

Alternative Funds Industry

Quarterly Update

July to September 2021



Legal & Regulatory Quarterly Update on selected matters in the AIF industry

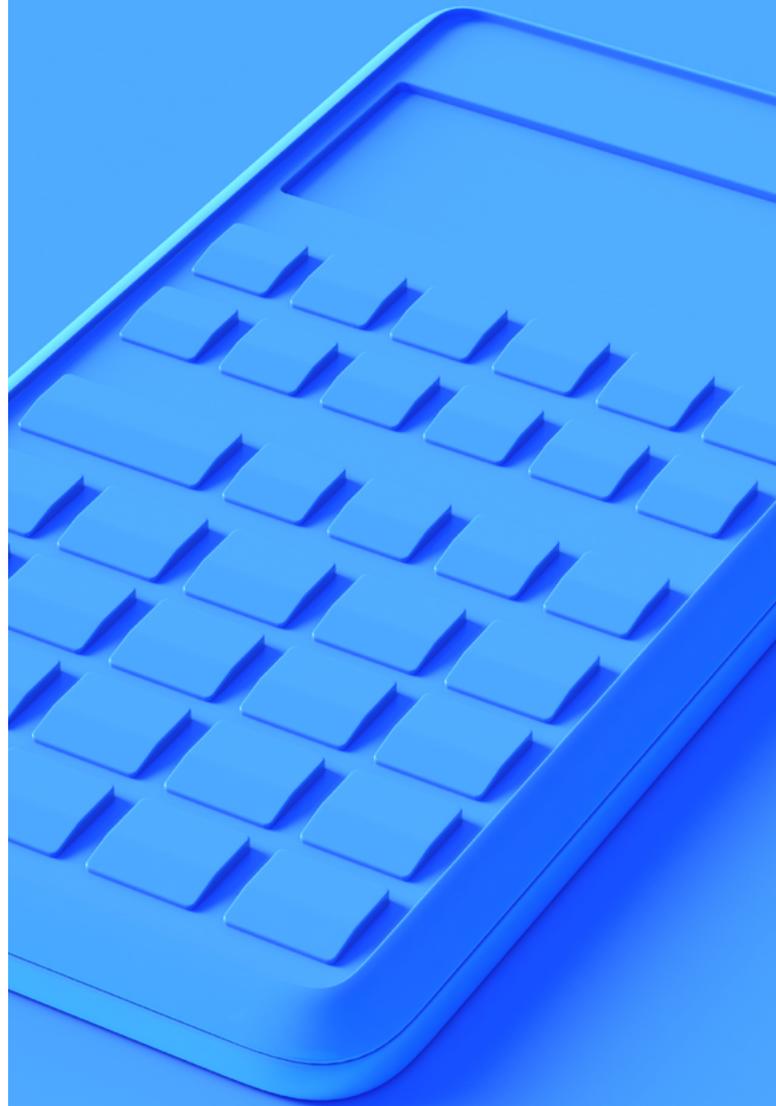
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I. AIFMD

1. LUXEMBOURG

New eDesk module for declaration of performance fee models

Luxembourg AIFMs are invited to complete a declaration and provide data collection on performance fees for Luxembourg based regulated AIFs they manage via the launch of a new eDesk module on performance fees as from 30 September 2021. The aim is to ensure that performance fee models used by AIFMs comply with the principles of acting honestly and fairly in conducting their business activities and acting with due skill, care and diligence, in the best interest of the fund that they manage, in such a way as to prevent undue costs being charged to the fund and its investors.

It has to be noted that on 18 December 2020 the CSSF already published its [Circular 20/764](#) in order to promote supervisory convergence in this field at the European level as of 6 January 2021, the date on which the ESMA guidelines on performance fees ([ESMA34-39-968](#)) came into effect with the aim to increase convergence and standardisation in the sector of performance fees.

2. EUROPEAN UNION

New ESMA guidelines on article 25 of the AIFMD (leverage)

On 23 June 2021, ESMA published guidelines regarding the assessment of leverage-related systemic risk in the AIF sector ([ESMA34-32-552](#)), which should help to safeguard financial stability and limit the potential sources of systemic risks arising from leverage.

These guidelines further aim to ensure uniform and effective supervisory practices in the European system of financial supervision and NCAs take a consistent approach when assessing whether the conditions for imposing leverage-related measures are met.

