

In case of discrepancies between the French and the English text, the French text shall prevail.

Luxembourg, 23 August 2018

To all credit institutions, investment firms, professional depositaries 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 Luxembourg branches of credit institutions and investment firms originating from a Member State of the European Union or a third country acting, or planning to request an authorisation to act, as fund depositary, that are not subject to Part I of the Law of 17 December 2010.

CIRCULAR CSSF 18/697

Re: Organisations 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;
Amendment to Circular CSSF 16/644 regarding the provisions applicable to credit institutions acting as UCITS depositary subject to Part I of the 2010 Law, where appropriate, represented by their management company; and
Amendment to Circular IML 91/75 (as amended by Circular CSSF 05/177) regarding the revision and recast of the rules to which Luxembourg undertakings governed by the Law of 30 March 1988 on undertakings for collective investment (“UCIs”) are subject.

Ladies and Gentlemen,

This circular should be placed 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 on the duties of the depositaries regarding the safekeeping of assets, oversight duties as well as the monitoring of cash flows and they have introduced a liability regime of depositaries towards alternative investment funds and their investors.

This circular clarifies or provides further details 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 the Luxembourg context, by implementing principles of sound governance and by specifying the CSSF requirements on internal organisation and good practice of Luxembourg entities performing depositary duties for the following vehicles:

- AIFs managed by an IFM,
- undertakings for collective investment established in Luxembourg that are subject to Part II of the 2010 Law (“UCIs Part II”), managed by an IFM authorised under Chapter 2 of the 2013 Law or Chapter 2 of the AIFMD and which, in their offering documents, explicitly refer to the prohibition of the marketing of fund shares or units to retail investors established in Luxembourg,
- UCIs Part II whose managers benefit from and use the exemptions provided for in Article 3 of the 2013 Law and which, in their offering documents, explicitly refer to the prohibition of the marketing of fund shares or units to retail investors established in Luxembourg, and
- where relevant, 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 manager benefits from and uses the exemptions provided for in Article 3 of the 2013 Law.

In this circular, any reference to these vehicles is, where appropriate and depending on the circumstances, to be understood as a reference to the vehicle and/or its IFM.

This circular is addressed to credit institutions, investment firms and professional depositaries of assets other than financial instruments, established in Luxembourg and covered by the Law of 5 April 1993 on the financial sector (the “1993 Law”) and, as regards credit institutions and investment firms originating from a Member State of the European Union¹, to their Luxembourg branches² acting, or planning to request an authorisation or approval to act, as depositary (“depositaries” or “depository”) of the vehicles listed above. It is also addressed to these vehicles themselves, where appropriate, represented by their IFM for their interaction with their depositary.

Since the duties and responsibilities of the depositaries may evolve or be clarified, in particular for AIF depositaries, through the adoption of new regulations, notably at European level, or through the publication of guidelines, recommendations, or even questions and answers of the

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

² In respect of SIFs and SICARs which do not qualify as AIFs, Luxembourg branches of credit institutions and investment firms from third countries are also concerned.

European Securities and Markets Authority (ESMA), the organisational arrangements set out below may be supplemented or amended and, where relevant, should be read together with such regulations, guidelines and recommendations.

TABLE OF CONTENTS

DEFINITIONS.....	6
PART I. GENERAL REMARKS.....	11
Chapter 1. Provisions applicable to credit institutions.....	12
Chapter 2. Specificities applicable to IFs.....	12
Chapter 3. Specificities applicable to PDAOFIs.....	13
Chapter 4. Organisational arrangements specific to the entities appointed in accordance with Article 37(a) of the 2013 Law.....	15
Chapter 5. Organisational arrangements specific to depositaries of SIFs and/or SICARs that do not qualify as AIFs, to depositaries of SIFs and/or SICARs that qualify as AIFs and whose manager benefits from and uses the exemptions provided for in Article 3 of the 2013 Law, and UCIs Part II whose managers benefit from and use the exemptions provided for in Article 3 of the 2013 Law and which, in their offering documents, explicitly refers to the prohibition of the marketing of shares or units of the fund to retail investors established in Luxembourg.	15
PART II. APPOINTMENT OF AN AIF DEPOSITARY: ELIGIBILITY AND APPROVAL CRITERIA	17
Chapter 1. Eligibility criteria to act as an AIF depositary.....	17
Chapter 2. Approval procedure to be able to act as an AIF depositary.....	17
Sub-chapter 2.1. Requirement of professional experience and good repute of the <i>dirigeants</i> of the depositary ..	17
Sub-chapter 2.2. Description of human and technical resources.....	18
Sub-chapter 2.3. Specific provisions applicable to outsourcing.....	18
Sub-chapter 2.4. Specific provisions applicable to delegation.....	19
Chapter 3. Contract for the appointment of a depositary	20
PART III. DETAILS ON GOVERNANCE AND ORGANISATION.....	20
Chapter 1. Conflicts of interest.....	20
Chapter 2. Internal procedures and written procedures or contracts with external persons in relation to the AIF depositary function.....	22
Sub-chapter 2.1. Internal procedures	23
Sub-chapter 2.2. Written procedures or contracts with external persons	24
Chapter 3. Right of access to information.....	25
Chapter 4. Escalation procedure between the depositary and AIF and/or its IFM.....	25
Chapter 5. Organisational arrangements to be established with respect to the assets of an AIF.....	27
Sub-chapter 5.1. Booking and proper monitoring of financial flows.....	28
Section 5.1.1. Duties of the depositary regarding subscriptions.....	28
Sub-chapter 5.2. Safekeeping duties with regard to assets held in custody.....	29
Section 5.2.1. Financial instruments	29
Section 5.2.2. Account maintenance duties.....	29
Section 5.2.3. Segregation duties.....	29
A. Segregation duties to be put in place by the entity ranking first in the custody chain (appointed depositary).....	29
B. Segregation duties to be put in place by the entity directly downstream of the delegate in the custody chain	30
C. Segregation duties to be put in place by the entities downstream of the delegate in the custody chain (sub-delegates).....	30
Section 5.2.4. Due diligence required in case of delegation of custody functions to third parties	30
Sub-chapter 5.3. Duties relating to the assets that are not held in custody.....	32

Section 5.3.1. Assets not to be held in custody	32
Section 5.3.2. General duties regarding ownership verification, registration and record-keeping	32
Section 5.3.3. Specific duties according to the nature of the assets in which the AIF is invested.....	34
A. Specific duties where the AIF is invested in real estate.....	35
B. Specific duties where the AIF is invested in target funds.....	35
C. Specific duties where the AIF is invested in issuers or non-listed companies within the meaning of Article 1(63) of the 2013 Law	36
D. Specific duties where the AIF is invested in intangible rights.....	36
E. Specific duties where the AIF is invested in financial derivative instruments	37
F. Specific duties where the AIF is invested in movable property	37
Sub-chapter 5.4. Specific organisational arrangements regarding the guarantees or securities in the form of financial instruments or cash, including in the case of recourse to a collateral agent.....	38
Chapter 6. <i>Organisational arrangements as regards reconciliations</i>	40
Chapter 7. <i>Duty to establish a contingency plan</i>	40
PART IV. SPECIFIC DUTIES OF THE DEPOSITARY	40
Chapter 1. <i>Duties regarding the day-to-day asset administration</i>	40
Chapter 2. <i>Oversight and control functions</i>	41
Chapter 3. <i>Inventory duties</i>	41
PART V. INFORMATION DUTIES OF THE DEPOSITARY APPLICABLE TO THE AIF	41
PART VI. INFORMATION DUTIES OF THE DEPOSITARY VIS-À-VIS THE AIF	42
PART VII. INFORMATION DUTIES APPLICABLE TO THE DEPOSITARY VIS-À-VIS AUTHORITIES	42
PART VIII. SPECIFIC PROVISIONS WHERE A CONTRACT FOR THE APPOINTMENT OF A DEPOSITARY IS TERMINATED DURING THE EXISTENCE OF AN AIF	42
ENTRY INTO FORCE AND VARIOUS PROVISIONS.....	43

Definitions

For the purposes of this circular:

- “assets”:** shall mean the financial instruments to be held in custody and other assets in which an AIF is invested at a given time and/or owned by an AIF at a given time;
- “collateral agent”:** shall mean the agent appointed by the AIF, by the counterparty of the AIF or jointly by both, solely responsible for the custody (excluding the management and administration) of the guarantees and securities the AIF may provide or receive within the framework of the implementation of its investment policy;
- “other assets”:** shall mean the assets, including cash other than financial instruments to be held in custody within the meaning of Articles 19(8)(a) of the 2013 Law and 88 of Delegated Regulation 231/2013;
- “Circular IML 91/75”:** shall mean Circular IML 91/75 (as amended by Circular CSSF 05/177) on the revision and remodelling of the rules to which Luxembourg undertakings governed by the Law of 30 March 1988 on undertakings for collective investment ("UCIs") are subject;
- “Circular CSSF 12/552”:** shall mean Circular CSSF12/552 (as amended by Circulars CSSF 13/563, CSSF 14/597, CSSF 16/642, CSSF 16/647 and CSSF 17/655) on the central administration, internal governance and risk management;
- “Circular CSSF 16/644”:** shall mean Circular CSSF 16/644 on the provisions applicable to credit institutions acting as UCITS depository subject to Part I of the 2010 Law and all UCITS, where appropriate, represented by their management company;
- “Circular CSSF 17/654”:** shall mean Circular CSSF 17/654 on IT outsourcing relying on a cloud computing infrastructure;
- “Circular CSSF 17/656”:** shall mean Circular CSSF 17/656 on the administrative and accounting organisation; IT outsourcing;
- “contract for the appointment of a depository”:** shall mean the written contract concluded by an AIF, or its IFM, where appropriate, and an institution authorised as depository by which the depository function has been conferred upon this institution. The term “contract for the appointment of a depository” shall mean the depository agreement as such as well as all annexes and amendments to the contract, insofar as the provisions of these annexes or amendments give rise to contractual obligations between the parties. The contract may be a tripartite contract between the AIF, its IFM and the depository;

- “delegation”:** shall mean the delegation of functions in relation to the safekeeping of AIFs’ assets within the meaning of Article 19(11) of the 2013 Law;
- “delegate”:** shall mean the third party designated by the depositary to whom the depositary delegates the functions of safekeeping of AIFs’ assets in accordance with Articles 19(11), 19(12), 19(13) and 19(14) of the 2013 Law as well as Articles 98 and 99 of Delegated Regulation 231/2013;
- “AIFMD”:** shall mean 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;
- “dirigeant”, in relation to a depositary:** shall mean the person(s) who, pursuant to the law or the instruments of incorporation, represent the depositary or effectively determine the scope of its depositary activity;
- “PDAOFF”:** shall mean a professional depositary of assets other than financial instruments within the meaning of Article 26-1 of the 1993 Law;
- “IF”:** shall mean an investment firm within the meaning of the 1993 Law having its head office in Luxembourg, or, where appropriate, the branch of a Community investment firm, acting or planning to request an authorisation or an approval to act, as an AIF depositary.
As regards SIFs and SICARs that do not qualify as AIFs, Luxembourg branches of investment firms originating from a third country are also concerned;
- “credit institution”:** shall mean a credit institution within the meaning of the 1993 Law having its head office in Luxembourg, or, where appropriate, the branch of a Community credit institution, and acting, or planning to request an approval to act, as an AIF depositary.
As regards SIFs and SICARs that do not qualify as AIFs, Luxembourg branches of credit institutions originating from third countries are also concerned;

