

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

Luxembourg, 11 October 2016

To all credit institutions acting as UCITS depositary subject to Part I and to some UCIs subject to Part II<sup>1</sup> of the Law of 17 December 2010 relating to undertakings for collective investment and all these undertakings, where appropriate, represented by their management company or their manager, respectively

**CIRCULAR CSSF 16/644  
as amended by Circular CSSF 18/697**

**Re: Provisions applicable to credit institutions acting as UCITS depositary subject to Part I “and UCIs subject to Part II” of the Law of 17 December 2010 relating to undertakings for collective investment and all UCITS, where appropriate, represented by their management company**

Ladies and Gentlemen,

This circular follows the entry into force of the Law of 10 May 2016 transposing Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 (“UCITS V Directive”) into Luxembourg law (the “2016 Law”) by amending the Law of 17 December 2010 relating to undertakings for collective investment (the “2010 Law”) and Commission Delegated Regulation (EU) 2016/438 with regard to obligations of depositaries (the “Delegated Regulation”). These texts provide for a set of partly new requirements on the depositaries’ functions regarding safekeeping of assets, oversight duties as well as cash flow monitoring duties and amend the liability regime for depositaries towards UCITS and unit-holders.

---

<sup>1</sup> I.e. undertakings for collective investment established in Luxembourg subject to Part II of the 2010 Law (“UCIs Part II”) which, in their offering documents, have not explicitly mentioned that the marketing of the fund’s shares or units to retail investors established in Luxembourg is prohibited, regardless of the status of their manager.

This circular specifies the organisational requirements applicable to depositaries of undertakings for collective investment in transferable securities subject to Part I of the 2010 Law (each a “UCITS”) by clarifying certain aspects of the 2016 Law and/or the Delegated Regulation in the Luxembourg context and also by clarifying certain aspects which are not specifically covered by the 2016 Law or the Delegated Regulation. Consequently, this circular repeals and replaces Circular CSSF 14/587, as amended by Circular CSSF 15/608.

This circular applies to credit institutions incorporated under Luxembourg law subject to the Law of 5 April 1993 on the financial sector (the “1993 Law”) and Luxembourg branches of credit institutions originating from an EU Member State acting or contemplating to request an authorisation to act as a UCITS depositary bank (“depositaries” or “depository”). It also applies to these UCITS themselves, where applicable, represented by their management company, in their interaction with their depositary.

Following the entry into force of the Law of 27 February 2018 amending, inter alia, the 2010 Law, this circular shall also apply to entities acting or planning to request an authorisation to act as a depositary bank (“depositaries” or “depository”) of UCIs Part II which, in their offering documents, have not explicitly mentioned that the marketing of the fund’s shares or units to retail investors established in Luxembourg is prohibited, regardless of the status of their manager.

In this circular, any reference to a UCITS shall, where appropriate and depending on the circumstances, be understood as a reference to the UCITS and/or its management company or, where appropriate, to the UCI Part II and/or its manager.

As the functions and responsibilities of UCITS depositaries may change or become subject to clarification, especially by guidelines or questions and answers of the European Securities and Markets Authority (ESMA), the organisational arrangements described hereafter may be supplemented or amended and shall, where relevant, be read together with the guidelines and recommendations addressed to the competent authorities and/or the financial market participants.

## **TABLE OF CONTENTS**

<i>Definitions:</i> .....	5
<i>Part I. General remarks</i> .....	9
<i>Part II. Appointment of a credit institution as UCITS depositary: eligibility and approval criteria</i> .....	9
Chapter 1. Eligibility criteria to act as a UCITS depositary .....	9
Chapter 2. Approval procedure to be able to act as UCITS depositary.....	9
Sub-chapter 2.1. Requirement of professional experience and good repute of the person(s) in charge of the business line “UCITS depositary bank” of the credit institution .....	10
Sub-chapter 2.2. Description of human and technical resources .....	10
Sub-chapter 2.3. Specific provisions applicable to delegation and outsourcing.....	11
Chapter 3. Contract for the appointment of a depositary (chapter I of the Delegated Regulation) ....	12
<i>Part III. Details on governance and organisation</i> .....	12
Chapter 1. Conflicts of interest .....	12
Chapter 2. Internal procedures and written procedures or contracts with external persons in relation to the UCITS depositary function .....	15
Sub-chapter 2.1. Internal procedures .....	15
Sub-chapter 2.2. Written procedures or contracts with external persons .....	16
Chapter 3. Organisational arrangements to be established with respect to the assets of a UCITS.....	17
Sub-chapter 3.1. Details on the general aspects of the organisational arrangements originating from the 2010 Law and the Delegated Regulation .....	17
Sub-chapter 3.2. Safekeeping of assets .....	18
Sub-chapter 3.3. Organisational arrangements to be established with respect to the assets whose safekeeping is ensured by a delegate at the primary level below the depositary ..	18
Sub-chapter 3.4. Organisational arrangements to be put in place at the depositary level as regards entities downstream of delegates in the custody chain of an asset .....	19
Sub-chapter 3.5. Organisational arrangements to be put in place regarding the assets of the UCITS which are not held in custody .....	20
Sub-chapter 3.6. Due diligence duties in relation to an investment in a target UCI(TS) in which a given UCITS may invest.....	20
Sub-chapter 3.7. Booking and proper monitoring of financial flows .....	21
Chapter 4. Right of access to information .....	21
Chapter 5. Escalation procedure between the depositary and the UCITS and/or its management company (Articles 3.3. and 14.4. of the Delegated Regulation) .....	22
Chapter 6. Specific organisational arrangements at the level of the depositary depending on the investment policy of the UCITS or the techniques used by the UCITS.....	23
Sub-chapter 6.1. Specific organisational arrangements regarding the guarantees and securities, including in the case of recourse to a collateral agent.....	23
Sub-chapter 6.2. Organisational arrangements in case of investment of a UCITS in financial derivative instruments (financial derivative instruments dealt in on a regulated market or OTC financial derivatives) .....	24
Sub-chapter 6.3. Organisational arrangements applicable to investments by a UCITS in target UCI(TS) .....	25
Chapter 7. Organisational arrangements as regards reconciliation .....	26
Chapter 8. Duty to establish a contingency plan .....	26
<i>Part IV. Specific duties of the depositary</i> .....	27
Chapter 1. Duties regarding the day-to-day asset administration.....	27

