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UCITS and AIF depositaries guide

AUTORITÉ DES MARCHÉS FINANCIERS

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INTRODUCTION

UCITS and AIF depositaries perform three essential functions: the effective and appropriate monitoring of collective investments' liquid asset flows, asset safekeeping and an oversight duty, also known as the depositary control function[1].

This guide is intended for UCITS depositaries and aims to support these market participants in implementing their obligations. Other asset management entities, including asset management companies (AMCs) and crypto-asset services providers (CASPs), are encouraged to read the sections of this guide that are relevant to their relationships with depositaries.

It is recalled that the rules applicable to AIF depositaries are the same for all AIFs[2], including 'Other AIFs'. For the sake of simplicity, the term 'UCI' (undertaking for collective investment) is used in this document.

It replaces the guide published in 2018 for depositaries on implementing the UCITS V obligations and now covers, in part, AIF depositaries as well as incorporating recent developments, particularly in the area of crypto-assets. It also provides clarifications regarding the escalation procedures put in place by depositaries.

This guide is a pedagogic document and does not constitute doctrine. It does not replace or supplement the legal or regulatory provisions in force. It is not exhaustive and is subject to additions and updates.

[1] See in particular Articles L. 214-10-5 of the Monetary and Financial Code ('MFC') for UCITS depositaries and L. 214-24-8 of the same code for AIF depositaries.

[2] The rules for depositaries apply *mutatis mutandis* to securitisation vehicle depositaries that fall under Article L214-167 I of the MFC, in accordance with Articles L. 214-175-2 of the MFC and Articles 323-42 to 323-64 of the AMF General Regulation.

1. IMPLEMENTATION OF CERTAIN OBLIGATIONS FOR UCITS DEPOSITARIES

1.1. REGULATORY FRAMEWORK

As a reminder, Directive 2014/91/EU of 23 July 2014 ('UCITS V'), which amended Directive 2009/65/EC of 13 July 2009, aims to delimit the role of UCITS depositaries in order to stipulate their tasks and responsibilities, and harmonise the rules with those applicable to AIFs[3], thus ensuring a high level of protection for investors.

Furthermore, AMF Instruction DOC-2016-01 has clarified the authorisation process for investment firms that are UCITS depositaries and the process for reviewing the specifications of other UCITS and AIF depositaries[4].

1.2. EXPLANATION OF KEY TOPICS

1.2.1. INDEPENDENCE REQUIREMENTS

Article 21 of the UCITS V Delegated Regulation[5] deals with governance issues, and aims to preserve, through various prohibitions, the independence of the asset management company (hereinafter 'AMC') and the depositary. These provisions apply to any AMC and any depositary who might contract together for the needs of one or more UCITS.

The provisions of Article 24 of the same delegated regulation provide for stricter independence rules in the presence of a group link[6] between the AMC and the depositary.

☐ Reminder of the relevant provisions of the UCITS V Delegated Regulation:

Article 21
Common management

The management company or the investment company and the depositary shall at all times comply with all of the following requirements:

a) no person may at the same time be both a member of the management body of the management company and a member of the management body of the depositary;
b) no person may at the same time be both a member of the management body of the management company and an employee of the depositary;
c) no person may at the same time be both a member of the management body of the depositary and an employee of the management company or the investment company;
d) where the management body of the management company is not in charge of the supervisory functions within the company, no more than one third of the members of its body in charge of the supervisory functions shall consist of members who are at the same time members of the management body, the body in charge of the supervisory functions or employees of the depositary;
e) where the management body of the depositary is not in charge of the supervisory functions within the depositary, no more than one third of the members of its body in charge of the supervisory functions shall consist of members who are at the same time members of the management body of the

[3] Rules introduced by Directive 2011/61/EU of 8 June 2011 ('AIFM Directive'), and its Delegated Regulation (EU) No 231/2013 of 19 December 2012, which entered into application on 22 July 2013 ('AIFM Delegated Regulation').
[4] The title and contents of Instruction DOC-2016-01 were amended on 24/09/2026. This instruction is now called 'Procedures for authorising and examining the specifications of UCITS and AIF depositaries and how to provide information to the AMF' (available in French only at the date of the publication of this Guide).
[5] Delegated Regulation (EU) 2016/438 of 17 December 2015 ('UCITS V Delegated Regulation').
[6] In accordance with Article 1) (b) of the UCITS V Delegated Regulation, a group link means a situation in which two or more undertakings or entities belong to the same group within the meaning of Article 2 11) of Directive 2013/34/EU of the European Parliament and of the Council or international accounting standards adopted in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council. Under French law, to assess the group link, reference must be made to the concept of control specified in the provisions of Article L 233-16 II of the Commercial Code.

management company, or the body in charge of the supervisory functions of the management company or of the investment company or employees of the management company or of the investment company.

Article 24
Independence of management boards and supervisory functions

1. Where a group link exists between them, the management company or the investment company and the depositary shall ensure that:
   a) where the management body of the management company and the management body of the depositary are also in charge of the supervisory functions within the respective companies, at least one third of the members or two persons, whichever is lower, on the management body of the management company and on the management body of the depositary shall be independent;
   b) where the management body of the management company and the management body of the depositary are not in charge of the supervisory functions within the respective companies, at least one third of the members or two persons, whichever is lower, on the body in charge of the supervisory functions within the management company and within the depositary shall be independent.
2. For the purposes of the first paragraph, members of the management body of the management company, members of the management body of the depositary or members of the body in charge of the supervisory functions of the above companies shall be deemed independent as long as they are neither members of the management body or the body in charge of the supervisory functions nor employees of any of the other undertakings between which a group link exists and are free of any business, family or other relationship with the management company or the investment company, the depositary and any other undertaking within the group that gives rise to a conflict of interest such as to impair their judgment.

☐ Concepts of management body and supervisory body:

As a reminder, **at a public limited company with a management board and a supervisory board, known as a 'two-tier' public limited company:**

- the management board is vested with the broadest powers to act on behalf of the company[7];
- the supervisory board carries out the control tasks, performs the necessary checks and controls, and obtains the documents necessary for its role.[8] It does not have, unless the articles of incorporation so provide[9], the power to dismiss members of the management board.

In this case, it is easy to identify the management body (the management board) and the supervisory body (the supervisory board).

