

# AFG RESPONSE CONSULTATION

## Depositary function of UCITS and AIFs

Draft Delegated Acts

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## AFG comments on the draft Commission Delegated Regulations relating to the depositary function of UCITS and AIFs

The proposals for reform of the rules governing the depositary function of UCITS and AIFs are based on the work already initiated by ESMA in 2015 and 2016. During this work, AFG stressed its attachment to the rules of assets' segregation, essential measures to ensure effective protection of investors' assets in each fund.

The Commission's proposals amend and clarify the relationship between UCITS and AIF depositaries and sub-custodians to which asset conservation is delegated.

The two projects allow the sub-custodian established in the EU to collect in a single "omnibus" account all the assets belonging to the UCITS and AIFs received by delegation of the same depositary (*Article 16.1 (a) of the UCITS Regulation and Article 99 (1) (a) of the AIFM Regulation*).

AFG reiterates its reservations on setting up such a large omnibus account. If this mechanism makes it possible to protect the funds' assets from claims of the sub-custodian's creditors, on the other hand, it does not allow for a proper guarantee and a rigorous protection of the assets of each fund against the actions of other funds' creditors.

Therefore, we ask that both texts clearly include the possibility for the management company to request a finer segregation at a reasonable cost (an omnibus account for assets coming from the funds of the same management company, for example).

The content of the agreement binding the depositary and its sub-custodian (*Article 98 of the AIFM Regulation, and Article 15 of the UCITS Regulation*), appears as a measure allowing at least a minimum contractual framework between these two actors. AFG supports this provision.

In order to minimize the risk of confusion in the content of the expanded omnibus account, the two draft regulations (*Article 89 AIFM Regulation and Article 13 UCITS Regulation*) reinforce significantly the reconciliation requirements to be fulfilled by depositaries. It appears to us that these ex post facto control measures are essential but not necessarily sufficient against the recourse of another fund's creditor.

About AIFM regulation (article 89)

In order to minimize the risk of confusion of risk of understanding, we suggest to amend the commissions' proposition in the aim to precise that the reference " *points (a) to (e) of paragraph 1* " " concerns **article 89**.

*"Where a depositary has delegated its custody functions to a third party in accordance with Article 21(11) of Directive 2011/61/EU, it shall remain subject to the requirements of points (a) to (e) of paragraph 1 **of this Article**. It shall also ensure that the third party complies with the requirements of points(b) to (g) of paragraph 1 and segregation obligations laid down in Article 99"*.

## Special case of sub-custodian established in third countries

AFG approves the continuation of a segregation which is differentiating assets from UCITS and from AIFs for a same depository, when the sub-custodian is established in a third country. (Article 17 of the UCITS Regulation and Article 99 (2) of the AIFM Regulation).

If the AIFM regulation makes it clear that the requirement of a legal opinion only concerns the case where the sub-custodian is established in a third country, the wording of the actual Article 17 in the UCITS regulation is not as clear and should be specified. The current wording seems to impose the presence of a legal opinion in all situations of conservation delegation.

Therefore, AFG proposes to amend the beginning of Article 17, paragraph 2 of the UCITS Regulation as follows:

1. A depository shall ensure that a third party located in a third country, to whom custody functions are to be or have been delegated in accordance with Article 22a of Directive 2009/65/EC takes all necessary steps in order to ensure that in the event of an insolvency of the third party, assets of a UCITS held by the third party in custody are unavailable for distribution among, or realisation for the benefit of, creditors of that third party.
- 2; ***“Where the third party is located in a third country”***, a depository shall ensure that the third party takes the following steps: (.....)

In the UCITS Regulation, (Article 17. 2. (a)): it is stipulated that the sub-custodian established in a third country has to segregate the UCITS’ assets coming from the same depository in relation to the assets of the other custodian's customers. **“and from the assets held for customers of the depository which are not UCITS”**

This clarification does not appear in the proposed amendment of the AIFM Regulation. AFG suggests incorporating it in the wording of Article 99 2a (a) (i):

- 2a Where a depository delegates its custody functions to a third party located in a third country in accordance with Article 21(11) of Directive 2011/61/EU, in addition to the requirements of paragraph 1 of this Article, the depository shall ensure the following:
  - (a) the depository receives legal advice from an independent natural or legal person confirming that the applicable insolvency law recognises the following:
    - (i)the segregation of the assets of the depository's AIF clients from its own assets, from the assets of its other clients, ***“from the assets held for clients of the depository which are not AIF”*** and from the assets held for the depository's own account;

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