

## AMF Instruction

### Authorisation procedure for investment firms acting as a UCITS depository – Review procedure for the performance specifications of other UCITS and AIF depositories<sup>1</sup>– DOC-2016–01

Reference texts: L. 214-10-1 of the Monetary and Financial Code, articles 323-1-A to 323-41 of the AMF General Regulation

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#### UCITS Depositories:

In accordance with Article L. 214-10-1 of the Monetary and Financial Code:

“1. – Only the following may carry out UCITS depository activities:

- 1) The Banque de France;
- 2) The Caisse des Dépôts et Consignations;
- 3) Credit institutions with their registered offices in France;
- 4) Credit institutions with their registered offices in a Member State of the European Union or party to the European Economic Area agreement other than France, via a branch located on French soil, performing a depository activity under the same conditions as the credit institutions cited in Point 3;
- 5) Investment firms with their registered offices in France, whose capital exceeds the threshold calculated using an approach chosen in accordance with Article 315 or Article 317 of EU Regulation no. 575/2013 of the European Parliament and of the Council of 26 June 2013.

To operate as a UCITS depository, the entities cited in Points 3 to 5 above must be authorised to carry out securities administration or custody account keeping activities in accordance with Article L. 542-1.”

<sup>1</sup> Except the Banque de France and the Caisse des Dépôts et Consignations.

## AIF Depositories:

In accordance with the provisions of the Decree of 6 September 1989, amended by the Decree of 25 July 2013<sup>2</sup>:

“II. — AIF depositories may include:

- The Banque de France;
- The Caisse des Dépôts et Consignations;
- credit institutions;
- investment firms authorised to exercise custody account keeping activities;
- insurance companies and capitalisation undertakings governed by the Insurance Code;
- branches established on French territory of credit institutions that have their registered office in the European Union and are authorised as depositories in their home State and pursuant to Directive 2006/48/ EC of the European Parliament and the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions;
- branches established on French territory of investment firms that have their registered office in a European Union Member State and are authorised as depositories in that State and are subject to the capital requirements under the terms of Article 20, Paragraph 1 of Directive 2006/49/EC of the European Parliament and the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions, including capital requirements related to operating risk and which also provide ancillary safekeeping and administration of financial instruments services for the account of clients in accordance with Annex 1, Section B, Point 1 of Directive 2004/39/EC. In all cases, such investment firms must have capital of an amount of at least the level of initial capital referred to in Article 9 of Directive 2006/49/EC. »

This instruction applies to UCITS and AIF depositories governed respectively by Chapters III and IIIA of Title II of Book III of the AMF General Regulation<sup>3</sup>:

- Chapter I of this instruction details the authorisation process for investment firms acting as UCITS depositories;
- Chapter II describes the submission process for the performance specifications of credit institutions and branches of credit institutions acting as UCITS and AIF depositories, investment firms and branches of investment firms acting as AIF depositories, and the AMF's process for approving the performance specifications of UCITS depositories;
- Chapter III specifies the content of the programme of activity / performance specifications.

Open-ended investment companies (SICAV) and management companies acting on behalf of a UCITS that they manage, which prior to 18 March 2016 appointed as depository a firm that fails to meet the requirements of Article L. 2014-10-1 of the Monetary and Financial Code as worded following the order transposing Directive 2014/91/EU of 23 July 2014 (so-called UCITS V Directive, which changed the legal framework governing asset management), must appoint a depository that meets those requirements before 18 March 2018.

Thus, for UCITS in existence as of 18 March 2016, depositories are granted a transitional period to bring themselves into compliance with the new eligibility requirements for exercising a depository function. This transitional period does not apply to new UCITS created after 18 March 2016, which from that date must appoint a depository that meets the new eligibility requirements.

<sup>2</sup> This version of the decree is to be amended to remove the list of entities eligible to perform a UCITS depository activity and to remove the entities covered by the Insurance Code because they are not included in the list appearing in Article L. 542-1 which cites the persons authorised to use a custody account keeper.

<sup>3</sup> This does not include the securitisation vehicles acting as a depository discussed in Chapter IIIB of the AMF General Regulation.

## **Chapter I – Authorisation procedure for UCITS depositories**

This chapter applies solely to investment firms wanting to act as a UCITS depository.

In order to approve an investment firm's programme of activity in respect of its depository activity, the AMF must verify that the firm meets the conditions set out in Article L. 2014-10-1 of the Monetary and Financial Code and Article 323-1-A of the AMF General Regulation, and clarified in this instruction.

### **Article 1 – Application for an initial request or an extension of the programme of activity**

All investment firms that have their registered office in France and want to operate as a UCITS depository must file an application with the ACPR requesting authorisation to exercise the function of UCITS depository.