Chapter 2. Oversight and control functions.....	27
<i>Part V. Information duties of the depositary applicable to the UCITS.....</i>	<i>27</i>
<i>Part VI. Information duties applicable to the depositary vis-à-vis the UCITS .....</i>	<i>28</i>
<i>Part VII. Information duties of the depositary vis-à-vis authorities .....</i>	<i>28</i>
<i>Part VIII. Specific provisions where a contract for the appointment of a depositary is terminated during the existence of a UCITS.....</i>	<i>28</i>
<i>Entry into force and various provisions.....</i>	<i>29</i>

## **Definitions:**

For the purposes of this circular:

- “assets”:** shall mean the financial instruments to be held in custody and other assets in which a UCITS is invested at a given time and/or owned by a UCITS at a given time;
- “collateral agent”:** shall mean the agent appointed by the UCITS, by the counterparty of the UCITS or jointly by both, solely responsible for the custody (excluding the management and administration) of the guarantees and securities the UCITS 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 which are to be held in custody within the meaning of Articles 18(4)(b), 34(3)(b) and 39 of the 2010 Law;
- “Circular CSSF 12/546”:** shall mean Circular CSSF 12/546 (as amended by Circular CSSF 15/633) on the authorisation and organisation of Luxembourg management companies subject to Chapter 15 of the 2010 Law relating to undertakings for collective investment as well as investment companies which have not designated a management company within the meaning of Article 27 of the 2010 Law relating to undertakings for collective investment;
- “Circular CSSF 12/552”:** shall mean Circular CSSF 12/552 (as amended by Circulars CSSF 13/563, 14/597 and 16/642) on central administration, internal governance and risk management;
- “Circular CSSF 14/587”:** shall mean Circular CSSF 14/587 (as amended by Circular CSSF 15/608) on the provisions applicable to credit institutions acting as UCITS depositary subject to Part I of the 2010 Law relating to undertakings for collective investment and to all UCITS, where appropriate, represented by their management company;
- “Circular CSSF 14/592”:** shall mean Circular CSSF 14/592 on the guidelines of the European Securities and Markets Authority (ESMA) on ETFs and other UCITS issues;
- “contract for the appointment of a depositary”:** shall mean the written contract concluded by a UCITS or its management company (for a UCITS constituted in accordance with contract law) and an institution authorised as UCITS depositary by which the depositary function has been conferred upon this institution within the meaning of the provisions of Article 17, 33 or 39 of the 2010 Law. The term

“contract for the appointment of a depositary” shall mean the depositary 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. For UCITS established in corporate form which have designated a management company, the contract may be a tripartite contract between the UCITS, its management company and the depositary;

- “delegation”:** shall mean the delegation of functions in relation to the safekeeping of UCITS’ assets by the depositary to a third party within the meaning of the provisions of Articles 18a, 34a and 39 of the 2010 Law as well as Articles 15, 16 and 17 of the Delegated Regulation;
- “delegate”:** shall mean the third party designated by the depositary to whom the depositary delegates the functions of safekeeping of UCITS’ assets in accordance with Articles 18a, 34a and 39 of the 2010 Law as well as Articles 15, 16 and 17 of the Delegated Regulation;
- “UCITS V Directive”:** shall mean Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions;
- “financial instruments to be held in custody”:** shall mean financial instruments to be held in custody within the meaning of Articles 18(4)(a), 34(3)(a) and 39 of the 2010 Law;
- “collateral manager”:** shall mean the agent appointed by the UCITS, by the counterparty of the UCITS or jointly by both, responsible for the management and the administration of the guarantees and securities the UCITS 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;
- “cash”:** shall mean money and bank balances of a UCITS;
- “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;

<b>“2007 Law”:</b>	shall mean the Law of 13 February 2007 relating to specialised investment funds, as amended;
<b>“2010 Law”:</b>	shall mean the Law of 17 December 2010 relating to undertakings for collective investment, as amended;
<b>“2013 Law”:</b>	shall mean the Law of 12 July 2013 on alternative investment fund managers, as amended;
<b>“2016 Law”:</b>	shall mean the Law of 10 May 2016 transposing UCITS V Directive and amending the 2010 Law and the 2013 Law;
<b>“UCITS”:</b>	shall mean undertaking(s) for collective investment in transferable securities incorporated in the form of a SICAV (self-managed or having designated a management company) or a common fund ( <i>fonds commun de placement</i> ) subject to Part I of the 2010 Law;
<b>“unit-holders”:</b>	shall mean unit-holders in UCITS constituted in accordance with contract law (common funds, managed by a management company) as well as shareholders in UCITS established in corporate form (investment companies);
<b>“escalation procedure”:</b>	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 UCITS are specified. This procedure must clearly identify the persons to be contacted at the level of the UCITS 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 UCITS;
<b>“Delegated Regulation”:</b>	shall mean Commission Delegated Regulation (EU) 2016/438 of 17 December 2015 supplementing Directive 2009/65/EC of the European Parliament and of the Council with regard to obligations of depositaries;
<b>“person in charge of the business line UCITS “depositary bank” ”:</b>	shall mean the person(s), whether or not s/he or they is/are <i>dirigeant(s)</i> , of the institution acting as a depositary, who is/are in charge, at a high hierarchical level of responsibility, of the operational aspects of the UCITS depositary activities of the said institution in Luxembourg;
<b>“safeguarding of the assets of a UCITS in liquidation or lacking a depositary”:</b>	shall mean the obligation of the last credit institution acting as a UCITS depositary prior to its deregistration or withdrawal from the official list provided for in Article 130(2) of the 2010 Law, to keep all the securities and cash accounts open for the various assets of this UCITS held in custody with this institution at the time of deregistration or withdrawal up to the appointment of a successor or up to the closing of the

liquidation of this UCITS, in accordance with the provisions of points 91 and 92 of this circular;