“external valuer”:	shall mean a natural or legal person that is independent from the AIF, the IFM and any other person having close links to 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 that carries out the calculation of the net asset value for an AIF should not be considered as an external valuer as long as it does not provide valuations for individual assets, including those requiring a subjective judgement, but incorporates into the calculation process values which are obtained from the IFM, pricing sources or an external valuer;
“AIF”:	shall mean an 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 European venture capital funds (EuVECAs);
“self-managed AIF”:	shall mean a self-managed alternative investment fund: internally managed AIF within the meaning of Article 4(1)(b) of the 2013 Law;
“SIF”:	shall mean a specialised investment fund within the meaning of the 2007 Law ;
“collateral manager”:	shall mean an agent appointed by the AIF/IFM, by the counterparty of the AIF or jointly by both, responsible for the management and the administration of the guarantees and securities the AIF has to provide or receive within the framework of the implementation of its investment policy. A collateral manager may, in certain cases, also act as a collateral agent;
“IFM”:	for the purposes of this circular, IFM shall mean: <ul style="list-style-type: none"> - Luxembourg management companies subject to Chapter 15 of the 2010 Law and authorised under 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 under Chapter 2 of the 2013 Law; - Luxembourg branches of foreign IFMs subject to Chapter 17 of the 2010 Law, - alternative investment fund managers authorised under Chapter 2 of the 2013 Law or Chapter 2 of the AIFMD as well as - self-managed AIFs;

“senior management”:	shall mean the persons who effectively conduct the business of the AIF within the meaning of Article 102(1)(c) of the 2010 Law and Article 7(1)(c) of the 2013 Law;
“financial instruments to be held in custody”:	shall mean the financial instruments which are capable of being held in custody within the meaning of Articles 19(8)(a) of the 2013 Law and 88 of Delegated Regulation 231/2013;
“cash”:	shall mean the money and bank balances of an AIF;
“1993 Law”:	shall mean the Law of 5 April 1993 on the financial sector, as amended;
“2004 Law”:	shall mean the Law of 15 June 2004 relating to the investment company in risk capital (SICAR), as amended;
“2007 Law”:	shall mean the Law of 13 February 2007 relating to specialised investment funds, as amended;
“2010 Law”:	shall mean the Law of 17 December 2010 relating to undertakings for collective investment, as amended;
“2013 Law”:	shall mean the Law of 12 July 2013 on alternative investment fund managers, as amended;
“UCIs Part II”:	shall mean an undertaking for collective investment established in Luxembourg, subject to Part II of the 2010 Law;
“UCITS”:	shall mean an undertaking for collective investment in transferable securities subject to Part I of the 2010 Law;
“escalation procedure”:	shall mean the procedure to be put in place as an integral part of the contract for the appointment of a depositary in which the various successive stages to be followed during an intervention by the depositary or the AIF are specified. This procedure shall clearly identify the persons to be contacted at the level of the AIF by the depositary, where it considers that an intervention is necessary, as well as at the level of the depositary during an intervention by the AIF;
“Delegated Regulation 231/2013”:	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;
“person in charge of the business line “depositary bank””:	shall mean the person(s), whether or not s/he or they is/are <i>dirigeant(s)</i> of the entity acting as depositary that is/are in charge, at a high hierarchical level of responsibility, of the operational aspects of the depositary activities of said institution in Luxembourg;

“safeguarding of the assets of an AIF in liquidation or lacking a depositary”:

shall mean the obligation of the last service provider acting as an AIF depositary, to keep all the securities and cash accounts open for the various assets of this AIF held in custody with this service provider upon deregistration or withdrawal of the AIF from the official list or upon the opening of its liquidation, up to the appointment of a successor or up to the closing of the liquidation of this AIF, in accordance with the provisions of points 161 and 162 of this circular;

“SICAR”:

investment company in risk capital within the meaning of the 2004 Law;

“outsourcing”:

shall mean the complete or partial transfer of the depositary’s operational tasks, activities or (support) services to an external service provider, whether or not it forms part of the group to which the depositary belongs, other than a delegation;

“outsourcing of a material activity”:

shall mean the outsourcing of any activity that, when it is not carried out in accordance with the rules, reduces the institution's ability to meet the regulatory requirements or to continue its operations as well as any activity necessary for a sound and prudent risk management.

PART I. General remarks

1. The organisational aspects applicable under the AIFM depositary regime introduced by the 2013 Law are mainly specified in Delegated Regulation 231/2013 with regard to the depositaries' duties. Delegated Regulation 231/2013 thus provides clarification, in particular, on the content of the contract for the appointment of a depositary between an AIF (and/or its IFM) and its depositary, the escalation procedure of the depositary towards the AIF, the tasks to be performed by the depositary in compliance with its oversight duties under the 2013 Law and the information to be received by the depositary on its duties with respect to the monitoring of cash flows. Delegated Regulation 231/2013 also specifies the duties of safekeeping of the depositary's assets with regard to the various types of assets in which the AIFs may invest, including, inter alia, details on the segregation and due diligence obligations to be put in place at the level of the depositary and the entities to which the depositary intends to delegate or has delegated its asset safekeeping duties. Where this circular provides further details on subjects which are also covered by Delegated Regulation 231/2013, reference is made to the relevant article(s) of Delegated Regulation 231/2013.
2. According to the legal provisions applicable, access to the AIF depositary function is restricted to:
 - credit institutions, within the meaning of the 1993 Law, having their head office in Luxembourg,
 - IFs fulfilling the conditions laid down in Article 19(3)(i) of the 2013 Law,
 - Luxembourg branches of credit institutions or IFs having their registered office in another Member State of the European Union³, and
 - entities that have the PDAOFI status, provided that the conditions laid down in Article 19(3)(i), fourth sub-paragraph, of the 2013 Law are fulfilled.

According to the legal provisions applicable, access to the function of depositary of SIFs and SICARs that do not qualify as AIFs is limited to credit institutions or IFs within the meaning of the 1993 Law. A depositary of SIFs and SICARs that do not qualify as AIFs must have its registered office in Luxembourg, or be established in Luxembourg, when its registered office is abroad.

3. The entities listed in the points above can only agree to be appointed as AIF depositary provided they comply with the provisions of this circular applicable to them, as specified in Chapters 1. to 5. below.

³ *As specified in the 2013 Law, the States that are contracting parties to the European Economic Area Agreement other than the Member States of the European Union, are considered as equivalent to Member States of the European Union within the limits set forth by this agreement and related acts.*

Chapter 1. Provisions applicable to credit institutions

4. Credit institutions are required to comply with all the provisions of this circular.

Chapter 2. Specificities applicable to IFs

5. An IF is eligible as depositary only if this IF fulfils the conditions laid down in Article 19(3) of the 2013 Law. An IF providing, or planning to request an authorisation to provide ancillary services of safekeeping and administration of financial instruments for the account of clients, in accordance with point 1. of Section C of Annex II 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 proceedings in relation to (i) its initial authorisation as an investment firm or (ii) the extension of its activities regarding the provision of ancillary services of safekeeping and administration of financial instruments for the account of clients, in accordance with point 1. of Section C of Annex II of the 1993 Law, or, as the case may be, within the context of the notification to the CSSF referred to under Article 19(3)(i), the IF must provide the CSSF in particular with the information referred to in points 34 to 38 hereinafter. An IF may act as a depositary for:
 - i) AIFs, and
 - ii) SIFs and for SICARs that do not qualify as AIFs.
(hereinafter for the purposes of this chapter the “clients”).
6. When it is appointed as a depositary, an IF is subject to the provisions of this circular and must comply with them, provided that these provisions are applicable to the tasks it performs for its clients, excluding point 56 of this circular. In such case, any reference to a credit institution hereinafter should be read as a reference to an IF.
7. An IF can perform services regarding the custody and administration of financial instruments for the account of clients, including safekeeping and related services such as cash/collateral management and excluding the provision and maintenance of securities accounts at the top tier level (“central maintenance service”) referred to in point (2) of Section A of the Annex to Regulation (EU) No 909/2014.
8. It shall ensure the appointment, in accordance with Article 19(11) of the 2013 Law, of a delegate with whom the safekeeping of assets other than financial instruments to be held in custody of its clients is ensured. In such case, and by way of derogation from the provisions of point 86 hereinafter, the first accounts relating to the assets to be held in custody whose custody has been delegated, must be opened in the name of each client (or, where appropriate, of each of the compartments of an umbrella AIF) at the level of this delegate.

9. An IF which acts as depositary must also ensure the appointment of one or more entities with which all cash of the AIF shall be booked in cash accounts in accordance with Article 19(7) of the 2013 Law.
10. The provisions of this circular shall apply to the tasks performed by the IF 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 established and applied for the asset valuation of the AIF, in accordance with point 63 of this circular;
 - ii) applying the due diligence required vis-à-vis their delegates pursuant to points 92 to 97 of this circular. They must notably ensure 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 must, moreover, keep a record in the name of each of its clients (or, where appropriate, each of the compartments of its multiple-compartment clients), which documents all assets belonging to its clients, in order, in particular, to be able to provide a comprehensive 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 Chapter 1. of Part III. of this circular, IFs acting as AIF depositary may also act in the following capacities, provided that they benefit, where applicable, from the required authorisations:
 - i) agent for reception and transmission of orders relating to one or more financial instruments;
 - ii) collateral agent;
 - iii) collateral manager;
 - iv) external valuer within the meaning of Article 17(4)(a) of the 2013 Law.
13. The provisions of Chapter 5. of Part I. of this circular shall apply to the tasks performed by the IF for its clients SIFs and SICARs that do not qualify as AIFs or for its clients SIFs and SICARs that qualify as AIFs and whose IFM uses the exemptions provided for in Article 3 of the 2013 Law.

Chapter 3. Specificities applicable to PDAOFI

14. An entity acting or planning to request an authorisation to act as PDAOFI, must comply with the provisions of this circular. As part of the proceedings related to this authorisation, the PDAOFI must notably provide the CSSF with the information referred to in points 34 to 38 hereinafter. Once authorised by the Ministry responsible for the CSSF, the PDAOFI may act as depositary for:
 - i) AIFs, and
 - ii) SIFs and SICARs that do not qualify as AIFs(hereinafter for the purposes of this chapter the “clients”)
and which have no redemption right that can be exercised during five years as from the date of the initial investments and which, pursuant to their main investment policy, generally do not invest in assets which must be held in

custody pursuant to Article 19(8)(a) of the 2013 Law or which generally invest in issuers or non-listed companies in order to possibly acquire control thereof in accordance with Article 24 of the 2013 Law.