In order to authorise the request, the ACPR must verify that the investment firm's programme of activity has been approved by the AMF, that its capital meets the requirements calculated according to an approach that complies with Article 315 or Article 317 of Regulation 575/2013/EU of the European Parliament and of the Council of 26 June 2013, and that the firm is certified to perform securities administration or custody account keeping activities.

The ACPR cannot grant its authorisation unless the AMF has approved the programme of depository activity attached to the application form.

Within five business days of the application's submission, in accordance with the provisions of Article R. 532-3 of the Monetary and Financial Code, the ACPR shall provide a copy of the programme to the AMF.

To expedite their review of the application, the ACPR and AMF may ask the applicant to send them an electronic version of the application.

### **Article 2 - AMF review of the application**

When reviewing the application, the AMF may contact the applicant directly to request any additional information it needs to conduct its review.

The AMF may need to suspend its review period, as specified below, if the application lacks any of the items it needs to conduct its review. The applicant may send in the missing items electronically or by post, making sure to provide the application's reference numbers. If the AMF does not receive the requested items within 60 days of the date the additional information was requested, the application shall become void, and the AMF will inform the ACPR and the applicant of this fact.

The programme of activity is part of the application, so any material changes made to it must follow the same procedure as the one described above with respect to the authorisation itself.

### **Article 3 - Announcement of the AMF's decision**

Within three months of receiving the application, in accordance with the provisions of Article R. 532-5 of the Monetary and Financial Code, the AMF will notify the applicant of its decision to approve or reject the programme of activity (and any material changes) by registered letter with return receipt or hand-delivery with receipt, and will inform the ACPR of its decision.

## **Chapter II - Procedure for submitting performance specifications to the AMF, and for the AMF review and approval of the document**

This chapter applies to:

- UCITS depositories with the status of credit institution or branch of a credit institution, as stipulated in Article L. 214-10-1, Paragraph I, Points 3 and 4 of the Monetary and Financial Code;
- AIF depositories.

In application of the following regulations:

For UCITS: Article L. 2014-10-1 of the Monetary and Financial Code and Article 323-6 of the AMF General Regulation.

For AIFs: Article 323-26 of the AMF General Regulation.

### **Article 4 – Submission of performance specifications by UCITS and AIF depositories**

UCITS and AIF depositories must submit their performance specifications to the ACPR, which forwards them to the AMF.

The specifications must be updated and sent to the AMF each time a material change is made by the UCITS and AIF depositories, in accordance with Articles 323-6 and 323-26 of the AMF General Regulation.

### **Article 5 - AMF review of the request to approve performance specifications for a UCITS depository activity<sup>4</sup>**

Entities cited in Article 214-10-1, Paragraph I, Points 3 and 4 of the Monetary and Financial Code wishing to exercise a UCITS depository function must first obtain AMF authorisation of their performance specifications.

When reviewing the performance specifications, the AMF may contact the applicant directly to request any additional information it needs to conduct its review.

The AMF may need to suspend its review period, as specified below, if the specifications lack any of the items it needs to conduct its review. The applicant may send in the missing items electronically or by post, making sure to provide the case reference numbers.

If the AMF does not receive the requested items within 60 days, the request shall become void, and the AMF will inform the applicant of this fact.

Any material changes to the performance specifications must follow the same procedure as the one described above with respect to the authorisation itself.

### **Article 6 - Announcement of the decision regarding performance specifications for a UCITS depository activity<sup>5</sup>**

Within three months of receiving the application, the AMF will notify the applicant of its decision to approve or reject the performance specifications (and any material changes) by registered letter with return receipt or hand-delivery with receipt. It will also inform the ACPR of its decision.

## **Chapter III – Content of the programme of activity / performance specifications**

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<sup>4</sup> This article applies to the entities cited in Article L.214-10-1, Paragraph I, Points 3 and 4 of the Monetary and Financial Code.

<sup>5</sup> This article applies to the entities cited in Article L.214-10-1, Paragraph I, Points 3 and 4 of the Monetary and Financial Code.

The content of the programme of activity and performance specifications is specific to each depository and incorporates all of the sections described below, in accordance with Article L. 214-10-1 of the Monetary and Financial Code and Book III of the AMF General Regulation.

#### **Article 7 - Organisation of the activity**

The performance specifications / programme of activity shall cover the scope of the activity that the depository intends to exercise, any related controls, and the mechanisms and resources devoted in France to complying with the rules for organisation and good conduct.

Information software and tools shall be summarised in the document supplied to the AMF, with distinctions specifying the framework for their usage. The methods used to develop, monitor and validate the configuration of these IT tools allow the depository to verify that the tools it is using are robust, relevant, and operating correctly. Monitoring and control tools shall be configured and validated jointly with an individual or service provider who has appropriate experience.

The service provider shall also disclose if it plans to outsource any of its tasks to third parties. If it does, it must describe the selection process and tell how frequently it reviews the third party providers it has selected both in France and abroad (see below).