At a public limited company with a board of directors, known as a 'one-tier' public limited company, the corporate bodies are:

- the board of directors, which 'determines the areas of the company's activities and ensures these are implemented'[10] and can take up 'any issue in relation to the proper functioning of the company and resolve, through its deliberations, the matters that concern it'[11] has the power to dismiss, at any time, the chair of the board of directors and general management (CEO, and deputy CEOs where applicable)[12]; its acts bind the company vis-à-vis third parties; finally, it also exercises a right of control and verification[13];

[7] Article L. 225-64 of the Commercial Code.
[8] Article L. 225-68 of the Commercial Code.
[9] The law grants this power of dismissal to the general meeting of shareholders. However, by way of exception, the Commercial Code permits the articles of incorporation, pursuant to Article L. 225-61 of the Commercial Code, to also grant this power of dismissal to the supervisory board.
[10] Article L. 225-35 (1) of the Commercial Code.
[11] Article L. 225-35 (1) of the Commercial Code.
[12] For the principle of dismissing the chair of the board of directors at any time (Article L. 225-47 of the Commercial Code). For the dismissal of the CEO and the deputy CEO at any time by the board of directors (Article L. 225-55 of the Commercial Code).
[13] Article L. 225-35 (3) and (4) of the Commercial Code.

- the CEO, who has the power to represent the company vis-à-vis third parties[14]; they are responsible for the day-to-day management of the company.

Here, the management body also performs the supervisory functions (board of directors).

For *sociétés en commandite simple* (limited partnerships), Article L. 221-3 of the Commercial Code provides that these companies are run by one or more managers (partners or otherwise), who have the power to bind the company vis-a-vis third parties through acts falling within its corporate purpose[15]. While the body of general partners has the power to dismiss the manager(s)[16], non-managing partners do not have the power to bind the company, nor to determine the areas of the company's activities or take up any issue related to the proper functioning of the company.
Thus, at limited partnerships, and for the purposes of the UCITS V Delegated Regulation, the management body is comprised of all the members of the management committee, and the company must set up a body that assumes the supervisory functions.

Finally, **at simplified joint-stock companies** ('SAS'), Article L. 227-5 of the Commercial Code provides that the articles of incorporation determine the conditions under which the company is managed. This great freedom granted to the articles of incorporation means that we cannot set out, *in abstracto*, which corporate body has management power. On the other hand, it follows from the provisions of Article L. 227-6 of the Commercial Code that a SAS has a chair who 'is vested with the broadest powers to act in all circumstances on behalf of the company within the limits of its corporate purpose'. Consequently, the latter constitutes a management body. Furthermore, and for the purposes of the UCITS V Delegated Regulation, it is desirable that the articles of incorporation include the establishment of a supervisory body and the prerogatives granted to it.

The table below summarises the different situations observed

Company form	Management body	Supervisory body
'Two-tier' public limited company	Management board	Supervisory board
'One-tier' public limited company	Board of directors	Board of directors
Limited partnership	Members of the management committee	Body defined by the articles of incorporation
Simplified joint-stock company	Chair or body defined by the articles of incorporation	Body defined by the articles of incorporation

☐ Alignment of the governance methods of the AMC and the depositary:

When there is **a group link** between an AMC and a depositary, the provisions of Article 24 of the UCITS V Delegated Regulation apply, even when they have different governance methods. Thus, at these two entities, at least one third of the members of the supervisory body (or their management body when it also assumes supervisory functions) must be independent, or two people, whichever is lower.

☐ Required number of independent members:

Pursuant to Article 24 of the UCITS V Delegated Regulation, to meet the requirement that 'one third of the members or two persons, whichever is lower [...] shall be independent', the rule is as follows[17]:

Number of members	Number independent

[14] Article L. 225-56 of the Commercial Code.
[15] Article L. 221-5 of the Commercial Code.
[16] Article L. 221-12 of the Commercial Code: dismissal of statutory managing partners by unanimous agreement of the partners, or according to the rules provided for in the articles of incorporation for non-statutory managing partners.
[17] Impact assessment accompanying the UCITS V Delegated Regulation of the European Commission of 17 December 2015. See in particular page 39: 'Due to downward rounding, this implies that boards of three and four members in total would only need to appoint one independent member'.

1	1
2	1
3	1
4	1
5	1
6 and over	2

☐ Status of independent member in the event of holding a corporate office at a financial holding company:

As a reminder, Article 24 2), of the UCITS V Delegated Regulation sets out a double presumption for ascertaining the independence of a member of the management or supervisory body:

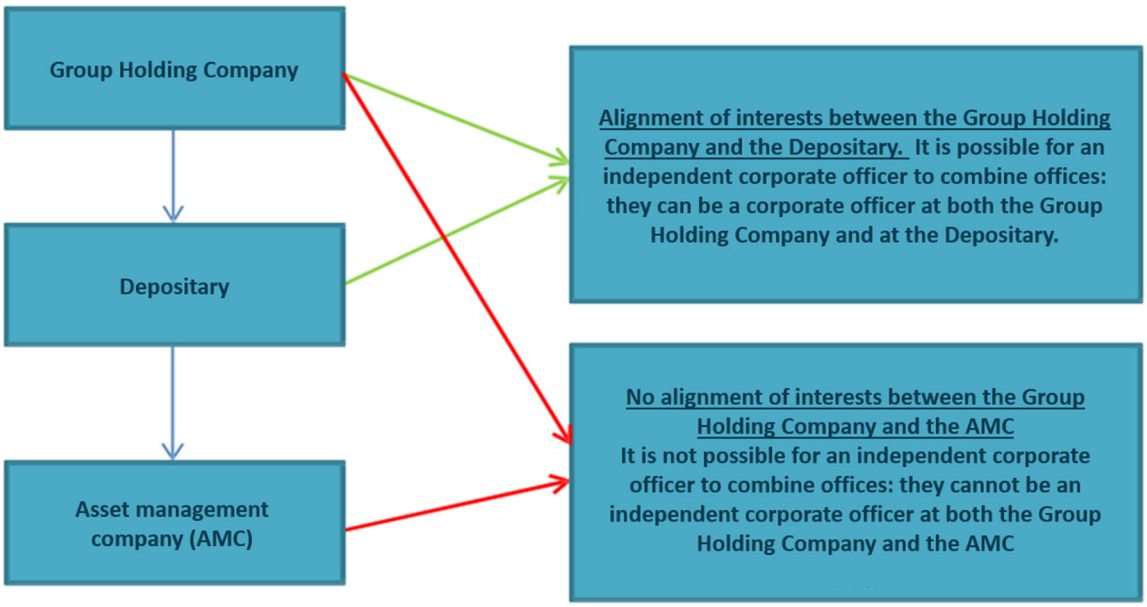
- an objective presumption of independence: the relevant member of the first entity (AMC or depositary) must not be a member of the management body, nor a member of the supervisory body, nor an employee of the other undertaking, but also not of any undertaking between which a group link exists;
- a cumulative presumption of subjective independence: the relevant member of the first entity (AMC or depositary) must be free of any:
    - business relationship,
    - family relationship or
    - other relationship

with the second undertaking and with any other undertaking within the group that gives rise to a conflict of interest such as to impair their judgement.

