the AIFs are operated in accordance with the AIFs' prospectus as required under Article 93(2) of the CDR 231/2013;
 3. the Entity had no processes in place, neither for the verification of the proper implementation of valuation policies, nor for verification of the status of valuation agents and appointment of external valuers as required under Article 94(1) and (4) of the CDR 231/2013;
 4. the Entity had not controls in place to monitor the AIF's compliance with investments restrictions and leverage limits as required under Article 95(a) of the CDR 231/2013;
 5. the Entity failed to set up an adequate procedure to detect any situation where a consideration related to operations involving the assets of the AIF is not remitted to the AIF within the usual time limits as required under Article 96 of the CDR 231/2013 together with point 105 of the Circular CSSF 18/697. Indeed, for transactions on illiquid assets, the Entity has not defined the documentation to be collected and reviewed (i) before the cash release to verify among others the existence the transaction, (ii) at the point of payment and (iii) post funding to verify the effective registration of the assets. This was also confirmed from the sample testing;
 6. the Entity did not verify the accuracy of income calculation and the appropriateness of remedial actions in case of reserves expressed in AIFs' audited financial statements as required under Article 97(1) of the CDR 231/2013.
- The **internal governance and control framework of the depositary function** contravened the principle of sound and prudent management mentioned in Article 51(1), 7th indent of the AIFM Law. The following elements have been taken into consideration:
 1. weaknesses in the compliance risk assessment and related compliance reviews of the depositary activities;
 2. weaknesses in the internal audit coverage of depositary activities;
 3. incomplete and inconsistent internal management reporting on depositary activities;
 4. shortcomings in internal written procedures;
 5. lack of initial depositary risk assessment as part of the new business acceptance process.
 - The **cash flow monitoring** process was not executed in accordance with the requirements of Article 86 of the CDR 231/2013 and Article 19(7) of the AIFM Law, notably in relation to the significant and inconsistent cash flows, the cash flow reconciliation and the completeness of accounts.
 - The shortcomings raised in the injunction letter from the CSSF dated 2017 covering the depositary function were **not all properly remediated**.