15. When it is appointed as depositary of such clients, a PDAOIF is subject to all the provisions of this circular, provided that these provisions are applicable to the tasks they perform for their clients, excluding points 32, 33 and 56 of this circular. In such case, any reference to a credit institution hereinafter should be read as a reference to a PDAOIF.
16. A PDAOIF cannot ensure the deposit of cash or of financial instruments to be held in custody of its clients. However, it may ensure the safekeeping of assets other than assets to be held in custody as well as assets other than cash or financial instruments whose custody can be ensured through delegation on behalf of the single depositary of an AIF.
17. It shall ensure the appointment, in accordance with Article 19(11) of the 2013 Law, of a delegate with whom the safekeeping of financial instruments to be held in custody of its clients shall be ensured. In such case, and by way of derogation from the provisions of point 86 hereinafter, the first accounts relating to the assets to be held in custody whose custody has been delegated must be opened in the name of each client (or, where appropriate, of each of the compartments of an umbrella client AIF) of this delegate.
18. A PDAOIF acting as depositary must also ensure the appointment of one or more entities with which all cash of the AIF shall be booked in cash accounts opened in accordance with Article 19(7) of the 2013 Law.
19. The provisions of this circular shall apply to the tasks performed by the PDAOIF for its clients. The PDAOIF is responsible for ensuring that the provisions of this circular are complied with, in particular by:
 - i) ensuring that appropriate and consistent procedures are established and applied for the asset valuation of the AIF, in accordance with point 63 of this circular;
 - ii) applying the due diligence required vis-à-vis their delegates pursuant to points 92 to 97 of this circular. They must notably ensure that the accounts opened with their delegates are segregated accounts in accordance with Article 19(8)(a)(ii) of the 2013 Law.
20. The PDAOIF must, moreover, keep a record in the name of each of its AIF clients (or, where appropriate, each of the compartments of its multiple-compartment clients), which documents all assets belonging to its clients, in order in particular to be able to provide a comprehensive inventory of all the assets of each of its clients, in accordance with points 151 and 152 of this circular.
21. By way of derogation from point 42 hereinafter, any outsourcing by a PDAOIF shall comply with the principles set out in Circular CSSF 17/654 and Circular CSSF 17/656.
22. The provisions of Chapter 5. of Part I. of this circular shall apply to the tasks performed by the PDAOIF for its clients SIFs and SICARs that do not qualify as AIFs or for its clients SIFs and SICARs that qualify as AIFs and whose manager uses the derogations provided for in Article 3 of the 2013 Law.

Chapter 4. Organisational arrangements specific to the entities appointed in accordance with Article 37(a) of the 2013 Law

23. Any entity established in Luxembourg and appointed in accordance with Article 37(a) of the 2013 Law shall be subject to the provisions of this circular and must comply with them, provided that these provisions are applicable to the tasks for which they have been appointed.

Chapter 5. Organisational arrangements specific to depositaries of SIFs and/or SICARs that do not qualify as AIFs, to depositaries of SIFs and/or SICARs that qualify as AIFs and whose manager benefits from and uses the exemptions provided for in Article 3 of the 2013 Law, and UCIs Part II whose managers benefit from and use the exemptions provided for in Article 3 of the 2013 Law and which, in their offering documents, explicitly refers to the prohibition of the marketing of shares or units of the fund to retail investors established in Luxembourg.

24. Pursuant to Articles 129(2) of the 2010 Law, 42(2) of the 2007 Law and 12(2) of the 2004 Law, UCIs Part II, SIFs or SICARs, respectively, shall only be authorised if the CSSF approves the choice of depositary. This approval shall only be given if the proposed depositary can justify that it possesses the required infrastructure to perform all the tasks relating to its duties, namely sufficient human and technical resources. When it is appointed as depositary of entities referred to in this chapter, the depositary is subject to this Chapter 5. as well as to the provisions of Chapter 2. of Part II. of this circular. In such case, any reference to a credit institution, in Chapter 2. of Part II. of this circular, should be read as a reference to a depositary of an entity referred to in this chapter.
25. The depositary of a SIF and/or a SICAR that does not qualify as AIF, is responsible for the safekeeping of its clients' assets. This implies that the depositary shall, at any time, know how the assets of its clients are invested and where and how these assets are available. The same principle shall apply to the depositary of a SIF and/or a SICAR that does qualify as AIF and whose manager benefits and uses the exemptions provided for in Article 3 of the 2013 Law; and to the depositary of a UCI Part II, respectively, whose manager benefits from and uses the exemptions provided for in Article 3 of the 2013 Law and which, in its offering documents, explicitly refer to the prohibition of the marketing of shares or units of the fund to retail investors established in Luxembourg.
26. The general mission of the depositary, for the vehicles referred to in this chapter, should not be understood in the sense of "holding in custody" but in the sense of "oversight", which implies that the depositary, at any time, must know how the assets of the UCI Part II, the SIF and/or the SICAR concerned are invested, and where and how these assets are available. In accordance with the meaning thus attributed 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 legal provisions applicable. The duty of oversight of the assets of the UCI Part II, the SIF and/or the SICAR concerned, and consequently the responsibility for such oversight always resides,

however, with the depositary. No clause, where appropriate, of the management regulations or the articles of incorporation of the UCI Part II, the SIF and/or the SICAR concerned, or no agreement whatsoever can exclude or limit this responsibility. This interpretation of the depositary's safekeeping mission does not, however, preclude recourse to a fiduciary agreement entered into between the depositary and the UCI Part II, the SIF and/or the SICAR concerned for the deposit of their assets; this solution offers some considerable advantages since the depositary is thus afforded significant authority in order to perform its duties.

27. Moreover, the depositary must ensure the completion of all the operations in relation to the day-to-day administration of the assets of the UCI Part II, the SIF and/or the SICAR concerned. This means that the depositary must, in particular, ensure the proper completion of the collection of dividends, interests and matured securities, the exercise of option rights and, in general, of any other operation concerning the day-to-day administration of the securities and liquid securities belonging to the assets of the UCI Part II, the SIF and/or the SICAR concerned. To the extent that the operations involve assets that are not held in custody by the depositary itself, it may delegate the execution thereof to third parties with which the assets are actually deposited. In such a case and in order to comply with its obligation of oversight of the assets of the UCI Part II, the SIF and/or the SICAR concerned, the depositary must organise its relationship with these third parties so as to ensure that it is immediately informed of any operations these third parties execute within the day-to-day administration of the assets deposited with them.
28. When the depositary delegates to third parties the execution of the tasks relating to the proper performance of the tasks referred to in point 27 above, it must verify the correct completion thereof. Thus for instance, it is conceivable that, for objective reasons, a depositary might set up a structure in which a foreign company assists it in the settlement of portfolio transactions. In this case, the depositary has fulfilled its duty of oversight when it is satisfied from the outset and throughout the term of the contract that the third parties with which the assets of the UCI Part II, the SIF and/or the SICAR concerned are on deposit, are reputable and competent and have sufficient financial resources.
29. With respect to the full range of tasks incumbent upon it, the depositary has an oversight duty which implies a liability for its failure to perform its obligations or improper performance thereof. In accordance with the Luxembourg law, the depositary is thus liable vis-à-vis the investors for any damage they may suffer as a result of the failure to perform its obligations or improper performance thereof.
30. The liability of the depositary shall not be affected by the fact that it has been assisted by third parties in the execution of its tasks or that it has entrusted agents with the execution of these tasks. It follows from there that the depositary may, in no case, be discharged of its oversight responsibility. Consequently, the depositary cannot, in particular, argue that the deposit of the assets of the UCI Part II, the SIF and/or the SICAR concerned has been made with the general or specific approval of the latter as its oversight responsibility must be performed, in particular, vis-à-vis third parties with which the assets of the UCI Part II, the SIF and/or the SICAR concerned have been deposited.

PART II. Appointment of an AIF depositary: eligibility and approval criteria

Chapter 1. Eligibility criteria to act as an AIF depositary

31. Credit institutions can accept to be appointed as AIF depositary only if they have a specific approval to act as depositary, as specified hereinafter.

Chapter 2. Approval procedure to be able to act as an AIF depositary

32. Credit institutions must submit an AIF depositary application file in accordance with the legal provisions in force.
33. Credit institutions, which have already been approved as UCITS or AIF depositary at the date of entry into force of the circular, are not required to request a new approval based on the provisions below but must comply with the requirements described hereinafter. Moreover, credit institutions which have been approved, after the entry into force of this circular, in order to act as UCITS depositary, in accordance with the provisions of Circular CSSF 16/644, shall not be required to request a new approval based on the provisions below to act as AIF depositary but must comply with the requirements described hereinafter. However, they do not need to appoint a person in charge of the business line “depositary” distinct from the person in charge of the business line “depositary bank” appointed in accordance with Circular CSSF 16/644. They must also notify their AIF depositary activities by providing the CSSF with the information listed in Annex I of this circular and which has not yet been provided in accordance with Annex I of Circular CSSF 16/644 within a period of one month as from the entry into force of this circular or the signature of the first depositary contract with an AIF, with a SIF or with a SICAR that does not qualify as an AIF.

Sub-chapter 2.1. Requirement of professional experience and good repute of the *dirigeants* of the depositary

34. In order for a credit institution to be approved as AIF depositary, the person(s) in charge of the business line “depositary” must be of the required good repute. In order for a credit institution to be approved as AIF depositary, the person(s) in charge of the business line “depositary” must also ensure that s/he/they possess(es) an adequate professional experience by surrounding herself/himself/themselves, where relevant, by persons with the necessary competences, especially in relation 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 gained by having already performed similar activities within the sphere of activities of a UCITS or an AIF depositary.