Thus, combining the office of board member/supervisory board member at a financial holding company with an office of board member/supervisory board member at the depositary does not preclude qualification as an independent member within the meaning of the UCITS V Delegated Regulation when the financial holding company directly holds exclusive control of the depositary, such that the interests of the two undertakings are aligned.

However, it would not be possible for a person to be considered 'independent' if they hold multiple roles at the same group, when these roles include an office as board member/member of the supervisory board at the AMC on the one hand, and an office of board member/member of the supervisory board at the holding company that owns the depositary on the other. In such a scenario, this person would hold a corporate office at two entities that could be subject to a conflict of interest likely to compromise their judgement.

For example:



☐ Status of independent member of supervisory bodies of sister AMCs:

Insofar as Article 24 of the UCITS V Delegated Regulation only aims to prevent conflicts of interest between the depositary and the AMC when a group link exists between them, a person who also holds board member/supervisory board member offices at another group AMC can be considered an independent member.

It is therefore possible for the same person to be an independent member of the supervisory bodies of two (or more) AMCs that have a group link, provided that this person does not hold corporate offices at the depositary or at any undertaking whose interests are aligned with those of the latter, and that the volume of remuneration from their offices at the AMCs of the same group does not compromise their independence.

1.2.2. INDEPENDENT LEGAL ADVICE

The independent legal advice provided for in Articles 15 and 17 of the UCITS V Delegated Regulation to confirm the insolvency protection of the UCITS's assets in the event that depositaries delegate their asset custody functions to third parties located in a third country, covers:

- an assessment of the regulatory and legal framework (including country risk and custody risk) and the enforceability of the contract (Article 15);
- the concept of the segregation of the UCITS's assets in the event of the insolvency of the sub-custodian in the latter's local law (Article 17).

The legal advice required by Article 15 2) of the UCITS V Delegated Regulation should be financed by the depositary in order to ensure that it is based on the legal advice of a natural person or legal entity that is independent of the third party in question.

The assessment of the legal and regulatory framework of the third country applicable to insolvency can be shared[18] provided, however, that such an assessment is sufficiently general and aims to analyse the regulations in force in the third country in a comprehensive manner.

On the other hand, the assessment of the enforceability of the contractual agreement concluded with the third-party sub-custodian in light of the applicable insolvency law and case law in the third country in which the latter is located remains specific to each bilateral relationship and must be produced for each contract.

In the event that a French depositary ensures custody of assets through a subsidiary located in a third country, it has the same obligations, namely to produce a legal opinion under Article 15 2) of the UCITS V Delegated Regulation covering the links it will establish with local sub-custodians, as well as on the legal and regulatory framework specific to the latter.

The depositary must provide this legal advice before a new contract is concluded.

It should be noted that the depositary must, in any event, (i) ensure that the contract concluded with the third-party sub-custodian provides for early termination should the legal and regulatory framework applicable to the latter no longer allow it to meet the obligations arising from the transposition into French law of the UCITS V Directive and Delegated Regulation on the safekeeping of the UCITS's assets, and (ii) inform the UCITS's AMC in such a situation[19].

[18] Recital 19 of the UCITS V Delegated Regulation, which provides that these 'opinions may be combined, as the case may be, or issued for each jurisdiction by relevant industry federations or law firms for the benefit of several depositaries'.
Articles 15 6) and 15 8) of the UCITS V Delegated Regulation.

The legal opinion referred to in Article 17 may be commissioned by the third-party sub-custodian itself. In this situation, it is the depositary's responsibility to ensure that its delegate located in a third country obtains an independent legal opinion on segregation.

Finally, in the event that the depositary uses a 'global custodian' established in a third country, it must commission a legal opinion in relation to its relationship with the global custodian, and the latter must provide a legal opinion covering the relationship it enters into with its sub-depositary. If the global custodian does not provide this legal opinion, it is the responsibility of the French depositary to do so.

1.2.3. MONITORING OF SUB-CUSTODIANS

Article L. 214-9 (1) of the Monetary and Financial Code (hereinafter 'MFC') specifies that the depositary must act honestly, loyally, professionally, independently and in the sole interest of the UCITS and its unit or shareholders.

Thus, regardless of the valuation of the assets in custody and regardless of the nature of the relationship between the depositary and its sub-custodian, the depositary must put a system in place for selecting delegates that protects investors' interests and have procedures for controlling and monitoring the services provided.

In this regard, it is recalled that a depositary that has delegated its asset safekeeping functions to a third party must continue to demonstrate all the requisite competence, care and diligence in the periodic assessment and ongoing monitoring of the third party to whom it has delegated certain parts of its tasks, as well as in relation to the arrangements made by the latter as regards the matters delegated to it[20]. In this respect, the depositary can use the delegate's certifications as a monitoring and control tool. Nevertheless, it is still required to carry out the necessary documentary and on-site controls to enable it to fulfil its own obligations.

1.2.4. SEPARATION OF COMPLIANCE AND DEPOSITARY CONTROL

Article L. 214-10-5 of the MFC identifies the operational functions of the depositary, including:

- Asset safekeeping,
- Checking decisions relating to the UCITS, known as 'depositary control',
- Monitoring liquid asset flows.

The 'depositary control' duty is an 'operational' activity, as it consists of the depositary ensuring that the AMC complies with the legal and regulatory provisions, and the UCITS' rules. Consequently, it must be subject to second-level controls.

It should be recalled that:

- Pursuant to Article 22 of Delegated Regulation (EU) 2017/565 and Article 312-1 of the AMF General Regulation ('AMF GR'), the investment services compliance officer must control the entire scope of the depositary activity and therefore cannot also be responsible for the depositary function (which is an 'operational' role). Therefore, they also cannot be responsible for depositary control, which forms part of the 'operational' functions of the depositary's activity.
- The person(s) in charge of depositary control (who carry out the first-level controls) must fall under the responsibility of the head of the depositary function insofar as this mission constitutes part of the depositary's functions. Thus, this organisational structure enables compliance, which must be independent of it, to carry out its second-level controls.
- However, in view of the principle of proportionality, when so justified by the nature, importance, complexity and diversity of the activities, it is possible for a single employee to be responsible for depositary controls and compliance controls, provided that the second-level controls are carried out by another entity, at the responsibility of the depositary (a consultancy firm for example) and completely

[20]Article 323-14 of the AMF General Regulation ('AMF GR').

independently from the operational functions. This organisation is reviewed by the AMF when it approves the depositary's specifications or programme of activity.