In addition, any entity wishing to exercise a depository activity for the first time must specify:

- the activity that it wants to develop, including the specific types and numbers of UCITS and AIFs, the investment strategies of the client management companies, and the markets on which it will be trading (as a function of the activity of its clients);
- the human resources to be allocated, the expected flow of funds, and the corresponding costs, i.e. a business plan for the next three years, with the financial assumptions explicitly stated. The performance specifications / programme of activity must clearly define the terms and conditions for receiving and paying compensation related to the depository activity. The applicant must show a diagram of the relationships between the various participants involved in carrying out this activity and the corresponding flows of compensation.

#### **Article 8 - Human resources**

The depository shall have sufficient human resources located in France that are suited to performing its depository activity. These resources must be disclosed in the document supplied to the AMF.

The performance specifications / programme of activity must include an organisational chart showing the individual in charge of the depository activity, the heads of the various departments involved in the depository activity, and the management structure of the depository.

The performance specifications / programme of activity must also indicate the staff located in France and assigned to this activity (depending upon the size of the service provider, the application may include the identities of all employees), as well as how much time they actually spend in France. It would be helpful to include a detailed description of the roles assigned to individuals performing other functions within the group or in other companies. In this case, a separate note detailing the management of conflicts of interest must be attached to the file.

The application must include the *curriculum vitae* of the senior managers, members of governing bodies and the head of the depository function. These annexes must contain enough detail for AMF staff to gauge the individuals' level of knowledge, skill and experience.

The level of experience of the managers and the head of the depository function must be suited to the UCITS or AIFs, the strategies pursued by the client management companies, and the financial instruments used.

The performance specifications / programme of activity must include a description of the governance structure and the composition of the governing and supervisory bodies.

If the depository is part of a group and one of the senior managers wishes to split his or her time with another company in the group, the depository must take specific measures to ensure that there is a permanent management presence and to prevent any risk of conflict of interest. These measures must be described in the application. In this respect, the AMF considers that a senior manager who spends less than 20% of his or her working hours at the depository does not constitute an effective managerial function.

The AMF may also request information on how personnel assigned to the depository function are compensated. This information may include details of the service provider's profit-sharing scheme or variable compensation linked to individual or collective performances (with a description of how the variable portion is calculated, if applicable).

#### **Article 9 - Shareholders**

The performance specifications / programme of activity shall include information on the applicant's shareholder structure. The information required covers both direct and indirect shareholders, as well as the percentage ownership of each shareholder.

#### **Article 10 - Establishing a relationship with and monitoring UCITS and AIFs, and their management companies**

The depository shall set up a sufficient and appropriate system for collecting all information on UCITS or AIFs – and their management companies – necessary for the exercise of its depository activity, and describe the system in its performance specifications / programme of activity.

The system shall include a mechanism for monitoring UCITS and AIFs (through the winding up or liquidation of the fund) and their management companies for the duration of the relationship. This mechanism must take into account the minimal level of information to be supplied to the management company in the context of the relationship.

#### **Article 11 - Asset custody and data safekeeping**

The depository shall keep records (notably phone records) of all services it provides, of all activities it carries out and all trades it makes. It must describe the methods used for asset custody, and when custodianship is not possible, the methods used to record and verify asset ownership.

The depository shall set up a robust custody and safekeeping mechanism, and shall maintain a system of accounting (notably employing double-entry accounting) endowed with technical and human resources located in France in order to trace and back-up all of the data necessary for the exercise of a depository activity. This shall also include a business continuity plan for its operations in France so that the depository can carry out its depository activity in the event of an emergency. This should include sufficient and appropriate back-up equipment and schedules, alternate locations, and systems for warning or communicating with affected parties.

The depository must confirm that it applies French securities law.

#### **Article 12 - Monitoring fund flows and omnibus accounts**

The depository shall have effective and suitable methods for monitoring the fund flows of the UCITS or AIFs for which it is responsible, notably the process for opening accounts in the name of the UCITS or AIF, or in the name of the management company; the process for opening omnibus accounts; the persons authorised to make transfers involving those accounts; and the tools used.

### Article 13 - Third-party agreements

The depository shall supply, in addition to the description of planned activities, descriptions of any planned agreements with third parties in respect of the depository activity. The details of these agreements must include the depository's responsibilities vis-à-vis each third party, and any information or reporting received from or sent to the third party.

Agreements to provide services or to make available the group's resources shall be analysed in light of the principle of autonomy and the rules governing potential conflicts of interest.

### Article 14 - Control by the depository

The depository shall set up, in France, an effective control mechanism for UCITS or AIF activities and describe it in its performance specifications / programme of activity. It must include the human resources located in France and assigned to the activity, as well as the monitoring and control of the activity and the entities to which it outsources certain aspects of its depository remit. The organisation and methods must respect Article L. 214-10-1 of the Monetary and Financial Code and the provisions of the AMF General Regulation.