For the purposes of this point, the identity of the person(s) in charge of the business line “depositary bank” as well as any person succeeding them in office shall be communicated forthwith 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 in terms of human and technical resources that the entity has put in place to perform all the tasks linked to the AIF depositary function. This description must take into account the type of AIF for which the entity intends to act as a depositary, including, in particular, the investment policy the relevant AIFs contemplate pursuing.
36. The information elements to be provided to the CSSF in the context of an AIF depositary approval file are to be filed by using the application form for administrative authorisation available on the CSSF's website. Once approved, the depositary must provide the CSSF with the information elements set out in Annex 1 of this circular, on a periodic, ad-hoc or annual basis. This list of information elements to be received by the CSSF is not exhaustive. It may be supplemented by any other element deemed appropriate in light of the characteristics of the file submitted to the CSSF.
37. The information elements to be provided shall allow the CSSF to consider whether there are sufficient resources in Luxembourg in view of the legal and regulatory requirements applicable. The information analysis shall focus on the operational model of the entity (or the model considered to be put in place) with a view to analysing the operational risks inherent in the model. Particular attention will be paid, where relevant, to the aspects of delegation of asset safekeeping functions, of outsourcing and of control procedures to be put in place by the entity in these fields, in case where such a delegation or outsourcing is planned as from the moment the initial approval request to act as an AIF depositary is made. As regards the provisions applicable to delegation and outsourcing, reference is made to points 39 to 44 hereinafter.
38. Any approval as an AIF depositary shall remain valid as long as the elements on the basis of which it was granted have not changed. Any entity acting as an AIF depositary is required to apply for approval with the CSSF of any fundamental change of the elements underlying the initial approval as an AIF depositary (including in particular any possible change as regards the aspects of delegation and outsourcing of a material activity) or in case of substantial change to its operational model. The elements included in Annex 1 of this circular must be kept up-to-date and must be provided to the CSSF according to the periodicity rules included therein. Without prejudice to the provisions of point 34 above, the fact for a credit institution to become depositary of AIFs whose investment strategy is different from that of AIFs underlying its initial approval, should not be considered as a fundamental change within the meaning of this point. In this case, however, the credit institution must provide the CSSF with an update of the information listed in Annex I of the circular.

Sub-chapter 2.3. Specific provisions applicable to outsourcing

39. Any entity acting as an AIF depositary shall comply with the provisions of this sub-chapter in case of outsourcing.

40. An AIF depositary must ensure that the risk management policies and procedures and, where appropriate, the risk management function properly identify the risks associated with any outsourcing of a material activity. With regard to the risks which have been identified, the depositary must also ensure that efficient arrangements, processes and mechanisms to manage and control these risks are in place.
41. Any outsourcing by the depositary must be documented by a contract between the depositary and the service provider to which the activity has been outsourced according to the principles set out in Sub-chapter 2.2. of Chapter 2. of Part III. of this circular. The contract between the depositary and its service provider provides for an access right of the depositary to the documentation relating to the operations performed by the service provider as well as to the data relating to AIFs, upon request, even by electronic means. The service provider may reject the request if it would lead it to a breach of the law applicable in the country of establishment of the service provider. The contract drawn up between a depositary and its service providers must notably grant the CSSF a direct access right to the premises of any entity to which a material activity has been outsourced.
42. Any outsourcing must comply with the principles set forth in Sub-chapter 7.4. of Circular CSSF 12/552 and Circular CSSF 17/654.
43. Any outsourcing of a material activity requires prior authorisation by the CSSF. A notification to the CSSF confirming compliance with the conditions set forth in the texts applicable to the depositary, is sufficient where the depositary uses a Luxembourg credit institution or a support PFS pursuant 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. As regards the delegation of the functions in relation to the safekeeping of the AIFs' assets, the rules under sub-paragraphs (11), (12), (13) and (14) of Article 19 of the 2013 Law as well as 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 in a list of delegates which shall be updated and 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 contract between the depositary and its delegate in accordance with the principles set forth in Sub-chapter 2.2. of Chapter 2. of Part III. of this circular. The contract between the depositary and its delegate provides for an access right of the depositary to the documentation relating to the operations performed by the delegate as well as to the data relating to AIFs, upon request, even by electronic means. The delegate may reject the request if it would lead him to act in breach of the law applicable in the country of establishment of the delegate.

Chapter 3. Contract for the appointment of a depositary

45. One single depositary must be appointed for each AIF in accordance with the provisions of Article 19(1) of the 2013 Law. For umbrella AIFs, one single depositary must be appointed for all the compartments of this umbrella AIF.
With the entry into force of the contract for the appointment of the depositary, the depositary shall be entrusted with the depositary function in relation to the AIF with which this contract has been concluded.
46. The definitions and details of the written contract (contract for the appointment of a depositary) to be drawn up between, on the one hand, the depositary and, on the other hand, an AIF, are specified under Chapter IV of Delegated Regulation 231/2013. Article 83 of Delegated Regulation 231/2013 lists the elements that this contract must at least include.
47. Any contract for the appointment of a depositary is subject to the general principle of contractual freedom, provided that the legal, regulatory and administrative provisions applicable are complied with. The law applicable to the contract must be specified. In any case, this applicable law must be the Luxembourg law. It is also recommended that the contracting parties provide that any possible disputes shall be subject to the exclusive jurisdiction of the Luxembourg courts.
48. The depositary may, subject to specific contractual provisions, benefit from a general or specific right of pledge over the deposited assets of the AIF. The provisions relating to this general or specific right of pledge must, where applicable, specify the exceptions to the general or specific right of pledge, either in the form of specific provisions in the contract for the appointment of a depositary, or by way of an addendum to the contract for the appointment of a depositary.
49. Any possible provisions relating to the right of pledge of the depositary shall specify to what extent the depositary benefits from a right to use the assets pledged in its favour.
50. The parties may agree on a clause allowing the depositary to rely on the right to set off debit/credit balances of accounts opened in its books on behalf of an AIF or, where relevant, on behalf of each of the different compartments for an umbrella AIF.

PART III. Details on governance and organisation

Chapter 1. Conflicts of interest

51. Pursuant to Articles 11(1) and 19(10) of the 2013 Law, the AIF and the AIF depositary must act honestly, fairly, professionally, independently and in the interest of the AIF and the investors. Articles 18(2), 18(5), 19(4) and 19(10) of the 2013 Law specify more particularly the independence requirements between the depositary and the IFM. In this respect, it should be noted that Delegated Regulation 213/2013 outlines these independence requirements with respect 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 solely in the interest of the AIF and the AIF investors includes in particular the obligation for the activities of the AIF depositary to be managed and organised in a way that minimises any potential conflicts of interest.
53. In order to avoid any potential conflicts of interest, in accordance with Article 18(2)(a) of the 2013 Law, no delegation or sub-delegation of the core investment management function may be accepted by the depositary.
54. The prohibition as regards the delegation or the sub-delegation of the core investment management function shall also apply to any delegate and, in general, to any entity downstream of a delegate in an asset custody chain. The prohibition whereby no mandate relating to the core investment management function can be given to either the depositary or a delegate and, in general, any entity downstream of a delegate in an asset custody chain does not preclude the delegation of the core investment management function to an entity linked to the depositary by common management or control.
55. Neither the depositary nor one of the delegates to which it has entrusted all or part of the assets of a given AIF may accept a 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 linked to the risk management function.
56. Subject to compliance with the rules set out above, a credit institution acting as AIF depositary may, inter alia, act in the following capacities, provided that it benefits, where applicable, from the required authorisations:
 - i) credit and and/or financing grantor
 - ii) agent for reception and transmission of orders relating to one or more financial instruments;
 - iii) counterparty to transactions conducted by AIFs;
 - iv) administration agent and/or registrar agent;
 - v) collateral agent;
 - vi) collateral manager;
 - vii) tax or reporting service provider (reporting);
 - viii) prime broker;
 - ix) currency hedging agent;
 - x) external valuer within the meaning of Article 17(4)(a) of the 2013 Law.
57. When an AIF depositary wishes to act in capacities other than in its capacity as depositary, it is required (i) to establish, implement and maintain an effective conflicts of interest policy, (ii) to establish a functional and hierarchical separation between the performance of its AIF depositary functions and the performance of its other tasks, (iii) to proceed with the identification, management and adequate disclosure of potential conflicts of interest and (iv) where appropriate, to establish a contractual separation. It should be noted that any entity acting as AIF depositary must, where applicable, provide evidence of adequate management of any potential conflicts of interest. More particularly, this evidence can be provided by reference to the management policy of conflicts of interest in place, in the case where all or part of the services other than those

related to the depositary are provided to the AIF by the legal entity of the depositary or by entities linked to the depositary by a common management or control.

58. A depositary can be a direct or indirect shareholder of an IFM where it is acting as a depositary of an AIF managed by this IFM, or even have a qualifying holding in such an IFM. Consequently, in the case of a qualifying holding, the IFM must identify the conflicts of interest that could result from such holding and endeavour to avoid them in accordance with the procedures provided for by the conflicts of interest policy of the IFM. By analogy, the depositary, in such case, shall also establish a procedure relating to the policy and the management of potential conflicts of interest.
59. Moreover, the principle of independence of the depositary from an AIF or from the IFM of an AIF prevents the members of the senior management of the IFM from being employees of the depositary.

Chapter 2. Internal procedures and written procedures or contracts with external persons in relation to the AIF depositary function

60. The depositary must establish internal written procedures relating to the acceptance and implementation of a contract for the appointment of an AIF depositary and must establish written procedures or contracts with the external persons with which the depositary is called upon to work when performing each of its AIF depositary mandates. “External persons” within the meaning of this chapter shall mean any persons with which a depositary is called upon to work when performing its AIF depositary mandates (i.e. external persons that are not appointed by the depositary itself, such as, for example, the registrar agent of an AIF as well as external persons that are appointed by the depositary itself such as, for example, a delegate or a service provider of the depositary). In addition to the procedure for the acceptance of the appointment as AIF depositary, the internal procedures must document the operational stages and process in relation to the performance of the contracts for the appointment of a depositary, i.e. the performance of the various tasks linked to the depositary function at the level of the depositary itself. The written procedures or the contracts with the external persons shall, however, cover the organisation of any relationship with third parties with which the depositary is called upon to work when providing AIF depositary services. These internal procedures and written procedures or contracts with external persons must adequately cover all the aspects linked to the AIF depositary function and take account of the specific features of the AIFs for which the entity is acting as a depositary. The written procedures or contracts with external persons may be put in place directly between the depositary and the external person or be covered by the written procedures or the contracts between the AIF and/or its IFM and the relevant external persons.
61. The internal audit or the internal control department of the depositary is in charge of verifying the existence and the appropriateness of these internal procedures and written procedures or contracts with the external persons as well as ensuring their periodic update at least once a year. The internal audit or the internal control department must also verify the effective application of these internal procedures and written procedures or the contracts with external persons. This requirement

is notably applicable to the internal procedures and written procedures or contracts with the delegates and service providers of the depositary.