1.2.5. MONITORING REGULATORY AND STATUTORY RATIOS

In accordance with Article L. 214-10-5 III 3° of the MFC, the depositary of a UCITS '*executes the instructions of the SICAV or the asset management company of the UCITS unless these are contrary to the legal or regulatory provisions, the rules or instruments of incorporation of the UCITS, or its prospectus'*. Article L. 214-10-6 of the same code stipulates that this function cannot be delegated to third parties.

Article 323-19 of the AMF GR stipulates that:
'The depositary shall establish and implement a control plan. This plan shall define the purpose, nature and regularity of the controls concerned.
Controls shall be carried out ex post and exclude any discretionary review. They shall include verifications of the following:
1° Compliance with the investment and asset composition rules;
2° Minimum asset size;
3° The regularity of UCITS valuations;
4° The rules and procedures for establishing the net asset value;
5° Justification of the content of UCITS suspense accounts;
6° Elements specific to certain types of UCITS;
7° The inventory reconciliation report communicated by the asset management company.
The control plan, reports of controls carried out and notes on any anomalies shall be retained for five years.'

In its recital (7), the UCITS V Delegated Regulation provides that:
'By virtue of its obligation of oversight under Directive 2009/65/EC, the depositary should set up a procedure to verify on an ex post basis the UCITS' compliance with applicable law and regulations and its rules and instruments of incorporation. This should cover areas such as checking that the UCITS' investments are consistent with its investment strategies as described in the UCITS' rules and offering documents and ensuring that the UCITS does not breach its investment restrictions. The depositary should monitor the UCITS' transactions and investigate any unusual transaction. If the limits or restrictions set out in the applicable law or regulations or the UCITS rules and instruments of incorporation are breached, the depositary should act promptly to reverse the transaction that is in breach of those laws, regulations or rules.'

Thus, Article 6 of the Delegated Regulation stipulates that:
'A depositary shall be deemed to comply with the requirements set out in point (c) of Article 22(3) of Directive 2009/65/EC where it establishes and implements at least:

a) appropriate procedures to verify that instructions of the management company or the investment company comply with applicable laws and regulations and with the UCITS' rules and instruments of incorporation;
b) an escalation procedure where the UCITS has breached one of the limits or restrictions referred to in second subparagraph.
For the purposes of point (a), the depositary shall in particular monitor the UCITS' compliance with investment restrictions and leverage limits to which the UCITS is subject. The procedures referred to in point (a) shall be proportionate to the nature, scale and complexity of the UCITS.'

Thus, since checking the lawfulness of the UCITS' decisions cannot be delegated, the calculation of regulatory and statutory ratios must be carried out by the depositary itself and using own resources, which implies that the depositary has its own ratio calculation tool.
This tool may be provided by a technical service provider under a technical resources provision agreement. This agreement must define the parameters and stipulate that it is possible for the depositary to check the ratio calculations.

Insofar as the depositary cannot, without delegating ratio calculation, rely on the calculations of the AMC or its administrative and accounting delegate, its technical service provider, where applicable, cannot be the administrative and accounting service provider of the AMC, otherwise the latter would be in a situation of conflict of interest. However, in instances – assessed on a case-by-case basis – where the depositary is unable to carry out certain checks independently, as it cannot obtain the data needed for the calculation using its own resources, it may rely on data from the AMC to carry out these checks, on the express condition that it has previously audited the procedures, processes and calculation methods in place at the AMC pertaining only to the checks in question, has ensured that they were appropriate and controllable, and has verified their effective implementation by the AMC over time. The scope, depth and frequency of these procedures are proportionate to the identified risks.

Finally, in order to fulfil its obligation to oversee the instructions of the UCITS or its AMC, and to be able to react swiftly to a non-compliant transaction, the depositary must ensure compliance with the ratios at the time of each transaction and at a minimum, when publishing each net asset value.

2. IMPLEMENTATION OF THE OBLIGATIONS OF DEPOSITARIES OF UCIS INVESTED IN CRYPTO-ASSETS, UCIS INVESTED IN FINANCIAL INSTRUMENTS RECORDED USING DLT OR UCIS USING DLT FOR KEEPING LIABILITIES

This chapter applies to depositaries that are depositaries for AIFs invested in crypto-assets or UCIs invested in financial securities recorded using distributed ledger technology (DLT or blockchain). This chapter also applies to market participants, including depositaries, that carry out a delegated activity of fund administration using DLT.

Carrying on an activity related to the use of blockchain is likely to constitute a substantial modification of the depositary's specifications or programme of activity. It is therefore necessary for the entities involved to communicate with their portfolio managers at the AMF upstream of implementing their plans. On the other hand, the activity of CASP does not fall under the depositary's specifications or programme of activity.

2.1. AIFS INVESTED IN CRYPTO-ASSETS

2.1.1. DEPOSITARY'S OWNERSHIP VERIFICATION AND RECORD KEEPING FUNCTIONS

Crypto-assets are those assets that are subject to Regulation (EU) 2023/1114 on markets in crypto-asset ('MiCA'), which has been applicable to CASPs since 30 December 2024. Provided that they are authorised under it, the MiCA Regulation stipulates that these providers can provide crypto-asset services, including the service of custody and administration of crypto-assets on behalf of clients. When providers are authorised and provide this service, they act as crypto-asset custodians (hereinafter 'CASP custodians').

As a reminder, a depositary to whom the AIF's asset safekeeping is entrusted, has an obligation[21]:

- to ensure the custody of (i) financial instruments recorded in a financial instruments account and (ii) financial instruments that are physically delivered to it;
- for other assets, to verify that they are owned by the AIF and to keep a record of them.

The depositary of AIFs invested in crypto-assets does not ensure the custody of these crypto-assets, but is required to verify ownership and maintain a record of them[22]. To achieve this, it must, in particular:

- have access, without undue delay, to all the relevant information it needs in order to perform its ownership verification and record-keeping duties, including relevant information to be provided by the third party responsible for the custody of the crypto-assets subscribed (CASP custodian or third country service provider), selected by the fund's AMC;

[21] Article L. 214-24-8, II of the MFC, Article 323-25 of the AMF GR and Articles 88 to 91 of the AIFM Delegated Regulation.
[22] Article L. 214-24-8, II, 2° of the MFC, Article 323-25 of the AMF GR and Article 90 of the AIFM Delegated Regulation.