**“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 depositary'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 UCITS V depositary regime introduced by the 2016 Law are mainly specified in the Delegated Regulation with regard to the depositaries' duties. The Delegated Regulation thus provides clarification on, in particular, the content of the written contract between a UCITS (and/or its management company) and its depositary, the escalation procedure of the depositary towards the UCITS, the tasks to be performed by the depositary in compliance with its oversight duties provided for by the 2016 Law and the information to be received by the depositary on its duties with respect to the monitoring of cash flows. The Delegated Regulation also specifies the new duties of safekeeping of the depositary's assets with regard to the various types of assets in which the UCITS 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 the Delegated Regulation, reference is made to the relevant article(s) of the Delegated Regulation.

## **Part II. Appointment of a credit institution as UCITS depositary: eligibility and approval criteria**

### Chapter 1. Eligibility criteria to act as a UCITS depositary

2. According to the provisions applicable to UCITS under the 2010 Law, access to the UCITS depositary function is limited to credit institutions, within the meaning of the 1993 Law, having their registered office in Luxembourg or Luxembourg branches of credit institutions having their registered office in another EU Member State<sup>2</sup>.
3. These institutions can accept to be appointed as UCITS depositary only if they hold, in addition to their authorisation as credit institution, a specific approval to act as a UCITS depositary established in Luxembourg, which is issued by the CSSF in accordance with the provisions of Chapter 2 below.

### Chapter 2. Approval procedure to be able to act as UCITS depositary

4. An institution eligible to act as a UCITS depositary according to the legal provisions applicable (cf. above Chapter 1) must submit a UCITS depositary application file in accordance with the provisions of Article 129(2) of the 2010 Law.

---

<sup>2</sup> As specified in the 2010 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.

5. The institutions, which have already been approved as UCITS 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.

Sub-chapter 2.1. Requirement of professional experience and good repute of the person(s) in charge of the business line “UCITS depositary bank” of the credit institution

6. In order for an institution to obtain the approval as UCITS depositary, the person(s) in charge of the business line UCITS “depositary bank” must be of the required good repute and have the required experience, notably with regard to the type of UCITS for which the credit institution intends to act as a depositary. To this end, the identity of the person(s) in charge of the business line UCITS “depositary bank”, as well as any person succeeding them in office must be communicated forthwith to the CSSF.

As far as the professional experience requirement is concerned, the person(s) in charge of the business line UCITS “depositary bank” must have an adequate professional experience gained by having already performed similar activities in the area of UCITS depositary activities or of a depositary of UCIs other than UCITS with investment policy characteristics similar to those of UCITS for which the person(s) intend(s) to act as person(s) in charge of the business line “depositary bank” with a high level of responsibility and autonomy.

Sub-chapter 2.2. Description of human and technical resources

7. The CSSF must receive a precise and detailed description of the organisation in terms of human and technical resources that the credit institution has in place to perform all the tasks linked to the UCITS depositary function. This description must take into account the type of UCITS for which the credit institution intends to act as a depositary, including in particular the investment policy the relevant UCITS contemplate pursuing.
8. The information elements to be provided to the CSSF within the context of a UCITS depositary approval file are set out in Annex 1 of this circular. 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.
9. The information elements to be provided must allow the CSSF to consider whether there are sufficient resources in Luxembourg in view of the legal and regulatory requirements applicable. The analysis of the information received shall focus on the operational model of the institution (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, outsourcing and control procedures to be put in place by the institution in these fields, in case where such a delegation or outsourcing is planned as from the moment the initial approval request to act as a UCITS depositary has been made. As regards the provisions

applicable to delegation and outsourcing, reference is made to points 11 to 16 of Sub-chapter 2.3. hereinafter.

10. Any UCITS depositary approval shall remain valid as long as the elements on the basis of which it was granted have not changed. Any credit institution acting as a UCITS depositary is required to apply for approval with the CSSF of any fundamental change of the elements underlying the initial UCITS depositary approval (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 provided to the CSSF according to the periodicity rules included therein.

#### Sub-chapter 2.3. Specific provisions applicable to delegation and outsourcing

11. Any credit institution acting as a UCITS depositary must comply with the provisions of this sub-chapter in case of delegation and outsourcing.
12. UCITS depositaries must ensure that the risk management policies and procedures and, where appropriate, the risk management function properly identify the risks associated with any delegation and outsourcing of a material activity. With regard to the risks which have been identified, the depositaries must also ensure that efficient arrangements, processes and mechanisms to manage and control these risks are in place.
13. Any delegation and outsourcing by the depositary must be documented by contract between the depositary and its delegate or service provider according to the principles set out in Sub-chapter 2.2. of Chapter 2 of Part III of the circular. Such contractual documentation must notably grant the CSSF a direct access right to the premises of any entity in charge of the outsourcing of a material activity.
14. As regards the delegation of the functions in relation to the safekeeping of the UCITS' assets, the rules under Articles 18a, 34a and 39 of the 2010 Law as well as Articles 15, 16 and 17 of the Delegated Regulation specify the conditions applicable to such delegation. It should be noted that these delegates must be included in a list of delegates which must be kept up-to-date and provided to the CSSF on an annual basis in accordance with point (f) of Annex 1 of this circular.
15. Any outsourcing by a depositary to external providers must comply with the principles set out in Sub-chapter 7.4. of Circular CSSF 12/552.
16. Any outsourcing of a material activity requires prior authorisation by the CSSF. A notification to the CSSF demonstrating compliance with the conditions applicable, notably under the 2010 Law, the Delegated Regulation and the principles set out in Sub-chapter 7.4 of Circular CSSF 12/552, 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.