Sub-chapter 2.1. Internal procedures

62. The internal procedures to be established by the depositary must notably:
- i) describe in general the types of AIF (based on the legal nature and the investment strategy and policy of the AIF, and based on the nature of the assets in which the AIF is invested) for which the entity may and is prepared to act as a depositary;
 - ii) ensure the implementation of a prior control, through either proper procedures, where appropriate, in accordance with Sub-chapter 7.3. of Circular CSSF 12/552 and/or an approval committee for the appointment as AIF depositary aiming to ensure that, for any new appointment as AIF depositary, the entity identifies and examines the specific features of each AIF presented, in particular in terms of operational and legal risks. By way of this prior control, it must be assured that the entity accepts to knowingly act as a depositary, in particular, by taking into consideration the risk profile and the operational complexities of a given AIF;
 - iii) indicate the *dirigeant(s)* of the depositary, and where appropriate, the person(s) in charge of the business line “depositary”;
 - iv) generally describe how the depositary will perform its duties as AIF depositary by taking into account the various types of AIFs based, in particular, on their investment policy (description of the general operational model) and the specific AIFs where the internal operational model for certain AIFs is different from the general operational model (description of the specific operational model for one or several AIFs);
 - v) generally describe the human and technical resources put in place for the performance of the AIF depositary duties; and
 - vi) document in detail 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 AIF depositary must also develop written procedures (with external persons that are not appointed by the depositary itself such as for example a registrar agent, an external valuer, a prime broker) or contracts (with the external persons that are appointed by the depositary itself, such as, for example, a delegate or a service provider of the depositary) with all the persons with which the depositary must work when performing its duties as AIF depositary. The implementation of these written procedures or contracts must ensure that the operational stages of the interaction of the depositary with each given third party, which are necessary for the proper execution of the obligations linked to the depositary's mandate, are properly documented. Such written procedures or contracts may take the form of an operating memoranda or service level agreements. These written procedures or contracts with external persons shall, in particular, include a procedure with the administrative agent of the AIF and, as the case may be, with the registrar agent of the AIF, the contracts and procedures to be put in place with the delegates as well as the contracts and procedures with the service providers of the depositary. The depositary shall determine the external persons with which such a procedure or contract should be set up and the form and complexity of each of them. The depositary must notably ensure that written procedures and contracts necessary for the performance of its duties are in place for the performance of its duties, and in particular its obligations pursuant to Article 94 of Delegated Regulation 231/2013, with the IFM or any other person in charge of 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 notably:

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

The depositary applies these procedures at a frequency that is consistent with the frequency of the AIF's valuation policy as defined in Article 19 of the AIFMD and its implementing measures. When a depositary considers that the calculation of the value of the shares or units of the AIF has not been performed in compliance with applicable law or the AIF's incorporating documents or with Article 17 of the 2013 Law, it shall notify the IFM or AIF and ensure that timely remedial action is taken in the best interest of the investors of the AIF. Moreover, where an external valuer has been appointed, the depositary shall check that the external valuer has been appointed in accordance with Article 17 of the 2013 Law and its implementing measures.

64. The contracts and written procedures with the external persons to be set up by the depositary referred to in this Sub-chapter 2.2. aim to document the operational process(es) between the depositary and third parties that have been formally appointed by the AIF, where appropriate. Hence, the requirement that the depositary must set up contracts and written procedures with external persons is without prejudice to the obligation applicable to the AIF to enter into a contract

with the service providers that have been appointed by the AIF.

65. Where the prime broker holds assets in custody which are owned by the AIF, the prime broker must be considered as acting as delegate of the depositary of the AIF concerned. The depositary has a right to refuse the AIF's or the IFM's choice and appointment of the prime broker will have to hold assets owned by the AIF in the performance of its duties. The IFM must provide the depositary, in due time, with all the relevant information relating to the prime broker so that the depositary is able to fulfil its duties.

Chapter 3. Right of access to information

66. The depositary must, at all times, have a right of access, at the earliest opportunity, to all relevant information the depositary needs in order to fulfil its legal obligations. The right of access to the information referred to in point 153 of this circular must more specifically allow the depositary to have access to the information available from notably a delegate, a clearing broker, a broker or a registrar agent or a transfer agent, a prime broker or a counterparty, which are necessary for the depositary in terms of transactions and asset positions. The duty to have a right of access to information is, in particular, deemed as fulfilled where the depositary has a right of access to a reporting system available via an access to a website (for example, in respect of positions in target UCIs held with its registrar or transfer agent or assets of an AIF which are, for all or part, held in custody by the entity acting as a broker or as regards the contracts of financial derivative instruments).
67. As regards guarantees and securities, this right of access to information must also exist towards any entity with which the collateral provided to the AIF lies, such as for example any collateral agent (e.g. during a transfer of ownership as collateral to the AIF in the books of a collateral manager acting as a collateral agent, towards this collateral manager).
68. As regards more particularly the duties of safekeeping of the other assets, it is recalled that the depositary must also take action in order to ensure that procedures are in place so that the assets recorded can be assigned, transferred, exchanged or delivered only if the depositary itself or the third party to whom the safekeeping duties were delegated has been informed thereof.

Chapter 4. Escalation procedure between the depositary and AIF and/or its IFM

69. According to sub-paragraph (4) of Article 90 of Delegated Regulation 231/2013, the depositary must set up and implement one or more escalation procedures to be followed by the AIF depositary in the event of the detection of any possible discrepancy or irregularity, which notably includes, without prejudice to the obligations applicable to the AIF and/or its IFM, the notification of the situation to the AIF and/or its IFM and to the competent authorities if the situation cannot be remedied.
70. Similarly and without prejudice to the obligations applicable to the depositary, one or several escalation procedures must also be set up and implemented by the AIF and/or its IFM regarding the levels to be followed by the AIF and/or its IFM

in the event of the detection of any possible discrepancy or irregularity, which notably includes the notification of the situation to the depositary and the competent authorities if the situation cannot be clarified or remedied.

71. The escalation procedure(s) as regards the depositary's intervention with the AIF must identify the persons working for the AIF that the depositary must contact when it launches such a procedure and provide for an obligation for the AIF to inform the depositary on the measures it takes following an intervention by the depositary, where appropriate, to cure any breach of the rules applicable to the AIF. This or these procedure(s) must also provide that the depositary must inform the CSSF in the case where the AIF fails to take appropriate measures within a reasonable period. These elements shall apply by analogy with the escalation procedure(s) regarding the intervention of the AIF with the depositary. The escalation procedure(s) is(are) part of the contract (contract or annexes) for the appointment of a depositary. The contract for the appointment of a depositary or its annexes may include the principles of the escalation procedure(s) and the details can be described in other documents which are easier to amend (such as, for example, a service level agreement or an operating memorandum).
72. Any notification by or to the AIF must be made by or to the IFM for the AIFs constituted under the law of contract (common funds). For AIFs constituted by statute (investment companies) having designated an IFM, notifications to the AIF must be made to the IFM at the same time as the investment company. Notifications for self-managed investment companies must be made by or to the investment company. Notifications to the depositary must be made by the AIF or by IFM, as the case may be.

Chapter 5. Organisational arrangements to be established with respect to the assets of an AIF

73. The 2013 Law and Delegated Regulation 231/2013 include important provisions regarding the AIF depositary's duties and, in particular, the organisational measures to be established by the depositary in relation to the assets of an AIF. These provisions mainly cluster around (i) a classification of the assets into two categories, i.e. (a) the category of financial instruments to be held in custody and (b) the category of other assets, and (ii) a precise definition of the tasks to be performed by the depositary with respect to these categories and sub-categories of assets. Thus, the 2013 Law and Delegated Regulation 231/2013 define the organisational measures to be put in place, in particular, as regards the rules of account maintenance and record-keeping (Articles 89 and 99 of Delegated Regulation 231/2013), the rules governing segregation at the different levels of a custody chain (Articles 89 and 99 of Delegated Regulation 231/2013), rules regarding the delegation of tasks linked to these assets by the depositary (sub-paragraphs (11) to (14) of Article 19 of the 2013 Law and Articles 98 and 99 of Delegated Regulation 231/2013) and rules governing cash monitoring (Articles 85 to 86 of Delegated Regulation 231/2013). These provisions are combined with a liability regime of the depositary that depends on the category of assets (sub-paragraphs (12) to (14) of Article 19, and section 4 of Chapter IV of Delegated Regulation 231/2013), with an obligation of principle to return lost financial instruments to be held in custody to the AIF and to investors and with a more general liability regime based on the negligence or intentional failure to properly fulfil 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 common definition of the concept of asset safekeeping. Hence, the concept of safekeeping is defined as a duty of custody of the financial instruments to be held in custody (Articles 19(8)(a) of the 2013 Law), such as the requirement of record-keeping and ownership verification for the other assets (Article 19(8)(b) of the 2013 Law) and as the duties of cash flow monitoring (Articles 19(7) of the 2013 Law). Delegated Regulation 231/2013 specifies the organisational arrangements applying to the monitoring of cash flows in Articles 85 and 86, Article 89 on the safekeeping duties with regard to financial instruments to be held in custody and in Article 90 on the safekeeping duties regarding the ownership verification and record-keeping of the other assets.
75. It is acknowledged that the depositary uses the records and accounts opened in its books for each AIF (or each of the compartments in the case of an umbrella AIF), the records and accounts opened in the accounting books of the AIF with the administrative agent and account statements (e.g. account statements of a collateral agent) issued by third parties. For the records and accounts of the AIF in the accounting books of the administrative agent, it is required that the depositary has access to the accounting data of the administrative agent allowing it to identify, at all times, the assets included in the books of the administrative agent on behalf of the AIF or each of the compartments of the AIF for umbrella AIFs. It is also required that the depositary runs a due diligence on the administrative agent and/or any other third party covering the accounting system

used and that allows proper and comprehensive booking of all the assets by the administrative agent and/or any other third party or ensures that the review of the accounting system is subject to an ISAE 3402/SSAE16 control.

Sub-chapter 5.1. Booking and proper monitoring of financial flows

76. The depositary is required to ensure efficient and proper monitoring of cash flows according to the provisions of 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 make appropriate arrangements in order to preserve the rights of its AIF clients. In this case, the depositary is required to comply with the rules provided for in Article 37-1(8) of the 1993 Law as well as the implementing measures included in Section 2 of the Grand-ducal Regulation of 30 May 2018 on the protection of the financial instruments and funds belonging to clients, product governance obligations and rules applicable the provision or reception of fees, commissions or any monetary or non-monetary benefits.
78. As regards the cash deposit of an AIF with a depositary or with a third party, the depositary, the AIF and/or, where relevant, the third party may have recourse to the fiduciary agreement between them.
79. The accounts opened in relation to the execution of issues (and redemptions) of units, in which the amounts receivable (or payable) by the AIF are or will be outstanding for payment to the AIF or, where appropriate, to the investors (collection accounts), must be opened with the entities as provided for in Article 19(7) of the 2013 Law.

Section 5.1.1. Duties of the depositary regarding subscriptions

80. In accordance with Article 87 of Delegated Regulation 231/2013, the depositary must ensure that the IFM or the AIF provides it with information on all the payments made by or on behalf of the investors upon the subscription of units or shares of an AIF at the close of each business day when the IFM, the AIF, in the name of the IFM acting on behalf of the AIF or a party acting on behalf of it, such as a transfer agent receives such payments or an order from an investor. Once all the relevant information it needs has been received, the depositary shall ensure that the payments are booked in cash accounts opened in the name of the AIF or in the name of the depositary, in accordance with the provisions of Article 19(7) of the 2013 Law.

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 the 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 physically delivered to the depositary still fall within the scope of application of the depositary's custody functions.
83. The financial instruments provided as collateral to a third party or by a third party to the AIF must also be held in custody by the depositary itself or by a third party to which custody functions have been delegated, insofar as they belong to the AIF or the IFM acting on behalf of the AIF.