- possess sufficient and reliable information for it to be satisfied of the AIF's ownership right over the assets[23]. The depositary must, in particular, have, according to the terms agreed with the AMC and, where applicable, with the CASP custodian or the third-country provider, the information and documents enabling it to carry out its task to verify ownership;
- maintain a record of those assets for which it is satisfied that the AIF holds the ownership. In practice, in order to allow depositaries to perform this record-keeping, exchange processes must be clearly established with the AMC upstream[24], and where applicable, with the CASP custodian or third-country service provider.
  To fulfil its record-keeping obligation, the depositary must, in particular, be able to provide at any time a comprehensive and up-to-date inventory of the AIF's assets. To this end, the depositary must ensure that procedures are in place so that registered assets cannot be assigned, transferred, exchanged or delivered without the depositary or its delegate being informed of such transactions and the depositary shall have access without undue delay to documentary evidence of each transaction and position from the relevant third party[25]. The AMC must ensure that the relevant third party (CASP custodian or third country service provider) provides the depositary without undue delay with certificates or other documentary evidence everytime there is a sale or acquisition of assets, and at least once a year.

The depositary is free to specify the documents it needs to fulfil its duty of assets safekeeping and agrees the appropriate review frequency with the AMC, which can be more often than the minimum annual frequency if necessary.

The regulations require that the depositary and the AMC enter into a contract[26]. This contract must, in particular, describe the services provided by the depositary, and how information will flow between the AMC and the depositary so that they can fulfil their respective obligations[27].

Therefore, the AMC must include in the contract the means and procedures for transmitting to the depositary all the information the latter needs to fulfil its duties, or to ensure that it has access to this information. These include, *inter alia*, procedures to ensure that the depositary receives the necessary information from the third parties appointed by the AMC[28].

The AMC may agree with the CASP custodian or the third country service provider that the latter transmit the necessary information directly to the depositary. The terms for exchanging information must then be included in the contract binding the AMC and the selected third party. In any event, the AMC must commit to provide the depositary with the details of this third party on a regular basis and, upon request, the criteria used to select it and the steps envisaged to monitor the activities carried out by the selected third party[29].

If the depositary is unable to obtain this information, the AMC may be held liable with regard to its obligation to provide the depositary, upon commencement of its duties and on an ongoing basis, with all information relevant for the performance of its duties, including information received from third parties[30].

2.1.2. CUSTODY OF CRYPTO-ASSETS

CASP custodians

[23] Article 90 2) (b) of the AIFM Delegated Regulation.
[24] Article 90 2) (c) ii) of the AIFM Delegated Regulation.
[25] Article 90 2) (c) ii) of the AIFM Delegated Regulation.
[26] Article L. 214-24-4 of the MFC and Article 83 of the AIFM Delegated Regulation.
[26] Article 83 of the AIFM Delegated Regulation.
[28] Article 83 1) (g) of the AIFM Delegated Regulation.
[29] Article 83 1) l) of the AIFM Delegated Regulation.
[30] Article 90 1) of the AIFM Delegated Regulation.

CASPs authorised to provide the service of custody and administration of crypto-assets on behalf of clients are subject to requirements relating to the safekeeping and custody of the crypto-assets[31], which include in particular the obligation to take steps to protect clients' ownership rights and to keep a register of positions corresponding to each client's rights to the crypto-assets.

However, the depositaries of AIFs invested in crypto-assets cannot rely on CASPs' authorisation as CASP custodians to assume that the latter are able to guarantee the AIF's ownership of the crypto-assets. In general, depositaries cannot rely on the obligations incumbent upon CASP custodians to exempt themselves from their regulatory duties relating to record keeping and verifying ownership in particular.

Custodians outside the EU whose services are not subject to the MiCA Regulation

Custodians that do not provide crypto-asset services in the European Union are not required to obtain authorisation under the MiCA Regulation and are not bound by its provisions. AMCs wishing to use a custodian located outside the EU assume responsibility for this choice and for the due diligence carried out for this purpose. For its part, the depositary ensures that the planned information flows allow it to fulfil its own obligations and verifies the AMCs' ability to use custodians located outside the EU in the AMCs' internal procedures.

Outsourcing of the service of custody of crypto-assets

When an authorised depositary acting as a CASP for the custody service uses third parties to provide this service, it may only make use of duly authorised service providers[32]. However, this outsourcing does not entail any transfer of the responsibilities incumbent upon it as a CASP, and the latter remains fully responsible for the outsourced services[33].

On the other hand, a non-CASP depositary cannot outsource to a third-party service provider a crypto-asset service that it is not itself authorised to provide, such as the service of custody of crypto-assets.

2.1.3. ANOMALY HANDLING

In general, when entering into a relationship with an AMC, the depositary must take care that it fully understands the risks associated with the complexity of the UCI's strategy and investment policy[34], and to define in the contract put in place with the AMC (and where applicable with the custodian) the terms for obtaining the information flows necessary for it to carry out its duties. In particular, to enable the depositary to fulfil its safekeeping duties regarding ownership verification and record keeping, it is recalled that the AMC provides the depositary with all relevant information the depositary needs in order to comply with its obligations and ensures that the depositary is provided with all relevant information by third parties[35].

If the processes in place do not allow it to obtain this information, the depositary must trigger its anomaly response system or its escalation procedure[36].

In the specific case of crypto-assets, if the AMC ceases to transmit the necessary information or continues to make investments in crypto-assets on behalf of the AIF without being able to provide the depositary with proof of ownership, the latter has the option to terminate[37] the contract binding it to the AMC[38]. This right to terminate is

[31] Articles 70 1) and 75 in particular of the MiCA Regulation.
[32] Article 75 9) of the MiCA Regulation.
[33] Article 73 1) (a) of the MiCA Regulation.
[34] Article 3 1) of the UCITS Delegated Regulation and Article 92 1) of the AIFM Delegated Regulation.
[35] Article 14 1) of the UCITS Delegated Regulation and Article 90 1) of the AIFM Delegated Regulation.
[36] See part 4 of this guide which sets out depositaries' power to define several criteria in their escalation systems with different deadlines for moving to the next level.
[37] The depositary is required to perform its functions until the AIF or its asset management company has appointed a new depositary at the end of the notice period provided for in the contract, or until the closure of the liquidation of the AIF (see Article L214-24-4 of the MFC).
[38] Recital 94 of the AIFM Delegated Regulation.

as the depositary's discretion, particularly in the event of a persistent lack of information or proof of ownership. It only takes place as a last resort, when the situation cannot be rectified despite having implemented the escalation procedure. The termination is still governed by the stipulations of the agreement concluded between the depositary and the AMC[39] .
It is therefore essential that the depositary carry out the necessary due diligence in advance, in order to ensure that the conditions agreed upon from the outset of the relationship will allow it to perform its duties adequately.