Chapter 3. Contract for the appointment of a depositary (chapter I of the Delegated Regulation)

17. 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, the investment and/or the management company, are specified under Chapter 1 of the Delegated Regulation. Article 2.2. of the Delegated Regulation lists the elements that this contract must at least include.

One single depositary must be appointed for each UCITS in accordance with the provisions of Articles 17(1), 33(1) and 39 of the 2010 Law. For umbrella UCITS, one single depositary must be appointed for all the compartments of this umbrella UCITS.

With the entry into force of the contract for appointment of a depositary, the depositary shall be charged with the depositary function of the UCITS with which this contract has been concluded.

18. Any contract for the appointment of a depositary shall be subject to the general principle of contractual freedom, provided that the legal, regulatory and administrative provisions applicable are complied with. In accordance with Article 2.5. of the Delegated Regulation, 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 will be subject to the exclusive jurisdiction of the Luxembourg courts.

19. The depositary may, subject to specific contractual provisions, benefit from a general or specific right of pledge over the deposited assets of the UCITS. 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.

20. The 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.

21. 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 a UCITS or, where relevant, on behalf of each of the different compartments for an umbrella UCITS.

### **Part III. Details on governance and organisation**

Chapter 1. Conflicts of interest

22. Pursuant to Articles 20, 37 and 39 of the 2010 Law, the management company and/or the investment company and the UCITS depositary must act honestly, fairly, professionally, independently and solely in the interest of the UCITS and the unit-holders. These articles of the 2010 Law specify more particularly the independence requirements between the depositary and the management and/or the investment company. In this respect, it should be noted that the Delegated Regulation outlines these

independence requirements with respect to an operational independence, as opposed to a legal or structural independence.

23. The obligation for the depositary to act honestly, fairly, professionally, independently and solely in the interest of the UCITS and the unit-holders includes, in particular, the obligation for the activities of the UCITS depositary to be managed and organised in a way that minimises any potential conflicts of interest.
24. In order to avoid any conflicts of interest, no delegation or sub-delegation of the core investment management function may be accepted by the depositary.
25. 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, 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 the delegate and, in general, to 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.
26. Neither the depositary nor one of the delegates to which it has entrusted all or part of the assets of a given UCITS may accept a delegation of the risk management function from the UCITS or from its management company. The depositary or a delegate may, however, be entrusted with the performance of certain tasks linked to the risk management function.
27. Subject to compliance with the rules set out in Articles 20(2), 37(2) and 39 of the 2010 Law, a credit institution acting as UCITS depositary may, inter alia, act in the following capacities, provided that it benefits, where applicable, from the required authorisations:
  - a) agent for reception and transmission of orders relating to one or more financial instruments;
  - b) counterparty to the transactions conducted by UCITS in accordance with the provisions of Chapter 5 of the 2010 Law;
  - c) administration agent and/or registrar agent;
  - d) collateral agent;
  - e) collateral manager;
  - f) tax or reporting service provider.

As regards points (c) to (f) above, the depositary is (i) required to establish, implement and maintain an effective conflicts of interest policy, (ii) to establish a functional and hierarchical separation between the performance of its UCITS 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 institution must, where applicable, provide evidence of adequate management of any potential conflicts of interest. This evidence can notably 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 related to the depositary are provided

to the UCITS by the legal entity of the depositary or by entities linked to the depositary by common management or control.

28. In accordance with the principles of Circular CSSF 12/546, a credit institution can be a direct or indirect shareholder of a management company where it is acting as a depositary of UCI(TS) managed by this management company, or even to have a qualifying holding in such management company. Consequently, in the case of a qualifying holding, the management company 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 management company. By analogy, the credit institution, in such case, must also establish a procedure relating to the policy and the management of potential conflicts of interest.
29. The principle of independence of the depositary from a UCITS or the management company of this UCITS provided for in Circular CSSF 12/546, moreover, precludes a conducting officer (within the meaning of Articles 27(1) or 102(1) and Article 129(5) of the 2010 Law) of the UCITS or, where appropriate, the management company from being employed by the depositary.

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

30. The depositary must establish internal written procedures relating to the acceptance and implementation of a contract for the appointment of a UCITS depositary and must establish written procedures or contracts with the external persons with whom the depositary is called upon to work when performing each of its UCITS depositary mandates. “External persons” within the meaning of this chapter shall mean any persons with whom a depositary is called upon to work when performing its UCITS depositary functions (i.e. external persons that are not appointed by the depositary itself, such as, for example, the registrar agent of a UCITS 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 UCITS 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 must, however, cover the organisation of any relationship with third parties with which the depositary is called upon to work when providing UCITS depositary services. These internal procedures and written procedures or contracts with external persons must adequately cover all the aspects linked to the UCITS depositary function and take account of the specific features of the UCITS for which a credit institution 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 UCITS and/or its management company and the relevant external persons.
31. The internal audit or the internal control department of the depositary shall be 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

32. The internal procedures to be established by the depositary must notably:
- describe in general the types of UCITS (based on the legal nature, the investment strategy and policy of the UCITS) for which the credit institution may and is prepared to act as a UCITS depositary;
  - ensure the implementation of a prior control, through either proper procedures and/or an approval committee for the appointment as UCITS depositary aiming to ensure that, for any new appointment as UCITS depositary, the credit institution identifies and examines the specific features of each UCITS presented, in particular in terms

- of operational and legal risks. By way of this prior control, it must be assured that the credit institution accepts to knowingly act as a depositary, in particular, by taking into consideration the risk profile and the operational complexities of a given UCITS;
- indicate the person(s) in charge of the business line UCITS “depositary bank” ;
  - generally describe how the depositary will perform its function as UCITS depositary by taking into account the various types of UCITS based, in particular, on their investment policy (description of the general operational model) and the specific UCITS where the internal operational model for certain UCITS is different from the general operational model (description of the specific operational model for one or several UCITS);
  - generally describe the human and technical resources put in place for the performance of the UCITS depositary duties; and
  - document in detail the due diligence criteria applied by the institution.

