

Regulatory Update Q1 & Q2 2022

1. Luxembourg

1.1 CSSF reforms the long form report (“LFR”):

With the objective to improve its risk-based supervision, the CSSF published 3 Circulars for prudential and AML/CFT purposes at the end of December 2021.

These do modify (and also replace) the requirements set forth in the updated CSSF Circular 02/81 dated 6th December 2002 in relation to the Guidelines concerning the task of auditors of UCITS and Part II UCIs (requiring the preparation of the “Long Form Report” - LFR) and extend the revised requirements to other regulated entities (SIFs, SICARs and investment fund managers (“IFMs”)).

These new CSSF Circulars are listed below:

- CSSF Circular 21/788 introduces a new AML/CFT external report to be prepared by the approved statutory auditor (*réviseur d'entreprises agréé*), as referred to in Article 49 of the CSSF Regulation 12-02 on the fight against money laundering and terrorist financing, as amended.

Circular 21/788 applies to all Luxembourg IFMs as defined in CSSF Circular 18/698, including registered AIFMs, and all Luxembourg investment funds supervised by the CSSF for AML/CFT purposes, except funds which have appointed an IFM (established in Luxembourg or abroad).

Therefore, UCITS that have appointed a management company and AIFs that have appointed an AIFM will not be subject to the requirements of this Circular.

- CSSF Circular 21/789 introduces a new self-assessment questionnaire (“SAQ”) for all authorised IFMs, self-managed SICAV and self-managed AIFs.

The approved external auditor of the authorised IFM or Self-Managed UCI is required to review on an annual basis certain questions of the SAQ and to complete on that basis a separate report.

- CSSF Circular 21/790 introduces a new SAQ for all UCITS, Part II UCIs, SIFs and SICARs.

The external auditor of the regulated UCIs is required to review on an annual basis certain questions of the SAQ and to complete on that basis a separate report.

The completion and filing of the SAQs, the separate reports and the management letters is to be performed using the eDesk platform developed by the CSSF.

A new module “**Collective Investment Sector Reporting Tool**” for preparing and filing with the CSSF the reports foreseen in CSSF Circulars 21/789 and 21/788 is already available on the CSSF [eDesk](#) platform.

The reports and the type of information to be communicated to the CSSF in case the external auditor issues a modified audit opinion for a regulated UCI, as foreseen in CSSF Circular 21/790 which will become applicable as of the financial years ending 30 June 2022, are expected to be available respectively, on the CSSF [eDesk](#) platform and the CSSF website, by 31 March 2022 at the latest.

1.2 CSSF Circular 22/795 concerning the application of ESMA guidelines on marketing communications:

On the 30th of January 2022, the CSSF published its CSSF Circular 22/795 concerning the application of ESMA guidelines on marketing communications (“ESMA Guidelines”) under Regulation (EU) 2019/1156 on the cross-border distribution of funds (“CBDF Regulation”), which were published on 2 August 2021.

CSSF Circular 22/795 applies as from 2 February 2022, which is also the date of application of ESMA Guidelines, whilst the marketing communication requirements set out in the CBDF Regulation have been applicable since 2 August 2021.

1.3 Ukraine Crisis:

In the context of the Ukrainian crisis, the CSSF has created a page dedicated to the Ukraine crisis on its website (Ukraine crisis - CSSF), with:

- the recently adopted regulations which details the sanctions and restrictions on financial operations with regard to Russia and some of its nationals;
- the publications of the EU Commission and the EBA;
- the publications of the CSSF in that respect.

1.4 CSSF FAQ on the application liquidity management tools by UCITS

On the 31st of March 2022, the CSSF provided guidance with respect to the challenges faced by investment funds holding Russian and Belarussian assets that have become illiquid as a consequence of the Ukraine crisis as well as due to the restrictive measures taken by the EU and other countries.

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Following this, the CSSF published on its website and FAQ on liquidity management tools ("LMTs") that may be applied by investment funds

The FAQ addresses more specifically the segregation of assets or creation of so-called "side-pockets".

The FAQ mainly tackle the application of possible LMTs by UCITS but the CSSF indicates that theses LMTs might also be applied by AIFs.

Besides, the CSSF also explains that a distinction has to be made to determine the relevant available LMTs between (i) funds having a limited exposure to illiquid assets, which allows the funds to continue its operations and (ii) funds having a higher exposure to such illiquid assets, which in that case may cause problems for the normal functioning of the funds.

According to the CSSF, the funds that have a limited exposure to illiquid assets have more straightforward and temporary options to deal with the situation, including fair valuation adjustments of the affected assets and a possible suspension of the subscriptions into the impacted sub-fund.

As a next step and also depending on the size of the exposure to the illiquid assets, a segregation of these assets could also be considered.