Furthermore, as mentioned above, the depositary of an AIF invested in crypto-assets cannot hold in custody said crypto-assets as part of its depositary function[40]. Consequently, the depositary of the AIF is not obligated to return identical assets or their equivalent in monetary value in the event of loss of the crypto-assets[41].
The same is not true of the CASP custodian that provides custody and administration of crypto-assets on behalf of clients: in accordance with Article 75 8) of the MiCA Regulation, in the event of the loss of any crypto-assets or of the means of access to crypto-assets as a result of an incident that is attributable to them, the liability of the CASP custodian 'shall be capped at the market value of the crypto-asset that was lost, at the time the loss occurred'.

2.1.4. COMBINATION OF THE FUNCTIONS OF DEPOSITARY OF AN AIF INVESTED IN CRYPTO-ASSETS WITH THOSE OF CASP CUSTODIAN BY THE SAME ENTITY

AIF depositaries may be authorised as CASPs to provide the service of custody and administration of crypto-assets on behalf of clients, under the terms of the MiCA Regulation[42].

In order to manage conflicts of interest related to the cumulation of CASP and AIF depositary activities at the same entity, these activities should be separated into distinct operational departments. The depositary control function must be in a position to independently assess the verification of crypto-asset ownership and record keeping. In any event, the cumulation of the depositary function and the CASP function does not exempt the depositary from carrying out its own regulatory due diligence.

On the contrary, the CASP operational department and the depositary function should put in place appropriate communication, particularly in the event of crypto-asset movements resulting from instructions from the AMC and in the event of incidents occurring on crypto-assets. This communication enables the depositary to fulfil its duties in terms of updating its register of positions and verifying the ownership of the AIF's assets properly.

In the event that an anomaly is detected in relation to the crypto-assets held in the assets of an AIF that could not be clarified or corrected, the depositary's escalation procedure[43] may involve reporting information to a manager of the entity that is common to both operational departments.

2.1.5. STEPS TAKEN BY DEPOSITARIES UPON COMMENCING A RELATIONSHIP WITH THE AMC, PARTICULARLY IN TERMS OF CUSTODY

Depositaries must take a number of steps before entering into a relationship with AMCs (see the summary of the 'SPOT' inspection carried out by the AMF on this topic[44]). These steps will serve as the basis for establishing the written contract between the depositary and the AMC, and for setting up the depositary's monitoring processes.

[39] The contract signed between the manager and the depositary must include the contract termination conditions, including the situations which may lead to contract termination and the details of the termination procedure, in accordance with Article 83 1) (d) of the AIFM Delegated Regulation.
[40] As a reminder, a depositary of AIFs invested in crypto-assets is required to verify ownership and keep a record of them in accordance with Article L. 214-24-8, II, 2° of the MFC.
[41] Article L. 214-24-10, I of the MFC.
[42] As a CASP that has been authorised pursuant to Article 63 of the MiCA Regulation or notified pursuant to Article 60 of the same Regulation.
[43] In accordance with Article 90 4) of the AIFM Delegated Regulation.
[44] Summary of SPOT inspections on the obligations incumbent on the depositaries of collective investments when entering into a relationship with and monitoring their client asset management companies (October 2022).

For the custody of the crypto-assets that form part of the assets of the AIFs it manages, the AMC selects a third-party provider (CASP or otherwise) and it is responsible for this selection. As part of its decision-making process for commencing a relationship, a depositary may, for example, request an independent legal opinion from the AMC regarding the operation of the selected custodian, particularly when the latter is located in a third country. An independent legal opinion can be an essential factor in the assessment for the depositary, who may not necessarily have other means to directly assess the legal and operational functioning of the custodian in question.

A depositary may refuse to enter into a relationship with the AMC if the selected service providers do not appear to provide sufficient guarantees for the proper functioning of the AIF or if the AMC has not set up sufficiently robust monitoring of its service providers. The depositary must be able to understand 'the risks associated with the nature, scale and complexity of the AIF's strategy'[45]. It also ensures that the AMC has detailed procedures for calculating the net asset value.

The depositary shall perform *ex post* controls and verifications on the processes and procedures that are under the responsibility of the AMC[46]. To do this, it may request all the information it needs to perform its duties from the AMC. It is therefore necessary that the depositary has adequate internal resources upstream, to assess its ability or inability to be a depositary of the AIF, and during the relationship, to support it in carrying out its checks.

The depositary can adjust its onboarding questionnaires, particularly in light of changes in fund asset classes and new investment strategies, in order to anticipate their impacts on its internal procedures and to be in a position to assess its actual capacity to carry out its missions.

2.2. UCIS INVESTED IN FINANCIAL SECURITIES RECORDED USING DLT (SECURITY TOKENS)

Under French law, the regime for financial securities recorded using DLT is provided for in Articles L. 211-3 *et seq.* of the MFC. Financial securities recorded on a DLT are referred to as being 'tokenised', meaning that they can be transferred and stored electronically using DLT or similar technology. Such financial securities are commonly referred to as 'security tokens' (STs). Since they cannot be delivered to the depositary, the latter cannot ensure their custody[47].

Under French law, with the exception of financial instruments recorded in a DLT under the pilot regime[48], STs are registered and are entered by the issuer on a DLT[49]. The issuer has the option of record keeping through the intermediary of the DLT using, where appropriate, an agent (acting on behalf of the issuer); the ST then takes the form of a pure registered security. An owner of registered financial securities can also entrust record keeping to an authorised intermediary. The ST then has the form of an 'administered registered' security[50].

For these assets, as for all other registered securities, the depositary's safekeeping function consists of verifying their ownership and keeping a register of them[51].

The other provisions relating to ownership verification and record keeping, detailed in paragraph 2.2.1 of this guide, apply to the depositaries of funds invested in ST.