Section 5.2.2. Account maintenance duties

84. The entity acting as depositary is required to comply with the rules laid down in Article 37-1(7) of the 1993 Law as well as the implementing measures included in Section 2 of the Grand-ducal Regulation of 30 May 2018 on the protection of financial instruments and funds belonging to clients, product governance obligations and rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits. The depositary must book the securities and other fungible financial instruments deposited or recorded separately from its own assets and off balance. With respect to the deposit of assets of an AIF with the depositary, the depositary and the AIF may have recourse to a fiduciary agreement entered into between the depositary and the AIF.

Section 5.2.3. Segregation duties

85. The depositary is responsible for ensuring that the AIF's assets to be held in custody can, at any time, be identified as belonging to the AIF (or a compartment for umbrella AIFs) in accordance with the applicable legislation.
 - A. *Segregation duties to be put in place by the entity ranking first in the custody chain (appointed depositary)*
86. A segregation by AIFs (or by compartment for umbrella AIFs) must, in any case, be put in place at the first level of the custody chain (i.e. at the level of the appointed depositary), even when the depositary subsequently delegates its

custody functions.

87. As regards the assets which the depositary itself holds in custody, the depositary shall open in its books, in the name of the AIF, in the name of the IFM acting on behalf of the AIF or, where appropriate, of each of the compartments of an umbrella AIF, one or more segregated accounts within which all the assets owned by the AIF are registered, in accordance with Article 19(8)(a)(ii) of the 2013 Law.

B. Segregation duties to be put in place by the entity directly downstream of the delegate in the custody chain

88. In the context of the depositary regime introduced by the 2013 Law and Delegated Regulation 231/2013, the recourse by the depositary to delegates technically qualifies as a delegation of asset safekeeping (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 borne in mind that, according to the provisions of Article (19)(11)(b) of the 2013 Law, the depositary must demonstrate that there is an objective reason for the delegation.
89. The depositary is responsible for ensuring that the third party segregates the assets of the clients so that they can, at any time, be clearly identified as belonging to its clients, and in accordance with Article 99 of Delegated Regulation 231/2013. The depositary may, at any time, consider it useful 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 a value decrease of its clients' financial instruments.

C. Segregation duties to be put in place by the entities downstream of the delegate in the custody chain (sub-delegates)

90. By analogy with the qualification of the recourse by the depositary to delegates as a delegation of asset safekeeping (Articles 19(11) of the 2013 Law), the regime put in place by the 2013 Law and Delegated Regulation 231/2013 as regards the use of entities downstream of delegates shall qualify as sub-delegation of asset safekeeping (Articles 19(11) of the 2013 Law and Articles 98(4) and 99(3) of Delegated Regulation 231/2013). As in relation to delegation, any sub-delegation must be justified by an objective reason.
91. As far as the structuring of accounts with its sub-delegates is concerned, the requirements of points 88 and 89 above shall apply *mutatis mutandis* to the accounts opened or maintained with entities downstream of the delegate in the custody chain of an asset.

Section 5.2.4. Due diligence required in case of delegation of custody functions to third parties

92. In the case of a delegation of the safekeeping of the assets to be held in custody,

the depositary must, in particular, ensure that an appropriate and documented due diligence procedure is implemented and applied in accordance with the provisions of Article 19(11)(c) of the 2013 Law and Article 98 of Delegated Regulation 231/2013.

93. The due diligence procedure aims, in particular, at assessing whether the requirements in relation to the account segregation as set out in Section 5.2.3. above are complied with and are sufficient to minimise the risk of loss or of value decrease of the financial instruments of the AIF clients of the depositary.
94. If the depositary notices that the asset segregation is insufficient to ensure the protection of the AIF's assets and rights against insolvency of the third party due to the legislation of the country in which the third party is located, it shall immediately inform the IFM thereof.
95. The due diligence procedure must be reviewed, on a regular basis, at least once a year, and made available to the CSSF upon request. The internal audit or the internal control department of the depositary is responsible for ensuring that this procedure exists, is updated on an ongoing basis and effectively applied.
96. The organisational measures applicable pursuant to the 2013 Law and Delegated Regulation 231/2013 must be applied effectively, at all times, and must not be considered to be exhaustive, either in terms of setting out all details of the depositary's exercise of the required due skill, care and diligence or in terms of setting out all the measures that a depositary should take in relation to the regulatory provisions applicable. The depositary shall be in charge of adapting the criteria on the basis of which it fulfils its obligations, notably in terms of due diligence, depending on particular situations which may occur, for example, based on specific features applicable to the custody chain of a given asset or the features specific to each of the delegates or specific rules applicable in the jurisdiction in which the delegate is established, i.e. in the event of exceptional circumstances that may occur.
97. The depositary must make sure that any delegate applies, at its level, the due diligence and segregation rules, by analogy, with regard to each entity immediately downstream of this delegate.

The depositary shall, vis-à-vis each delegate, benefit from the rights to access the information provided for in Chapter 3. of Part III. above, in order to ensure that it may exercise its obligations in relation to the assets of an AIF. The AIF is in charge of ensuring that the depositary benefits from these rights, in particular, in the cases where the accounts in question are opened or where record is maintained in the name of the AIF or a compartment of an AIF. The existence of these rights and the means by which the depositary may exercise these rights must be duly documented.

Section 5.3.1. Assets not to 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 directly registered in the name of the AIF with the issuer itself or with its agent, such as a registrar or a transfer agent, fall within the category of assets that are not to be held in custody.
99. Physical assets which do not qualify as financial instruments under the AIFMD or which cannot be physically delivered to the depositary, financial contracts such as derivatives, cash deposits or investments in non-listed companies and partnerships interests also fall within the category of assets that are not capable of being held in custody.

Section 5.3.2. General duties regarding ownership verification, registration and record-keeping

100. The depositary must, at any time, have a comprehensive overview of all the assets of an AIF, including all cash and assets other than the assets to be held in custody, notably in view of the drawing-up of a comprehensive inventory of all the asset positions mentioned under points 151 and 152.
101. The assets other than the assets to be held in custody are subject to an obligation to verify the ownership and maintain a record, in accordance with Article 90 of Delegated Regulation 231/2013.
102. The depositary must maintain a record of all those assets for which it is certain that the AIF is the owner. In order to comply with such obligation, the depositary shall:
 - i) register in its record, in the name of the AIF, assets, including their value, for which it is certain that the AIF or the IFM acting on behalf of the AIF is the owner, by using the most appropriate measure with regard to the nature of the assets concerned (e.g. notional amounts, nominal value or net book value);
 - ii) be able to provide, at any time, a comprehensive and up-to-date inventory of the AIF's assets, including their respective notional amounts.
103. The depositary must in particular be able to know at any time:
 - i) what assets belong to the fund,
 - ii) where these assets are located or held.
104. In order to fulfil its duties regarding ownership verification and record-keeping, the depositary should take into account the nature of the assets in which the AIF is invested (or the compartment for umbrella AIFs). The sufficient and reliable information and documentary evidence for the depositary to be certain of the AIF's ownership right or of the ownership right of the IFM acting on behalf of the AIF over the assets may vary depending on how the AIF invests in these

assets and on the regulatory framework applicable to the assets concerned. Moreover, to fulfil its duties regarding ownership verification and record-keeping, 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 specifying the type of transactions to be anticipated with regard to the AIF's investment policy as well as the cash flows to be anticipated when there is a direct or indirect acquisition or sale 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 appropriate. The procedure provides for the list of documents and other documentary evidence that must be transmitted, by the AIF or the IFM acting on behalf of the AIF, at the earliest opportunity, to the depositary in order to be able to fulfil its duties regarding ownership verification and record-keeping having regard to the nature of the assets concerned. This list provides that the depositary shall receive at least:
- i) the decision of the AIF or 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 laid down in this point provides that the AIF or the IFM acting on behalf of the AIF transmits to the depositary, at the earliest opportunity, any other relevant document in view of the nature of the asset(s) concerned, the way in which the AIF proceeds with the investment and the jurisdiction in which the asset(s) concerned is(are) located, including, where appropriate, a legal opinion confirming the direct or indirect ownership of the asset(s) concerned of the AIF and confirms compliance with the regulations applicable in this respect.

106. The depositary shall ensure that the procedures are in place so that the assets recorded can be assigned, transferred, exchanged or delivered only if the depositary itself or the third party to whom the safekeeping duties have been delegated has been informed thereof. The depositary must have access, at the earliest opportunity, at the third party concerned, to the documents proving each transaction and each position. The AIF or IFM acting on behalf of the AIF shall ensure that the depositary receives the information and documentary evidence as soon as possible, upon each sale or acquisition of assets as well as throughout the life of the AIF.
107. After each transaction and at least once a year, the depositary shall verify that the AIF or the IFM acting on behalf of the AIF remains the owner of the assets, insofar as it has not been informed that the assets have been assigned, transferred, exchanged or delivered in accordance with point 106 above. The written procedure referred to in point 105 above provides that the AIF or the IFM acting on behalf of the AIF shall transmit the documents that are required for such verification to the depositary.
108. In this context, the depositary shall ensure that the IFM establishes and applies appropriate procedures to verify that the assets acquired by the AIF that it manages are properly recorded in the name of the AIF or in the name of the IFM acting on behalf of the AIF, and to verify the correlation between the positions

shown in the records of the IFM and the assets for which the depositary is certain that the AIF or the IFM acting in the name of the AIF is the owner. The IFM shall ensure that all the instructions and relevant information relating to the AIF's assets are transmitted, at the earliest opportunity, to the depositary so that the latter is able to implement 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 pursuant to Chapter 4. of Part III. of this circular must provide for the procedure to be followed in case of detection of an anomaly in the implementation of this Section 5.3.2. as well as the notification of the situation of the IFM and the competent authorities if it cannot be clarified or remedied.
110. All the depositary's safekeeping duties referred to in this chapter shall apply on a look-through basis to underlying assets held by financial or legal structures established by the AIF or by the IFM acting on behalf of the AIF for the purposes of investing in the underlying assets and which are controlled directly or indirectly by the AIF or the IFM acting on behalf of the AIF. To this end, the AIF or the IFM shall inform without delay the depositary of the nature of the underlying asset(s) and any change in the financial or legal holding structure, of the asset(s) in question. The requirement referred to in this point shall not apply to funds of funds or master-feeder structures if the target funds have a depositary that performs the functions of ownership verification and record-keeping for their assets.
111. In case of delegation of the functions of custody of assets which are not to be held in custody, the depositary must ensure that an appropriate and documented due diligence procedure has been implemented. The due diligence procedure aims notably at assessing whether the ownership verification, the registration and record-keeping duties as detailed in this Chapter 5.3. have been complied with.