#### Sub-chapter 2.2. Written procedures or contracts with external persons

33. In addition to the internal procedures, the UCITS depositary must also develop written procedures (with external persons that are not appointed by the depositary itself such as for example the registrar agent of a UCITS) 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 whom the depositary must work when performing its function as UCITS 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 UCITS and, as the case may be, with the registrar agent of the UCITS, 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 whom such a procedure or contract should be set up and the form and complexity of each of them.
34. The contracts and written procedures with the external persons to be set up by the depositary referred to in this Chapter 2 aim to document the operational process(es) between the depositary and third parties that have been formally appointed by the UCITS, 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 UCITS to enter into a contract with the service providers that have been appointed by the UCITS.

Chapter 3.            Organisational arrangements to be established with respect to the assets of a UCITS

Sub-chapter 3.1.        Details on the general aspects of the organisational arrangements originating from the 2010 Law and the Delegated Regulation

35. The 2010 Law and the Delegated Regulation include important arrangements regarding the depositary's functions and, in particular, the organisational measures to be established by the depositary in relation to the assets of a UCITS. These arrangements focus on (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 (including the sub-category of cash), 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 2010 Law and the Delegated Regulation define the organisational measures to be put in place, in particular, as regards the rules of account maintenance and record keeping (Articles 13, 16 and 17 of the Delegated Regulation), the rules governing segregation at the different levels of a custody chain (Articles 13, 16 and 17 of the Delegated Regulation), rules regarding the delegation of tasks linked to these assets by the depositary (Articles 18a, 34a and 39 of the 2010 Law and Articles 15 and 16 of the Delegated Regulation) and rules governing cash monitoring (Articles 9 to 11 of the Delegated Regulation). These provisions are combined with an amended liability regime of the depositary that depends on the category of assets (Articles 19, 35 and 39 of the 2010 Law and Chapter 3 of the Delegated Regulation), with an obligation of principle to return lost financial instruments to be held in custody to the UCITS and to unit-holders and with a more general liability regime based on the negligence or intentional failure to properly fulfil its other obligations under the 2010 Law.
36. It is acknowledged that the depositary uses the records and accounts opened in its books for each UCITS or each of the compartments of an umbrella UCITS, the records and accounts opened in the accounting books of the UCITS 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 UCITS 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 UCITS or each of the compartments of the UCITS for umbrella UCITS. 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. According to the provisions of Articles 18(5), 34(4) and 39 of 2010 Law, the depositary must provide the management company or the investment company with a comprehensive inventory of all the assets of the UCITS, on a regular basis. The provision of a comprehensive inventory/statement of all the asset positions of the UCITS or, where relevant, of each of the compartments of an umbrella UCITS in which the UCITS is invested, is compulsory at the closing date of a financial year of a UCITS with a view to the audit

of the annual accounts to be published by each UCITS.

37. The comprehensive inventory/statement of all the asset positions of the UCITS must indicate any guarantee or security belonging to the UCITS or a given compartment of an umbrella UCITS.

#### Sub-chapter 3.2. Safekeeping of assets

38. The 2016 Law and the Delegated Regulation have also amended the depositary regime by introducing a new 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 (Articles 18(4)(a), 34(3)(a) and 39 of the 2010 Law), as the requirement of record-keeping and ownership verification for the other assets (Articles 18(4)(b), 34(3)(b) and 39 of the 2010 Law) and as the duties of cash flow monitoring (Articles 18(3), 34(2) and 39 of the 2010 Law). The Delegated Regulation specifies the organisational arrangements applying to the monitoring of cash flows in Articles 9 and 10, Article 13 on the safekeeping duties with regard to financial instruments to be held in custody and in Article 14 on the safekeeping duties regarding the ownership verification and record-keeping of the other assets.
39. As regards the assets which the depositary itself holds in custody, the depositary shall open in its books, in the name of the UCITS or, where appropriate, of each of the compartments of an umbrella UCITS, one or several accounts within which all the assets owned by the UCITS, which it holds in custody, must be registered in the books of the depositary.
40. The credit institution acting as a depositary is also required to comply with the rules provided for in Article 37-1(7) of the 1993 Law as well as the implementing measures contained in Articles 18 and 19 of Grand-ducal Regulation of 13 July 2007 relating to organisational requirements and rules of conduct in the financial sector. 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 a UCITS with the depositary, the depositary and the UCITS may have recourse to a fiduciary agreement entered into between the depositary and the UCITS.

#### Sub-chapter 3.3. Organisational arrangements to be established with respect to the assets whose safekeeping is ensured by a delegate at the primary level below the depositary

41. In the context of the depositary regime introduced by the 2016 Law and the Delegated Regulation, the use by the depositary of delegates technically qualifies as a delegation of asset safekeeping (Articles 18a, 34a and 39 of the 2010 Law) according to the categorisation of assets established by these texts and the Delegated Regulation. It should be borne in mind that, according to the provisions of Articles 18a(2), 34a(2) and 39 of the 2010 Law, the depositary must demonstrate that there is an objective reason

for the delegation.