[45] Article 92 1) of the AIFM Delegated Regulation.
[46] Article 92 2) of the AIFM Delegated Regulation.
[47] As a reminder, a UCITS or AIF depositary ensures the custody of the financial instruments recorded in a financial instruments account opened in its books and of the financial instruments that are physically delivered to it (Articles L. 214-10-5 and L. 214-24-8 of the MFC).
[48] Regulation (EU) 2022/858 of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU.
[49] Articles L. 211-7 and R. 211-2 of the MFC.
[50] Article 322-3 1 of the AMF GR: 'Where registered financial securities are concerned, in application of the first paragraph of Article R. 211-4 of the Monetary and Financial Code, an owner of registered financial securities may charge an intermediary with maintaining its securities account opened at the issuer, or with administering the entries in the distributed ledger system. In this case, the entries appearing on the securities account or on the distributed ledger system also appear in an administration account held in the name of this owner by this intermediary or in a register of positions kept by this intermediary. The securities are then considered to be in "administered registered" form.'
[51] Article L. 214-10-5, II, 2° of the MFC for UCITS depositaries, and Article L. 214-24-8, II, 2° of the MFC for AIF depositaries.

Verification by the depositary of the sufficiency and reliability of the information from the DLT:

The depositary must ensure that the information obtained from the DLT allows it to establish, in a sufficient and reliably manner, the ownership right of the UCITS or AIF over the securities concerned.

It is also recalled that the DLT must be designed and implemented in such a way as to guarantee the recording and integrity of the entries and to allow, directly or indirectly, the identification of the owners of the securities, and the nature and the number of securities held[52].

In this context, the depositary can obtain an independent expert opinion from the AMC, attesting that the DLT record kept by the issuer is sufficiently reliable. The custodian may rely on publicly available technical information on the DLT protocol for its ownership verification duty. However, it must ensure that it has sufficient and robust information to be certain of the ownership rights of the UCITS or AIF[53].

No obligation to return a financial security recorded on a DLT in the event of loss

The depositary does not hold any financial securities recorded on a DLT. As with other registered securities, the securities are kept by the issuer.

Since the depositary does not ensure the custody of these assets, it is not obligated to return an identical asset or its monetary equivalent[54] in the event of loss.

2.3. TOKENISATION OF UCI UNITS OR SHARES

Fund administration of UCI covers the following tasks[55]:

- centralising subscription and redemption orders for UCI units or shares[56], and
- managing the UCI unit or share registry[57].

Article L. 214-13 of the MFC for UCITS[58] provides that 'under the conditions defined by the General Regulation of the Autorité des Marchés Financiers, the responsibility towards third parties for the centralisation of subscription and redemption orders for UCITS units or shares shall be entrusted by the UCITS or, where applicable, the asset management company representing it either to said undertaking, or to the depositary, or to an asset management company or to another investment services provider authorised to provide one of the services referred to in Article L. 321-1. The entity entrusted with this responsibility shall have appropriate and sufficient resources.'

For UCITS, Article 411-71 of the AMF GR provides[59] that 'unit or share registry management is part of the administrative management of the UCITS. The UCITS or, where applicable, the investment management company that represents it, it may delegate the performance of the tasks described in Article 411-70 of unit or share registry management to an investment services provider in accordance with the conditions set out in Article 321-97 1°, 2° and 5° to 9°.'

[52] Article R. 211-9-7 of the MFC. Furthermore, it is recalled that the requirement for the DLT to guarantee the recording and integrity of entries and to allow the identification of the owners of the securities also applies in the event that record-keeping is carried out by the agent, acting on behalf of the issuer (see Article 322-2, II of the MFC).
[53] Article 90 2) of the AIFM Delegated Regulation and Article 14 2) of the UCITS V Delegated Regulation.
[54] In accordance with Articles L. 214-11 of the MFC for UCITS depositaries and L. Article 214-24-10 of the MFC for AIF depositaries, only those financial instruments that are held in custody must be returned by the depositary. This provision applies to all STs, regardless of their country of issue.
[55] Articles 411-64 of the AMF GR for UCITS and 422-42 for certain categories of AIF.
[56] The key centralisation tasks are stipulated in Article 411-65 of the AMF GR (for UCITS) and Article 422-43, I of the AMF GR (for certain categories of AIFs).
[57] The key tasks of unit or share registry management are stipulated in Article 411-70 of the AMF GR (for UCITS) and Article 422-48 of the AMF GR (for certain categories of AIFs).
[58] Article L. 214-24-46 of the MFC for certain categories of AIF.
[59] Article 422-49 of the AMF GR for certain categories of AIF.

Thus, fund administration, when entrusted by a UCI or an AMC to a third party, can only be carried out by an investment services provider, without constraint on the services for which it must be authorised.

Maintaining the record of UCI units or shares entered using DLT complies with the provisions[60] on the registration of financial securities.

Some UCI units or shares may simultaneously offer two methods of record keeping: traditional record keeping or entry using a DLT. It is not necessary to isolate the two records by using two separate ISIN codes[61]. In this case, the constraints relating to entry using distributed ledger technology[62] do not apply to the traditional circuit. Where several entities share the tasks of centralising subscription or redemption orders, only the UCI unit or share registry manager is responsible for the total aggregation.

Furthermore, when liability keeping is performed by means of a DLT, the entries made in this record system are subject to an updated business continuity plan including, in particular, an external system for the periodic storage of data[63].

3. UCIS AUTHORISING THE SETTLEMENT OF SUBSCRIPTION AND REDEMPTION ORDERS IN ELECTRONIC MONEY TOKENS (E-MONEY TOKENS OR EMT)

Electronic money tokens (hereinafter 'EMT') are covered by the MiCA Regulation and are subject to specific provisions[64]. EMTs are defined as 'a type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency'. Upon request by a holder of an EMT, the issuer of that EMT shall redeem it, at any time and at par value, by paying in funds, other than electronic money, the monetary value of the EMT held to the holder of the EMT[65]. This redemption of EMTs is not subject to any fees. EMTs can only be issued by credit institutions or electronic money institutions which are subject to specific requirements, particularly with regard to the protection of the funds received in exchange for EMTs.

Under the MiCA Regulation, EMTs are considered to be crypto-assets and are also deemed to be electronic money[66], as defined in Directive 2009/110/EC[67]. However, the AMF does not establish any equivalence between the concept of EMT and that of 'liquid assets' contained in the set of laws and regulations specific to the asset management sector.

In terms of the types of UCIs for which EMTs are likely to be eligible as assets, subject to the applicable legal and regulatory provisions, EMTs may be accepted as settlement assets for the purpose of subscribing to and redeeming units or shares in these UCIs. The operation is treated as a subscription (or redemption) in cash, the terms and conditions of which must be described in the UCI's legal documentation. Furthermore, subscription and redemption orders can only be settled in EMTs if said EMTs are pegged to the same official currency as that used for the accounting of the category of units or shares of the UCI.