Section 5.3.3. Specific duties according to the nature of the assets in which the AIF is invested

112. To achieve a sufficient degree of certainty that an AIF or 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 is the owner of such asset. This evidence may vary depending on the nature of the assets in which the AIF is invested or the way in which the investment is made. In this respect, this Section 5.3.3. provides some non-exhaustive clarifications with regard to a certain number of specific investment strategies.
113. In any case, and irrespective of the AIF's investment strategy, the depositary is responsible for ensuring that compliance with the provisions of this Sub-chapter 5.3. is sufficient to enable it to fulfil its duties regarding ownership verification and registration, and in particular to reach the required level of certainty as regards the ownership right of the AIF or the IFM acting on behalf of the AIF over a given asset. Otherwise, the depositary must require that the AIF, the IFM or where relevant the third party to which the safekeeping has been delegated in accordance with Article 19 of the 2013 Law provides it with additional evidence elements.

A. Specific duties where the AIF is invested in real estate

114. To comply with its duties regarding AIFs investing in real estate (for example a real estate fund), the depositary must take account of how the AIF makes the investment and the jurisdiction in which the real estate is located. Real estate must be understood as buildings, land as well as property related long-term interests such as surface rights and emphyteutic leases.
115. Where the AIF is invested in real estate, the list of documents and other evidence that must be transmitted, by the AIF or the IFM acting on behalf of the AIF, to the depositary pursuant to point 105 above must also include at least a detailed organisation chart of the holding structure of the non-residential property concerned by the AIF. Moreover, the IFM must ensure that the depositary has the right to conduct regular visits, by itself or via a third party, to the IFM or to the place(s) where the AIF's property is located in order to verify the existence of the assets. The IFM must ensure that the depositary has a right to make or to have such visits made at least once a year, in compliance with the national law 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 ensure the on-site visits referred to in this paragraph, it shall ensure that this person is not an employee or a member of the senior management or the body performing the supervisory functions of the AIF or its IFM, or an employee of any other companies between which there is a group connection and is not bound by any business, family or other relationship with the AIF or its IFM or any other company within the group which would give rise to a conflict of interest that could jeopardise its judgement.
116. Where the AIF invests in property related long-term interests, the provisions of points 114 and 115 above must, where appropriate, be understood as relating to the underlying property interests in which the AIF invests.
117. Where investment is made by means of holdings in real estate companies (including claims on such companies) whose main object and purpose is the acquisition, promotion and sale as well as the letting and agricultural lease of property, the requirements provided for in point 110 above shall apply.

B. Specific duties where the AIF is invested in target funds

118. In order to fulfil its duties regarding AIFs investing in other target funds (i.e. funds of funds), the depositary must take account of how the AIF invests, i.e. how the investment with the issuer or its agent, for example a registrar or transfer agent is recorded. Funds of funds should be understood within the meaning of this section as AIFs whose target asset consists of units or shares in other collective investment vehicles, i.e. in particular AIFs or UCITS.
119. The requirements provided for in point 110 above shall apply to AIFs investing in other target funds.
120. As regards more specifically the record-keeping of investments of an AIF in target funds, it is accepted that this investment with the target fund or an agent thereof can be recorded directly in the name of the investing AIF insofar as the

national law of the target fund does not require a different record-keeping. Record of the investment of the AIF in the target entity can also be kept in the name of the depositary with an indication that the assets belong to the clients of the depositary, in the name of the depositary with an indication of the name of the investing AIF or even in the name of the relevant compartment in the case of an umbrella AIF or solely in the name of the investing AIF or a compartment of it in the case of an umbrella AIF. This last option is only available where the national law of the target fund so enables or requires. In the latter case, the depositary shall ensure that procedures are in place so that the assets can be assigned, transferred, exchanged or delivered only if the depositary itself or its delegate has been informed thereof and that the depositary has access to the documents proving each transaction and each position, at the earliest opportunity. The provisions of this point shall also apply to AIFs qualifying as feeder funds in master-feeder structures.

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

121. In order to fulfil its duties regarding AIFs investing in issuers or non-listed companies within the meaning of Article 1(63) of the 2013 Law, the depositary must take account of how the AIF invests, i.e. how the investment with the issuer or its agent, for example a registrar or transfer agent is recorded.
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 evidence that must be provided by the AIF or the IFM acting on behalf of the AIF, to the depositary pursuant to point 105 above must also include at least a detailed organisation chart of the holding structure, by the AIF of the assets concerned.
123. Where the investment is made through intermediary companies or a specialised intermediary (other than the registrar, the issuer or the non-listed company) with which the investments are held in an account on behalf of the AIF, the requirements provided for in point 110 above shall apply.

D. Specific duties where the AIF is invested in intangible rights

124. In order to fulfil its duties regarding AIFs investing in intangible rights (for example, use of patents, trademarks or image rights), the depositary must take account of the way in which the AIF invests, i.e. how the acquisition of the intangible right in question must be structured and how the AIF as the holder of this intangible right is recorded.
125. The depositary is responsible for ensuring that the AIF or the IFM acting on behalf of the AIF puts in place the necessary procedures in order to ensure that the AIF's rights are recorded so as to guarantee its ownership and its operating rights. To this end, the depositary shall obtain from the IFM, which has the ultimate responsibility for taking the necessary measures, an independent legal opinion which confirms the registration of the AIF's ownership right over the rights concerned, and the possibility for the AIF to use them.
126. Where the investment is made through intermediary companies or a specialised

intermediary with which the investments are held on an account on behalf of the AIF, the requirements provided for in point 110 above shall apply.

E. Specific duties 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 comply with the following aspects in relation with the transactional component of an investment in a financial derivative instrument in order to allow the depositary to fulfil its legal obligations as regards the safekeeping of assets and control functions:
- i) being aware of all the AIF's positions in such financial derivative instruments, in particular for the positions held with clearing brokers or a central counterparty. In order to fulfil this obligation, it is acknowledged in particular that the depositary may use the records and accounts opened in the accounting books of the AIF with its administrative agent, may rely on the reconciliations it performs or statements of accounts issued by third parties as specified in point 75 of this circular (subject to the conditions set out therein);
 - ii) following, on a day-to-day basis, the exposures in relation to the initial margin deposits made by the AIF with an intermediary (e.g. a broker) and to variation margin calls within the context of derivative financial instruments dealt in on a regulated market or OTC financial derivatives. The depositary may, in this context, in particular, rely on account statements received from brokers (broker statements) involved in a given transaction or reconciliations performed by the administrative agent.

F. Specific duties where the AIF is invested in movable property

128. In order to fulfil its duties regarding the ownership verification and record-keeping as regards moveable property, the depositary shall ensure that the safekeeping is entrusted to a company specialised in the safekeeping of this type of assets, and that the designated company has the technical and material resources to ensure the preservation of the value and integrity of these assets. This company need not be located in Luxembourg. Several specialised companies can be designated in order that all the AIF's moveable assets are not held in custody at the same place. Financial instruments to be held in custody as defined in this circular cannot be understood as moveable property within the meaning this Sub-section F.
129. To this end, the depositary shall obtain from the IFM which has the ultimate responsibility for designating the specialised company(ies), a report specifying the tasks performed by the IFM within the selection process.
130. The IFM must ensure that the depositary has the right to conduct regular visits by itself or via a third party, to the IFM or to the place(s) where the AIF's property is located in order to verify the existence of the assets. Moreover, the IFM must ensure that the depositary has the right to conduct, or have such visits conducted at least once a 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 ensure the on-site visits referred to in this paragraph, it shall ensure that this person is not an employee or a member of the senior management or the body performing the supervisory functions of the AIF or its IFM, or an employee of any other companies between which there is a group connection and is not bound by any business, family or other relationship with the AIF or its IFM or any other company within the group which would give rise to a conflict of interest that could jeopardise its judgement.

131. The IFM shall ensure that the depositary obtains, upon the first request, a copy of the contract concluded between the AIF or the IFM acting on behalf of the AIF and the specialised company(ies).
132. The contract shall specify the custody arrangements to be put in place to properly ensure the preservation, maintenance and protection of the assets. In addition to the information duties laid down in points 66 to 68 of this circular, the contract shall lay down that the designated company shall provide the depositary with a list of each asset safekept by the designated company on behalf of the AIF or the IFM acting on behalf of the AIF as well as the notional amount of each asset in the reference currency of the AIF. These lists are to be provided at each transaction relating to one or more items of movable property of the AIF, and at least once a year, and upon the depositary's request of at any time.
133. The contract shall also provide that at each transaction relating to one or more items of movable property of the AIF, and at least once a year, the designated company shall provide the depositary with a list indicating the movements of all the assets entrusted to its safekeeping over the period since the preceding list.
134. The depositary shall use the lists provided for in points 132 to 133 above to implement the reconciliation measures provided for in points 142 to 144, during each transaction relating to one or more items of movable property of the AIF, and at least once a year. Reconciliation measures are implemented with greater frequency where the nature of the assets concerned and the frequency of the transactions carried out by the AIF so require.
135. The relationships with any third entity in charge of the transportation or restoration or renovation are subject to the provisions of points 128 to 134 above, which shall apply *mutatis mutandis*.
136. The requirements laid down in point 110 above shall apply.

Sub-chapter 5.4. Specific organisational arrangements regarding the guarantees or securities in the form of financial instruments or cash, including in the case of recourse to a collateral agent

137. Insofar as an AIF uses techniques or invests in instruments giving rise to the implementation of guarantees or securities (collateral) 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 a third party or by a third party for the benefit of the AIF is owned by the AIF.
138. The assets of an AIF that are provided by the AIF as a guarantee to a third party,

or that have been received as a guarantee by the AIF from a third party, are safekept by the depositary as long as these assets are owned by the AIF. The custody scheme of these assets may, in these cases, be structured according to the following three schemes: (1) the collateral taker is the depositary of the AIF or is appointed by it or by the AIF as custodian of the collateralised assets of the AIF; (2) the depositary of the AIF appoints a delegate acting on behalf of the collateral taker; or (3) the collateralised assets remain with the depositary of the AIF and are notified as collateralised in favour of the collateral taker.

139. When assessing whether or not the collateral provided to a third party or by a third party in favour of the AIF is owned by the AIF, the depositary must take account of the legal nature and/or the legal, regulatory or contractual provisions applicable to the transaction that gave rise to the implementation of this guarantee or security. The AIF must ensure that the depositary receives all the information necessary in this respect.
140. Without prejudice to the responsibility of the AIF in this respect, where the guarantees or securities are implemented in favour of the AIF (whether in the form of ownership transfer or collateral), the depositary is required:
 - i) within the context of securities lending transactions, to ensure that the securities to be received by the AIF are received prior to or at the latest on the day of the transfer of the securities lent and that, at the end of the lending contract, the security will be remitted simultaneously or subsequently to the restitution of the securities lent;
 - ii) is required to verify that the securities to be received comply with the legal and regulatory provisions in force.
141. In the case where the guarantees and securities that have been transferred by the AIF or have been delivered to the AIF by a counterparty are transferred or delivered to a collateral manager (acting also as a collateral agent) or 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 must be put in place. In this event, the entity in charge of the management and administration of the guarantees and securities which the AIF may provide or receive (in principle, the collateral manager) must undertake to ensure that an adequate level of guarantees and securities is included in the asset pool serving as guarantees and securities. The collateral manager must also undertake to ensure that any substitution of assets in this pool of guarantees and securities is made in accordance with the rules defined by the parties within the framework of the agreement in place. The depositary must, in this context, benefit from the rights of access to the information in accordance with points 66 to 68 of this circular and benefit from a real-time access and online to a reporting tool of this collateral manager (also acting as a collateral agent) or this collateral agent or to daily reports at the disposal of the depositary by the collateral manager (also acting as a collateral agent) or the collateral agent, regarding all the information necessary to allow the depositary to fulfil its duties. Where this collateral manager or collateral agent may act as a delegate of the depositary for the safekeeping of the assets of an AIF, the depositary shall benefit from a right to refuse the choice and appointment of this collateral manager or collateral agent as far as the 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 the services provided to the AIF, is entrusted with the safekeeping of the assets of this AIF.