42. In the case of a safekeeping delegation, the depositary must, in particular, ensure that an appropriate documented due diligence procedure is implemented and applied in accordance with the provisions of Articles 18a(2), 34a(2) and 39 of the 2010 Law and Article 15 of the Delegated Regulation.
43. 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 shall be responsible for ensuring that this procedure exists, is updated on an ongoing basis and effectively applied.
44. The organisational measures applicable 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.
45. As far as the structuring of accounts with the delegates is concerned, any account opened with a delegate may take the form of a common segregated account or omnibus account, it being understood that separate omnibus accounts must be opened or maintained by the delegates for the assets belonging to the depositary's clients subject to collective management (i.e. UCITS and other UCIs subject to the 2010 Law, the 2004 Law and the 2007 Law). Thus, omnibus accounts opened with a delegate for one or several clients of the depositary subject to collective management cannot be used either for the assets of the other clients of the depositary which are not subject to collective management or for the own assets belonging to the depositary itself.
46. In the case where laws, regulations or administrative measures applicable to an investment market provide otherwise and require that the accounts be opened otherwise than according to the rules above, the accounts may be opened in accordance with the requirements of this investment market insofar as these rules are not contrary to the provisions of the 2010 Law and the Delegated Regulation. The depositary must then take all the required and necessary measures insofar as the rules of the investment market in question so allow in order to ensure an effective control over the assets in question and to ensure, to the extent possible, that the assets belonging to the depositary's UCITS clients are protected from any insolvency of the entity with which the assets are held in custody.

Sub-chapter 3.4.      Organisational arrangements to be put in place at the depositary level as regards entities downstream of delegates in the custody chain of an asset

47. By analogy with the qualification of the use by the depositary of delegates as a delegation of asset safekeeping (Articles 18a, 34a and 39 of the 2010 Law), the regime

put in place by the 2016 Law and the Delegated Regulation as regards the use of entities downstream of delegates shall qualify as sub-delegation of asset custody (Articles 18(4), 34(3) and 39 of the 2010 Law and Articles 15.4., 16.2. and 17.4. of the Delegated Regulation). As in relation to delegation, any sub-delegation must be justified by an objective reason.

48. 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.
49. The accounts opened or maintained with entities downstream of the delegates in the custody chain of an asset may take the form of omnibus accounts. These omnibus accounts do not need to be either segregated omnibus accounts specific to UCITS clients of the depositary (or clients of the depositary whose assets are subject to collective management) or segregated omnibus accounts specific to the depositary.
50. The depositary must, vis-à-vis each delegate, benefit from the rights to access the information provided for in Chapter 4. below, in order to ensure that it may exercise its obligations in relation to the assets of a UCITS. The UCITS shall be 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 UCITS or a compartment of a UCITS. The existence and the means by which the depositary may exercise its rights must be duly documented.

Sub-chapter 3.5.      Organisational arrangements to be put in place regarding the assets of the UCITS which are not held in custody

51. Based on the provisions of Articles 18(5), 34(4) and 39 of the 2010 Law, the depositary must, at all times, have a comprehensive overview of all the assets of a UCITS, including of the other assets also comprising the entire liquidity. These other assets shall be subject to an obligation to verify their ownership and to maintain a record, notably in view of the drawing-up of a comprehensive inventory/statement of all the asset positions mentioned under points 36 to 37. To reach a sufficient degree of certainty that a UCITS is indeed the owner of such an asset, the depositary must ensure that it receives all the information it deems necessary to make sure the UCITS is the owner of this asset. Where necessary, the depositary must require that the UCITS or, where relevant, a third party provides it with additional evidence elements.

Sub-chapter 3.6.      Due diligence duties in relation to an investment in a target UCI(TS) in which a given UCITS may invest

52. In respect of the due diligence duties as regards an investment in a target UCI(TS) in which a given UCITS may invest, account should be taken of how a UCITS is investing in a target UCI(TS), i.e. how the investment with the issuer or its agent, for example a registrar or transfer agent is recorded (cf. Sub-chapter 6.3.).

In line with this principle, the depositary is required to employ the required diligence

based on the criteria of Article 15 of the Delegated Regulation where the investment in a target UCI(TS) is made through a specialised intermediary (other than the registrar of the target UCI(TS)) with whom the investments in one or several target UCI(TS) are held in an account on behalf of a UCITS.

In the cases where the investment in a target UCI(TS) is made directly with the target UCI(TS) or one of its agents, for example, the registrar agent or the transfer agent of this target UCI(TS), such an investment of the UCITS in the target UCI(TS) does not give rise to specific due diligence duties for the depositary.

#### Sub-chapter 3.7. Booking and proper monitoring of financial flows

53. The depositary is required to ensure proper monitoring of booking and cash flows according to the provisions of Articles 18(3), 34(2) and 39 of the 2010 Law and Articles 9 to 11 of the Delegated Regulation.
54. Where the depositary holds cash belonging to UCITS clients, the depositary must make appropriate arrangements in order to preserve the rights of its UCITS clients. The credit institution acting as depositary must, in this case, comply with the rules provided for in Article 37-1(8) of the 1993 Law as well as the implementing measures included in Article 18 of Grand-ducal Regulation of 13 July 2007 relating to organisational requirements and rules of conduct in the financial sector.
55. As regards the cash deposit of a UCITS with a depositary or with a third party, the depositary, the UCITS and/or, where relevant, the third party may have recourse to a fiduciary agreement between them.
56. The accounts opened in relation to the execution of issues (and redemptions) of units, in which the amounts receivable (or payable) by the UCITS are or will be outstanding for payment to the UCITS or, where appropriate, to the unit-holders (collection accounts), must be opened with the entities as provided for in Articles 18(3)(b), 34(2)(b) and 39 of the 2010 Law.

#### Chapter 4. Right of access to information

57. The depositary must, at all times, have a right of access, at the earliest opportunity, to all relevant information the depositary needs to fulfil its legal obligations. The right of access to the information must 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, 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 UCI(TS) held with its registrar or transfer agent or assets of a UCITS which are, for all or part, held in custody by the entity acting as a broker or as regards the contracts of derivative financial instruments).
58. As regards guarantees and securities, this right of access to information must also exist

towards any entity with which the collateral provided to the UCITS lies, such as for example any collateral agent (e.g. during a transfer of ownership as collateral to the UCITS in the books of a collateral manager acting as a collateral agent, towards this collateral manager).