The functional reporting line must be specified, as well as the amount of time that the person(s) in charge of the various levels of control actually spend in France and the frequency of the controls, with distinctions made for:

- the controls central to the depository's mission, notably those cited in Articles L. 214-10-5 and L. 214-24-8 of the Monetary and Financial Code: trades of units or shares in UCITS or AIFs; calculation of the value of those units or shares; instructions executed at the request of the UCITS or AIF or the management company; compliance with legal and regulatory provisions and the provisions included in the instruments of incorporation and prospectus of the UCITS or AIF;
- if applicable, controls of entities to which tasks are delegated. The depository must implement effective controls and document them, specifying their frequency, in the performance specifications / programme of activity. These controls may take the form of documentary audits (using documentation collected from the entities to which tasks are delegated) or on-site inspections (at the entities' premises). The depository must also have effective traceability and reporting systems, which must be described in the performance specifications / programme of activity.

It is also necessary to specify the information transmitted to the depository's senior managers and the mechanism for alerting management and responding to malfunctions. The depository shall keep a record of documents that show that it has performed due diligence with respect to controls and, if applicable, the steps it took once an anomaly was discovered.

The depository shall implement appropriate and sufficient mechanisms, procedures and policies to ensure that it fulfils its obligations as a depository, and shall describe them in the document supplied to the AMF. These include:

- Oversight procedures appropriate to the UCITS or AIF and the assets in which it invests (those procedures shall be regularly updated).
- A clear and comprehensive escalation procedure to deal with situations where potential discrepancies are detected in the course of its oversight duties.
- A procedure to verify on a regular basis that there is consistency between the total number of units in the UCITS' or AIF accounts and the total number of outstanding units that appear in the UCITS' or AIF register (as part of its Duties regarding subscription and redemptions).
- A procedure to verify on an ongoing basis that appropriate and coherent procedures are established and applied (and periodically reviewed) for the valuation of the assets of the UCITS or AIF in compliance with the applicable national law and with the UCITS or AIF rules or instruments of incorporation.

- An escalation procedure when the calculation of the value of the units of the UCITS or AIF has not been performed in compliance with applicable law or the UCITS or AIF rules or with instruments of incorporation.
- An appropriate procedure to verify that instructions of the management company or the investment company comply with applicable laws and regulations and with the UCITS or AIF rules and instruments of incorporation. This procedure details the escalation intervention where the UCITS or AIF has breached one of the limits or restrictions.
- A procedure to detect any situation where consideration in transactions involving the assets of the UCITS is not remitted to the UCITS and to request the restitution of the assets.
- A procedure to reconcile all cash flow movements and to identify significant cash flows and cash flows which could be inconsistent with the UCITS' or AIF operations. The depository carries a full review of the reconciliation process at least once a year, and ensures that the cash accounts opened in the name of the investment company or in the name of the management company acting on behalf of the UCITS or AIF or in the name of the depository acting on behalf of the UCITS or AIF are included in the reconciliation process.
- A procedure to verify that registered assets cannot be assigned, transferred, exchanged or delivered without the depository or the third party to whom the safekeeping has been delegated having been informed of such transaction.
- A procedure to verify that the assets acquired by the UCITS or AIF are appropriately registered in the name of the fund, and check the consistency between the positions in the fund's records and the assets for which the depository is satisfied that the fund holds ownership.
- An escalation procedure for situations where a discrepancy is detected, including notification of the management company or the investment company and of the competent authorities if the situation cannot be corrected.
- An appropriate due diligence procedure for the selection and ongoing monitoring of the third party, to whom safekeeping functions are to be or have been delegated (reviewed at least once a year).
- A decision-making process for choosing and appointing the third parties, to whom safekeeping functions can be delegated, which shall be based on objective pre-defined criteria and meet the sole interests of the UCITS or AIF and its investors.
- A detailed procedure regarding the KYC process with every new client, to be provided with the performance specifications / programme of activity.
- A procedures ensuring that the depository identifies all conflicts of interest arising from its link with the asset management companies and takes all reasonable steps to avoid those conflicts of interest. Where a conflict of interest cannot be avoided, the depository shall manage, monitor and disclose that conflict of interest in order to prevent adverse effects on the interests of the UCITS or AIF and its investors.

#### **Article 15 - Internal control mechanism**

The depository shall have a policy, organisation and plan for internal control that is suited to its activities and allows it to meet all of the provisions of the AMF General Regulation. AMF staff shall verify:

- the resources devoted to internal control;
- the general organisation of the control function;
- the control and monitoring procedures that the depository intends to implement.

These resources, general organisation and procedures must be suited to the type, extent, complexity and diversity of the depository's activities.