

Regulatory Update Q2 & Q3 2021

1. Luxembourg

1.1 UCITS/UCIs/AIFs: Use of securities financing transactions Performance fees: ESMA clarifications and mandatory CSSF declaration for UCITS and regulated AIFs:

ESMA clarified on 28th of May 2021 and on 16th of July 2021, via new questions on performance fees that were added to its Q&As on UCITS and on AIFMs, to complete the Guidelines on performance fees in UCITS and certain types of AIFs. This was published by ESMA on 5th of December 2020 and following that the CSSF issued its CSSF Circular 20/764 integrating those Guidelines into its administrative and regulatory practices.

The clarifications provided are as follow:

1. the set-up of the reference period for performance fee models based on a benchmark index;
2. the set-up of the reference period in case of a merger where the receiving UCITS/AIF is a newly established fund with no performance history and is in effect a continuation of the merging UCITS/AIF
3. the application of the Guidelines in the case of delegation of the portfolio management function to different delegated portfolio managers within the same sub-fund of a UCITS; and
4. the crystallisation of performance fees in case of creation of a new sub-fund/share class in an existing umbrella UCITS or AIF in the course of its financial year or in case of creation of a new UCITS/AIF.

Mandatory CSSF declaration for UCITS and regulated AIFs Via a press release dated 22 September 2021, the CSSF announced a new requirement for a performance fee declaration to be made as from the 30th of September 2021 on eDesk by IFMs for the Luxembourg regulated UCITS and AIFs they manage.

The declaration is to be made by the IFM and is now available since 30th September 2021 for Luxcellence. The deadline for submission of the initial declaration will be at the latest before the corresponding closing date of each fund as further specified in the IFM's performance fee eDesk dashboard. The form must also be completed for Funds and sub-funds that are not subject to a performance fee. Luxcellence will also be responsible to ensure that performance fee declarations shall be kept up to date.

1.2 AML/CFT market entry form for investment funds and IFMs:

The CSSF published on 21st June 2021 the FAQ Market Entry Form regarding the completion of the AML/CFT market entry form, or also known as MEF.

What's new is that the MEF is not an excel file anymore but is to be completed online via eDesk for UCIs and IFMs.

Only the person responsible for the respect of compliance ("RR") and the person responsible for compliance of the UCI ("RC") have the rights to initiate and submit the MEF.

But delegates may contribute to the completion of the MEF before its final submission to the CSSF via eDesk by the RR or the RC.

It's important to note that some documents normally attached to the MEF do not need to be attached again if they have been filed previously and they have not changed.

1.3 UCITS: treatment of breaches of UCITS global exposure limit:

The CSSF updated its FAQ on the UCI Law on 17th of August 2021.

The added questions bring about clarity in relation to passive and active breaches of VaR limits, such as:

- in what circumstances a breach can be considered as passive, the actions which the CSSF expects managers to take in case of passive breaches and confirmation that passive breaches do not need to be reported to the CSSF;
- the information that UCITS must communicate to the CSSF upon occurrence of an active breach of VaR limits.

3. Europe

3.1 ESMA Common Supervisory Action on UCITS Liquidity Risk Management

In the course of 2020 the ESMA performed a Common Supervisory Action (CSA) with national competent authorities (NCAs) across the EU/EEA on the supervision of UCITS managers' liquidity risk management.

The above is for information purpose only. Nothing contained therein constitutes or shall be deemed to constitute a commitment of any kind from Luxcellence Management Company S.A. ("Luxcellence" or "we"). Please note that the above information has also not been audited, is not a legal opinion, is the property of Luxcellence Management Company S.A. and cannot be forwarded as such.

On 24 March 2021, ESMA published the results of the CSA in a Public Statement, including the experiences and findings of all 30 EU/EEA NCAs (including the CSSF) participating to the exercise. ESMA informed in that context that the overall level of compliance with the applicable rules on LRM (Liquidity Risk Mgt) was satisfactory for most UCITS managers, but that the exercise also showed shortcomings in some areas and the need for improvements in certain key areas.

While the overall analysis of compliance for IFM in Luxembourg is consistent with the conclusions of ESMA, the CSSF would like to inform market participants about the publication of the report “CSSF Feedback Report – ESMA Common Supervisory Action on UCITS Liquidity Risk Management” which presents the main observations made by the CSSF in the context of the CSA together with the related recommendations for improvements in view of the applicable regulatory requirements.

The CSSF is currently engaging on a bilateral basis with IFM in relation to the observations made in the context of the CSA exercise, thereby asking these IFM to implement the necessary corrective measures for the shortcomings observed.

In addition, the CSSF asks hereby all UCITS managers to conduct, by the end of 2021, a comprehensive assessment with regard to the compliance of their liquidity risk management set-ups in relation to the observations of ESMA and of the CSSF and to take, if applicable, the necessary corrective measures.

3.2 UCITS/AIFs: Supervision of costs and fees: PRIIPS: postponement of the UCITS exemption:

On 15th of July 2021, the EU Commission published a proposal for regulation amending the PRIIPS Regulation aiming to postpone the end of the UCITS Exemption to 30 June 2022.

It's expected that the Regulation will become effective before year end.

3.3 Postponement of Level 2 SFDR

The EU Commission indicated, in a letter dated 8th of July 2021, that it will defer the application date of the SFDR level 2 Regulatory Technical Standards ("RTS") by six months from 1 January 2022 to 1 July 2022.

3.4 EU Commission FAQ on the application of SFDR

At the end of July 2021, the EU Commission published an FAQ on the application on SFDR which includes some answers to the priority questions raised by the ESAs in January 2021. The answers provide clarification on:

- i) the application of SFDR to registered AIFMs and to non-EU AIFMs;
- ii) the meaning of "promotion" in the context of financial products promoting environmental or social characteristics (Article 8 of SFDR);
- iii) clarifications as regards financial products with a sustainable investment objective (Article 9 SFDR);
- iv) the application of SFDR product rules to portfolios managed on a discretionary basis and dedicated funds.