59. As regards more particularly the duties of safekeeping of the other assets, it should be reminded 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 have been delegated has been informed thereof.

Chapter 5. Escalation procedure between the depositary and the UCITS and/or its management company (Articles 3.3. and 14.4. of the Delegated Regulation)

60. According to Articles 3.3., 6(b) and 14.4. of the Delegated Regulation, the depositary must set up and implement one or several escalation procedures to be followed by the depositary in the event of the detection of any possible discrepancy or irregularity, which notably includes, without prejudice to the obligations applicable to the UCITS and/or its management company, the notification of the situation to the UCITS and/or its management company and to the competent authorities if the situation cannot be remedied.
61. 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 UCITS and/or its management company regarding the levels to be complied with by the UCITS and/or its management company 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.
62. The escalation procedure(s) as regards the depositary's intervention with the UCITS must identify the persons working for the UCITS that the depositary must contact when it launches such procedure and provide for an obligation for the UCITS 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 UCITS. This or these procedure(s) must also provide that the depositary must inform the CSSF in the case where the UCITS 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 UCITS 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).
63. Any notification by or to the UCITS must be made by or to the management company for the UCITS constituted under the law of contract (common funds). For UCITS established in corporate form (investment companies) having designated a management company, notifications to the UCITS must be made to the management company 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 UCITS or by its management company, as the case may be.

Chapter 6. Specific organisational arrangements at the level of the depositary depending on the investment policy of the UCITS or the techniques used by the UCITS

64. This chapter provides clarification on certain specific situations occurring where a UCITS pursues an investment policy requiring the implementation of specific organisational arrangements at the level of the depositary in order to ensure, at any time, the protection of the interests of the unit-holders of the UCITS.

Sub-chapter 6.1. Specific organisational arrangements regarding the guarantees and securities, including in the case of recourse to a collateral agent

65. Insofar as a UCITS 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 either 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 in favour of the UCITS is owned by the UCITS.

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

67. When assessing whether or not the collateral provided to a third party or by a third party in favour of the UCITS is owned by the UCITS, 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 UCITS must ensure that the depositary receives all the information necessary in this respect.

68. Where a UCITS enters into transactions on OTC financial derivatives and uses efficient management techniques, it is necessary to take into account the ESMA guidelines on ETFs and other UCITS issues, as implemented in the Luxembourg framework by Circular CSSF 14/592 as regards collateral received by a UCITS within the context of these transactions or efficient portfolio management techniques and aiming to reduce the counterparty risk as well as Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse.

69. Without prejudice to the liability of the UCITS in this respect, where guarantees or securities are implemented in favour of the UCITS (whether in the form of a transfer of ownership or collateral), the depositary is required<sup>3</sup>:
- a) within the context of securities lending transactions, to ensure that the securities to be received by the UCITS are received previously to or simultaneously with the transfer of the securities lent and that, at the end of the lending contract, the security will be remitted simultaneously with or subsequently to the restitution of the securities lent and that the level of securities is adequate throughout the securities lending transaction;
  - b) to verify whether the securities to be received comply with the legal and regulatory provisions in force by taking into account, in particular, the rules laid down in Circular CSSF 14/592.
70. In the case where the guarantees and securities transferred by the UCITS or delivered to the UCITS 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, in particular, by Circular CSSF 14/592, a tripartite agreement between the UCITS, this collateral manager or collateral agent as well as the depositary shall be put in place. In such case, the entity in charge of the management and administration of the guarantees and securities which the UCITS 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 57 to 59 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, as regards 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 a UCITS, 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 UCITS which, in the context of the services provided to the UCITS, is entrusted with the safekeeping of the assets of this UCITS.

Sub-chapter 6.2.      Organisational arrangements in case of investment of a UCITS in financial derivative instruments (financial derivative instruments dealt in on a regulated market or OTC financial derivatives)

71. In the case where a UCITS invests in financial derivative instruments, the UCITS must

---

<sup>3</sup> Cf. Circular CSSF 08/356: Rules applicable to undertakings for collective investment when they employ certain techniques and instruments relating to transferable securities and money market instruments.

ensure that the depositary can comply with the following aspects in relation to 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:

- a) being aware of all the UCITS' 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 UCITS with its administrative agent, and may rely on the reconciliations it performs or statements of accounts issued by third parties as specified in point 36 of this circular (subject to the conditions set out therein);
- b) following, on a day-to-day basis, the exposures in relation to the initial margin deposits made by the UCITS 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.

#### Sub-chapter 6.3.      Organisational arrangements applicable to investments by a UCITS in target UCI(TS)

- 72. In respect of the due diligence duties towards target UCI(TS) in which a UCITS is invested, reference is made to point 52 of this circular.
- 73. As regards more specifically the record-keeping of investments of a UCITS in target UCI(TS), it is accepted that this investment with the target UCI(TS) or an agent thereof can be recorded directly in the name of the investing UCITS insofar as the national law of the target UCI(TS) does not require a different record-keeping. The investment of the UCITS in the target UCI(TS) can also be recorded 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 UCITS or even in the name of the relevant compartment in the case of an umbrella UCITS or solely in the name of the investing UCITS or a compartment thereof in the case of an umbrella UCITS. This last option is only available where the national law of the target UCI(TS) so allows or requires. In the latter case, procedures must be put in place with the target UCI(TS) or its agent in order to ensure that the positions opened in the name of the investing UCITS can be assigned, transferred, exchanged or delivered only if the depositary has been informed thereof beforehand and that the depositary has access to the documents proving each transaction and each position, at the earliest

opportunity. The provisions included in this point shall also apply to UCITS qualifying as funds of funds or feeder funds in master-feeder structures.