Now for the funds with higher exposure to illiquid assets the CSSF will expect these fund to suspend their subscription and redemption activities as a first immediate measure to protect the investor's interests, before deciding in a second step to apply one of the segregation options specified in the FAQ on LMT or, as a measure of last resort, to put the fund into liquidation.

Actions/steps to be undertaken by funds to determine the adequate segregation option:

The governing body of the relevant funds, shall adopt a thorough analysis to be able to justify why the selected tool is the only possible and adequate tool to be implemented taking into consideration the investor's best interest.

Such analysis will be made by considering all legal aspects (e.g. assessment of potential breaches with respect to the UCITS rules) as well as fiscal and accounting aspects of the envisaged option, and by ensuring that such option is compliant with, the specific fund documentation and the sanction regime in the context of the Ukraine crisis.

It should also be double-checked to what extent and under what conditions the approval of investors is required.

Prior notification to the CSSF with a view to authorisation, which requires the submission of an application file to the CSSF via email containing at least the information and supporting documents listed in the FAQ.

The CSSF stresses out that it remains the responsibility of the governing body of the fund to ascertain, on basis of the constitutional documents of the fund whether the selected option is a tool that could be implemented and under what circumstances and conditions, considering, amongst others, also the provisions of article 1(5) of the UCITS Directive, which prohibits UCITS from transforming themselves into collective investment undertakings which are not covered by the UCITS Directive (side pocket are not authorised in Luxembourg)

2. ESMA

2.1 UCITS: ESMA/EU Commission position on fee rebates

In November 2021, a question on fee rebate arrangements was added in the ESMA FAQ on UCITS.

In fact, ESMA did not answer itself but forwarded the question to the EU Commission. The question relates to the applicability of the UCITS inducement rules (i.e. Article 29 of the UCITS Level 2 Directive):

- to rebate arrangements where UCITS management companies (“**UCITS Mancos**”) pay these rebates from their own resources (payment vis-à-vis an individual investor);
- the payment of fees by UCITS Mancos from their own resources to separate investors (e.g. by concluding side letters with institutional investors, subscribing investment fund units on behalf of their clients).

The EU Commission in the first part of its reply verifies the application of the UCITS inducement rules in this case. According to the EU Commission, as management fee discount arrangements entail payments to certain investors based on the fees charged by the UCITS Mancos to remunerate investment management and/or administration activities, they should be analysed as payments for the activity of the investment management and administration of the UCITS and therefore as falling within the scope of the UCITS inducement rules.

The EU Commission states that UCITS Mancos must be able to provide accurate and documented justifications upon national competent authorities’ request.

2.2 UCITS and AIFs: CSA on valuation :

On 20th of January 2022, ESMA launched a Common Supervisory Action ("**CSA**") with national competent authorities ("**NCA**s") on valuation of UCITS and open-ended AIFs ("**CSA on valuation**") across the EU.

The CSA aims to assess compliance of supervised entities with the relevant valuation-related provisions in the UCITS and AIFMD frameworks, in particular the valuation of less liquid assets (e.g. unlisted equities, unrated bonds, corporate debt, real estate, high yield bonds, emerging markets, listed equities that are not actively traded, bank loans) and will be conducted throughout 2022.

In this context, in a Communiqué dated 24 January 2022, the CSSF indicated that at the beginning of March 2022 it will launch the first phase of the CSA by asking a representative selection of Luxembourg-based authorised IFMs of UCITS and open-ended AIFs and a limited number of EU IFMs managing Luxembourg UCITS and AIFs to complete a dedicated questionnaire for all UCITS and AIFs managed.

The response questionnaire will have to be submitted by the selected IFMs through a dedicated communication mean set up by the CSSF.

2.3. PRIIPs: Update amendments to the PRIIPs Level 2

Following the end of the UCITS exemption, new PRIIPs RTS have been adopted and published in the Commission Delegated Regulation (EU) 2021/2268. The new PRIIPs RTS introduces changes to the existing KID PRIIPs in order to adapt it to UCITS.



As regards the timing, unfortunately, the application date of the new PRIIPs RTS (i.e. 1 July 2022) is not aligned with the UCITS/PRIIPs Quick Fixes package.

In order to solve this issue, the EU Commission published a new proposal for a regulation on the 17th of March 2022 to change the application date of the new PRIIPs RTS and to align it with the UCITS/PRIIPs Quick Fixes.

The proposal is subject to a 3 months period of scrutiny by the EU Parliament and Council, during which the co-legislators could object, which is however not expected.

EPT (European PRIIPs Template):

On the 8th of February 2022, a new version of the EPT was published on FinDatEx website.

The EPT V2 incorporates the necessary changes made by the new PRIIPs RTS. It is intended to be used for PRIIPs sold from January 2023 onwards.