[60] Articles L. 211-7 and R. 211-2 of the MFC.
[61] An ISIN code is assigned to each category of UCI units or shares. The method of settling subscription or redemption orders (in legal tender or in EMT) is not on the list of categories of units or shares that may be subject to separate categories in Article 411-22 (UCITS) or Article 422-23 (AIFs) of the AMF GR.
[62] As referred to in Articles R. 211-2 *et seq.* of the MFC.
[63] Article R. 211-9-7 of the MFC. This responsibility is incumbent on the issuer or its intermediary.
[64] Definition in Article 3 7) of the MiCA Regulation and provisions in Title IV (Articles 48 to 58).
[65] Article 49 4) of the MiCA Regulation.
[66] Article 48 2) of the MiCA Regulation.
[67] Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions. The concept of electronic money is defined in Article 3 44) of MiCA, which refers to Article 2 2) of Directive 2009/110/EC.

As regards the other UCIs for which the EMTs are not eligible as assets, in particular UCITS and money market funds, EMTs are not eligible as liquid assets, if they are intended to be held as part of an investment strategy[68].

In order to take the legal nature of electronic money tokens into account, EMTs may temporarily form part of the inventory of these UCIs, including UCITS and money market funds, when used exclusively for payment purposes. The period during which the EMTs are held in the fund's inventory must be limited to the practical time period needed for the redemption or purchase of EMTs from their issuer.

The anti-money laundering and combatting the financing of terrorism system of the AMC and the relevant service providers must be adapted to meet the specific characteristics of EMTs with, in particular, the use of transaction analysis tools on the record kept using distributed ledger technology.

AMCs wishing to allow investors to settle their subscriptions and receive their redemptions in EMTs must demonstrate that their target organisation is compliant. The EMT flow chart must be compatible with depositaries complying with their obligations as provided for in the regulations, in particular those referred to in Articles 323-1 and 323-23 of the AMF GF. Thus, UCITS or AIF depositaries verify that they are able to comply with the obligations relating to cash flow monitoring, including payment flows related to EMT subscriptions which, for this specific purpose, must be treated as liquid assets for operational purposes[69].

Certain UCI units or shares may simultaneously offer two methods for settling subscription or redemption orders (legal tender, also called fiat currency, or EMTs). The costs incurred by the service providers of the EMT settlement mechanism can be paid by the UCI and borne by all unit holders or shareholders of the UCI provided that an analysis carried out by the AMC concludes that they do not create unfair treatment.

4. ESCALATION PROCEDURES PUT IN PLACE BY UCITS AND AIF DEPOSITARIES

Depositaries must establish procedures (hereinafter 'escalation procedures') which they must trigger as soon as a discrepancy or irregularity is detected. These procedures specify in particular the internal and external persons that the depositary must contact depending on the severity of the incident observed, ranging from the AMC for its resolution, to the AMF if the situation cannot be corrected.

The methods for alerting the AMF to irregularities, whether as part of its obligations of oversight, of monitoring liquidity flows or of safekeeping regarding ownership verification and record keeping are set out in Article 16 of AMF Instruction DOC-2016-01 - Procedures for authorising and examining the specifications of UCITS and AIF depositaries and how to provide information to the AMF[70].

4.1. REGULATIONS RELATING TO THE ESCALATION PROCEDURE

- Commission Delegated Regulation (EU) 2016/438 of 17 December 2015 ('UCITS V Delegated Regulation'), Article 3 3), Article 6, Article 10 1) (e) and Article 14 4);
- Commission Delegated Regulation (EU) 231/2013 of 19 December 2012 ('AIFM Delegated Regulation'), Article 86 (e), Article 90 4), Article 92 3) and Article 95;
- AMF General Regulation, Articles 323-19, ~~and~~ 323-40, 323-22-1 and 323-41-1;
- AMF Instruction DOC-2016-01, Articles 14 and 16.~~-~~

[68] In accordance with Article L. 214-20 of the MFC and Article 9 3) of Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017, a UCITS and a money market fund may hold ancillary liquid assets. However, EMTs cannot be considered as ancillary liquid assets within the meaning of these laws.

[69] Articles 86 and 87 of the AIFM Delegated Regulation, and Articles 10 and 11 of the UCITS V Delegated Regulation.

[70] Available in French only at the date of the publication of this Guide.

4.2. CONTENT OF THE ESCALATION PROCEDURE

The depositary may incorporate the following information into its escalation procedure:

- a definition, in precise and objective terms, of the criteria governing the escalation levels (based on the nature or criticality of the alert, for example);
- the deadline for moving up to the next level up in the system;
- the identity of the people to be contacted (internally at the depositary and externally at the AMC in particular) and the depositary's internal (e.g. ad hoc committees, executive management) and external (alert to the AMC and alert to the AMF if the situation cannot be corrected) notification obligations;
- which members of staff are responsible for monitoring remediation work and what tools they use;
- the remediation process to be followed by the depositary's employees;
- the procedures for retaining the documents attesting to the steps carried out and the remediation measures taken.

Depositaries may track the alerts in a dedicated tool (configured in particular to monitor unmet deadlines).

In accordance with the provisions of Articles 323-19 and 323-40 of the AMF GR, the anomalies observed shall be retained for a period of five years.

It is recalled that the details of the escalation procedure must be provided to the AMF upon request.

4.3. DEFINING THE ESCALATION PROCEDURE CRITERIA AND DEADLINES FOR MOVING UP A LEVEL

Depositaries can determine the criteria defining the levels of escalation based on each item of the depositary's control plan, as referred to in Articles 323-19 and 323-40 of the AMF GR. It is recalled that the controls focus in particular on the following areas:

1. Compliance with the investment and asset structure rules;
2. The minimum asset amount;
3. The frequency of UCI valuations;
4. The rules and procedures for establishing the net asset value;
5. Substantiation of the content of the UCI's suspense accounts;
6. Information that is specific to certain types of UCI, the tracking error of index AIFs for example;
7. The inventory reconciliation report communicated by the AMC.

Furthermore:

- different criteria can also be determined in the event that an irregularity is detected regarding ownership verification and record keeping as part of the depositary's safekeeping duties, and in the context of the effective and adequate monitoring of cash flows carried out by the depositary;
- these different criteria can be refined into sub-criteria, which may include, but are not limited to, details of the nature of the anomaly, its criticality (for example: to be adapted according to the frequency of the net asset value of the UCI, the need to quickly inform the auditors of the UCI in question and the AMF, the difficulty in resolving the incident, its impact on investor protection, etc.), the relevant contact person (for example, the AMC or a third party in the case of registered securities, etc.);
- the depositary can establish, by means of sub-criteria, the deadline for moving from a lower to a higher level.