#### Chapter 7. Organisational arrangements as regards reconciliation

74. The depositary of the UCITS is responsible for developing procedures covering all reconciliations and reconciliation methods (including the reconciliations used by the depositaries that are performed by third parties) to be implemented by the depositary in accordance with the provisions of Articles 3.2, 10, 13.1(c) and 16.1(c)) of the Delegated Regulation in order to fulfil its obligations as regards the assets of a UCITS to apply these procedures effectively and to review these procedures 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 to resolve reconciliation differences within a reasonable period.
75. The internal audit or the internal control department of the depositary is responsible for verifying the existence, the periodic update and the effective application of these reconciliation procedures and for ensuring resolution of any reconciliation difference that has been identified within a reasonable period.
76. In these reconciliation procedures, particular attention must be given to the following aspects:
  - a) the procedures to be put in place must cover all the assets and transactions in relation to the assets of the UCITS;
  - b) on the basis of the provisions of Articles 18(5), 34(4) and 39 of the 2010 Law, the depositary is required to provide a comprehensive inventory/statement of all the asset positions of a UCITS (or, where relevant, of each compartment of an umbrella UCITS) in which the UCITS 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 a comprehensive inventory/statement of all the positions of assets of a UCITS is provided.

#### Chapter 8. Duty to establish a contingency plan

77. 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 UCITS clients, any depositary must put in place a contingency plan.
78. The depositary must devise a contingency plan for each market in which the depositary appoints a third party to which safekeeping functions shall be delegated in accordance with the rules laid down in Article 15.5. of the Delegated Regulation.

## **Part IV. Specific duties of the depositary**

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

79. The depositary shall accomplish all the operations in relation to the day-to-day administration of the UCITS' assets held in its custody.
80. 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 UCITS.
81. 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, entrust the execution thereof to the delegates with whom the assets are actually deposited. In such cases and in order to comply with its duty of oversight regarding the UCITS' 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 delegates as part of the day-to-day administration of the assets deposited with them.

### Chapter 2. Oversight and control functions

82. The depositary shall perform the oversight and control functions pursuant to Articles 18(2), 34(1) and 39 of the 2010 Law and Articles 3 to 8 of the Delegated Regulation. The amendments provided by the 2016 Law and the Delegated Regulation are relatively limited, and mainly cluster around the five types of oversight duties to be fulfilled in relation to all the UCITS, regardless of their legal structure, and include clarifications provided in the Delegated Regulation on the tasks to be accomplished by the depositary in order 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.

## **Part V. Information duties of the depositary applicable to the UCITS**

83. In accordance with Articles 3.4, 9.3 and 14.1 of the Delegated Regulation, the UCITS shall 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 UCITS.
84. Where the home Member State of the UCITS management company is not the Grand Duchy of Luxembourg, the depositary must sign a written agreement with said management company 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.

85. 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 applicable to the depositary vis-à-vis the UCITS**

86. In order to ensure that any UCITS is informed of any element affecting the assets of a UCITS which are known or come to the knowledge of the depositary in the course of its functions, the depositary must ensure that the UCITS or, where relevant, its management company is informed of any element relating to the assets of the UCITS, at the earliest opportunity, insofar as the depositary has been informed thereof, and in particular as regards any event affecting the assets' life.
87. The information duties applicable to the depositary vis-à-vis the UCITS are to be seen in connection with the duties applicable under the escalation procedure in accordance with Chapter 5. of Part III. of this circular.

#### **Part VII. Information duties of the depositary vis-à-vis authorities**

88. 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 UCITS for which the credit institution acts as depositary.
89. If the CSSF is not the authority competent for the supervision of the UCITS management company, it provides the information received to the respective competent authorities.
90. In the context of the escalation procedure to be put in place based on Chapter 5. of Part III. of this circular, the depositary may have to notify the CSSF of any event identified/notified by the depositary to the UCITS as part of the escalation procedure where the UCITS 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 a UCITS**

91. In the case where a contract for the appointment of a depositary is terminated during the existence of a UCITS 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 UCITS are subject to an adequate safeguarding, depending on the nature of these assets, in the interest of the UCITS and its unit-holders (asset safeguarding measures). These safeguarding

measures are, in general, necessary in case of liquidation of a UCITS and/or in case the appointed depositary is lacking. Each UCITS is required to inform the CSSF of all the cases where asset safeguarding measures of a UCITS must be put in place.

92. With respect to the function of asset safeguarding of a UCITS in liquidation or without a depositary, the credit institution 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 UCITS which are held in custody with this institution when the UCITS is deregistered or withdrawn up to the appointment of a new depositary or up to the closing of the liquidation of the UCITS.

### **Entry into force and various provisions**

93. This circular enters into force with effect from 13 October 2016.
94. Circular CSSF 14/587, as amended by Circular CSSF 15/608, shall be repealed and replaced by this circular with effect at the date mentioned in point 93.
95. Chapter E (“Rules concerning the depositary of a Luxembourg UCI”) of Circular IML 91/75 of 21 January 1991 is no longer applicable to UCITS.

Yours faithfully,

COMMISSION DE SURVEILLANCE DU SECTEUR FINANCIER

Jean-Pierre FABER  
Director

Françoise KAUTHEN  
Director

Claude SIMON  
Director

Simone DELCOURT  
Director

Claude MARX  
Director General

**Annexe 1<sup>4</sup>. List of information on UCITS depositary functions to be kept updated and to be provided to the CSSF on a periodic, ad hoc or annual basis<sup>5</sup> (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 main 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

---

<sup>4</sup> Circular CSSF 18/697

<sup>5</sup> The annual information is to be provided at the latest two months after the closing of the financial statements of the depositary.

that must be covered pursuant to the applicable legislation according to the type of fund concerned;

- 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).