Chapter 6. Organisational arrangements as regards reconciliations

142. The depositary of the AIF is responsible for developing procedures covering all reconciliations and reconciliation methods (including the reconciliations used by the depositary that are performed by third parties) to be implemented by the depositary in order to fulfil its duties under Articles 86(b) to (f), 89(1)(c) and 92(2), 93(1)(iii) and 99(1)(c) of Delegated Regulation 231/2013 in order to apply these procedures effectively and to review them periodically. These procedures must both cover in detail the reconciliation processes to be implemented and also clarify the measures to be taken by the depositary in order to ensure the resolution of the reconciliation differences within a reasonable period.
143. The internal audit or the internal control department is responsible for verifying the existence, the periodic update and the effective application of these procedures as regards reconciliation and for ensuring resolution of any reconciliation difference identified within a reasonable period.
144. In these reconciliation procedures, particular attention is given to the following aspects:
 - i) the procedures to be put in place must cover all the assets and transactions in relation to the assets of the AIF;
 - ii) the depositary is required to provide, in accordance with Article 90(2)(c)(ii) of Delegated Regulation 231/2013, an inventory of all the asset positions of an AIF (or, where relevant, of each compartment of an umbrella AIF) in which the AIF is invested at the end of a financial year. This means that possible reconciliation differences identified by the depositary or a third party may be justified at the time when an inventory of all the positions of assets of an AIF is provided.

Chapter 7. Duty to establish a contingency plan

145. Pursuant to Article 98(6) of Delegated Regulation 231/2013 with the objective to ensure continuity in the depositaries' activities in case of events likely to cease the ability for a depositary to provide depositary services to its AIF clients, any depositary must put in place a contingency plan.
146. The depositary must devise a contingency plan for each market in which it appoints a third party to which safekeeping functions shall be delegated.

PART IV. Specific duties of the depositary

Chapter 1. Duties regarding the day-to-day asset administration

147. The depositary must accomplish all the operations in relation to the day-to-day administration of the AIF's assets held in its custody.

148. This means that the depositary is, in particular, responsible for the collection of dividends, interests and matured securities, the exercise of securities rights and, in general, for any other operation in relation to the day-to-day administration of the securities and liquid assets belonging to the AIF.
149. To the extent that the operations referred to above involve assets that are not held in custody by the depositary itself, it may, on the basis of contracts and in accordance with the applicable provisions, entrust the execution thereof to the delegates with whom the assets are actually held in custody. In such cases and in order to comply with its duty of oversight regarding the AIFs' assets, the depositary must organise its relationship with the delegates so as to ensure that it is immediately informed of any operation executed by these delegated as part of the day-to-day administration of the assets deposited with them.

Chapter 2. Oversight and control functions

150. The depositary shall perform the oversight and control functions pursuant to Article 19(9) of the 2013 Law and Articles 93 to 97 of Delegated Regulation 231/2013. The five types of oversight duties are to be fulfilled as regards all the AIFs whose management is carried out by an AIF, regardless of their legal structure. Delegated Regulation 231/2013 provides certain clarifications on the tasks to be accomplished by the depositary to discharge its duties as regards these oversight functions. In respect of these oversight and control functions, the internal audit or the internal control department of the institution acting as depositary is responsible for controlling the existence, the periodic update and the effective application of the procedures in relation to the control functions.

Chapter 3. Inventory duties

151. In accordance with Article 90(2)(c)(ii) of Delegated Regulation 231/2013, the depositary must provide the IFM or the AIF with a comprehensive inventory of all the AIF's assets on a regular basis. The provision of an inventory of all the assets positions of the AIF or, where relevant, (of each of the compartments of an umbrella AIF in which) the AIF is invested, is compulsory at the closing date of a financial year of an AIF in particular with a view to the audit of the annual accounts, where relevant.
152. The inventory of all the asset positions of the AIF must indicate any guarantee or security belonging to the AIF or a given compartment of an umbrella AIF.

PART V. Information duties of the depositary applicable to the AIF

153. The AIF must ensure that the depositary has access, at the earliest opportunity, when it is appointed and on an ongoing basis, to all relevant information it needs to fulfil its duties 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 must sign with said IFM a written agreement governing the flow of information deemed necessary to allow the depositary to perform its functions,

in particular, as regards the safekeeping of assets and control and, in general, as regards the legal, regulatory or administrative provisions applicable to the depositary.

155. The parties to the contract for the appointment of a depositary may agree to transmit, by electronic means, all or part of the information they communicate to each other.

PART VI. Information duties of the depositary vis-à-vis the AIF

156. In order to ensure that any AIF is informed of any element affecting the assets of an AIF which are known or come to the knowledge of the depositary in the course of its functions, the depositary must ensure that the AIF or, where relevant, its IFM is informed of any element relating to the assets of the AIF, at the earliest opportunity, insofar as the depositary has been informed thereof, and in particular as regards any event affecting the assets' life.
157. The information duties applicable to the depositary vis-à-vis the AIF are to be seen in connection with the duties applicable under the escalation procedure in accordance with Chapter 4. of Part III. of this circular.

PART VII. Information duties applicable to the depositary vis-à-vis authorities

158. The depositary is required to provide the CSSF, upon request, with all the information the depositary has obtained in the performance of its duties and which might be necessary to allow the CSSF to monitor compliance with the laws and regulations applicable to the depositary as well as the AIF for which it acts as depositary.
159. If the CSSF is not the authority competent for the supervision of the IFM, it provides the information received to the respective competent authorities.
160. In the context of the escalation procedure to be put in place based on Chapter 4. of Part III of this circular, the depositary may have to notify the CSSF of any event identified/notified by the depositary to the AIF as part of the escalation procedure where the AIF is failing to take adequate measures within a reasonable period.

PART VIII. Specific provisions where a contract for the appointment of a depositary is terminated during the existence of an AIF

161. In the case where a contract for the appointment of a depositary is terminated during the existence of an AIF without a new contract for the appointment of a depositary being put in place and entered into force at the end of the notice period applicable to a termination, it should be ensured that the assets of the AIF are subject to an adequate safeguarding, depending on the nature of these assets, in the interest of the AIF and its investors (asset safeguarding measures). These safeguarding measures are, in general, necessary in case of liquidation of an AIF and/or in case the appointed depositary is lacking. Each AIF and/or IFM is required to inform its supervisory authority of all the cases where the measures

of safeguarding of the assets of an AIF must be put in place.

162. With respect to the function of safeguarding of the assets of an AIF in liquidation or lacking a depositary, the entity which last acted in its capacity as depositary is required to maintain all the securities and cash accounts open for the various assets of this AIF which are held in custody with this institution at the time when the AIF is deregistered or withdrawn, up until the appointment of a new depositary or until the closing of the AIF's liquidation.

Entry into force and various provisions

163. This circular enters into force with effect as from 1 January 2019.
164. Chapter E of Circular IML 91/75, as amended by Circular CSSF 05/177, shall be repealed, with effect at the date mentioned in point 163 above.
165. The scope of application of Circular CSSF 16/644 shall be amended, with effect at the date mentioned in point 163 above, in that it is extended to be also applied to UCIs Part II whose offering documents allow the marketing of their shares to retail investors on the Luxembourg territory, regardless of the status of their IFM/manager. In this case, any reference to a UCITS or its management company, respectively, in Circular CSSF 16/644, shall be read as a reference to a UCI Part II or its IFM/manager, respectively.
166. Annex 1 of Circular CSSF 16/644 shall also be amended in that it is replaced by Annex 1 of this circular with effect at the date mentioned in point 163 above.

Yours faithfully,

COMMISSION de SURVEILLANCE du SECTEUR FINANCIER

Jean-Pierre FABER

Director

Simone DELCOURT

Director

Claude MARX

Director General

Annex 1. List of information on depositary functions to be kept updated and to be provided to the CSSF on a periodic, ad hoc or annual basis⁴ (cf. points hereinafter)

Pursuant to the provisions of this circular, the information listed hereafter must be kept up-to-date and provided to the CSSF, on a periodic, punctual or annual basis:

- a) name and title of the *dirigeant(s)* of the depositary, and, where appropriate, the person(s) responsible for the business line “depositary” (at the time when the person(s) responsible is(are) appointed), if there are several persons responsible, please indicate the reasons therefor and the decision-making method;
- b) the internal organisation chart of the institution, in particular in relation to the services involved in the depositary function of the type of fund concerned for the purposes of controlling the sufficiency and adequacy of the structures necessary for conducting its general function and specific functions (on an annual basis), if the institution also performs 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 function of “depositary” of the type of fund concerned (on an annual basis), please indicate the number of full-time employees by department or service;
- d) CV of the person(s) responsible for the business line “depositary” (at the time when the person(s) is(are) appointed), please specify the date of commencement of employment, professional career, education, the date and place of birth of the persons concerned;
- e) information on the technical means (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) list of the network of the delegates appointed by the depositary for the safekeeping of the financial instruments to be held in custody (on an annual basis), and list of the prime brokers or collateral agents; or information on the website on which these updated lists are available;
- g) list of service providers assisting the depositary in its function and description of the links with these service providers, the operating method of the depositary and the interaction with the delegates and service providers must be explained, where appropriate, on the basis of one or several diagrams (on an annual basis);
- h) list of agents, description of the possible group link with the administrative agent and, where different, the registrar agent if the administrative agent/registrar agent is the same legal entity as the depositary, description of the elements ensuring the required functional and hierarchical separation, as indicated under point (b) of this annex 1 (on an annual basis);
- i) written confirmation signed by the person responsible for the business line “depositary” that the contracts for the appointment of the depositary include all the various elements that must be covered pursuant to the applicable legislation according to the type of fund concerned;

⁴ The annual information is to be provided at the latest two months after the closing of the financial statements of the depositary.

- j) list of procedures with an indication of the thematic area covered and the date of the last update including the different aspects of the depositary function of the type of fund concerned (on an annual basis);
- k) description of the types of funds (depending on the legal nature as well as their investment policy) for which the depositary considers accepting to act as a depositary (on an annual basis).