Risk assessments should be performed by NCAs on a quarterly basis. ESMA recommends that NCAs follow a two-step approach when performing their risk assessments: first, identify the level, source, and use of

leverage, and then identify leverage-related systemic risks. NCAs are advised to conduct quarterly assessments and make use of both qualitative and quantitative data as to how leverage contributes to the build-up of systemic risk in the financial system, in accordance with Article 25 of the AIFMD.

These guidelines are applicable as from 23 August 2021.

Update of ESMA Q&A on application of AIFMD

On 16 July 2021, ESMA Q&As on the application of AIFMD ([ESMA34-39-897](#)) were updated by additional clarifications as regards performance fees, inter alia in certain types of AIFs, relating to the following performance fee scenarios: (a) authorised AIFM delegates portfolio management to several distinct portfolio managers, and (b) a new AIF or new compartment / share class in an existing AIF has been established during its financial year.

II. ESG

1. LUXEMBOURG

Deferral of the application of the SFDR Regulatory Technical Standards

The [Regulation \(EU\) 2019/2088 on sustainability-related disclosures in the financial services sector \(SFDR\)](#) has been in force since 10 March 2021. Containing new requirements the regulation is intended to provide investors with greater insight into sustainability risks and to improve the comparability of financial products with respect to sustainability.

On 23 July 2021, ESA published a [letter from the European Commission to the European Parliament and the Council of 8 July 2021](#) (the “**Letter**”). In the Letter, the European Commission announces that due to the length and technical detail of the regulatory technical standards under SFDR (the “**RTSs**”), the late submissions to the European Commission, and envisaged amendments, the European Commission will bundle all RTSs in a single delegated act and will defer the date of application of 1 January 2022 by six months to 1 July 2022.



It should facilitate the smooth implementation of the RTSs by financial market participants, providing them with sufficient time to gather the necessary information and adjust their practices applying specific requirements of the RTSs.

The Letter must be read together with the [Joint ESA Supervisory Statement](#) on the application of the SFDR issued on 25 February 2021 by the ESAs.

The ESAs recommend that the national competent authorities refer financial market participants for the interim period between 10 March 2021 and 1 July 2022 to the requirements set out in the draft RTSs of the final report, which the ESAs submitted to the European Commission on 4 February 2021 and which can be used as a reference for the application of Articles 2a, 4, 8, 9 and 10 of SFDR during this interim period.

2. THE NETHERLANDS

AFM report on the implementation of the SFDR (by managers of Dutch collective investment schemes)

The AFM conducted a survey among fund managers to gain insight into how managers of Dutch funds have implemented some of these new requirements under SFDR. The AFM then reviewed a selection of funds for compliance with the SFDR requirements.

In its [report](#) the AFM has established that all managers of funds with sustainability characteristics or objectives on the date that the SFDR came into effect had included relevant information in their prospectuses. However, the AFM sees room for improvement in the quality of this information and has doubts regarding the sustainability classification for a significant proportion of the selected group. More specifically, the AFM has raised the following concerns:

- Integration of sustainability risks in investment policy could be stated more clearly;
- Observance of the transparency obligations in article 8 and 9 SFDR could be more clear; and
- Fund objectives frequently are defined in overly vague terms.

In connection with these conclusions, the AFM acknowledges that the SFDR rules have been in force since March 2021, that there are still uncertainties with regard to the interpretation of some requirements and definitive technical standards are lacking for the moment. Managers of funds will therefore not receive a feedback letter with the findings from the review on an individual basis. The AFM does, however, expect managers to incorporate the insights of the review in their further implementation of the SFDR and the associated technical standards. The AFM also calls for extra attention to the correct sustainability classification of funds. In the coming period, the AFM will continue to exercise ongoing supervision of compliance with the SFDR requirements and the implementation of the RTSs and in this supervision will take account of the extent to which its review findings are incorporated by managers.

3. EUROPEAN UNION

Publication of Q&A on SFDR by the European Commission

- On 26 July 2021, ESAs published the [answers](#) of the European Commission to [questions](#) from the European Parliament and the Council of 7 January 2021 related to the interpretation of the SFDR, clarifying the scope of SFDR disclosures for AIFMs.

- The European Commission clarified that both non-EU AIFMs marketing sustainable EU-AIF under a national private placement regime and sub-threshold AIFMs (also known as de-minimis or registered AIFMs) must ensure compliance with the disclosure obligations of the SFDR.
- In addition, the European Commission provided further guidance on the application of Articles 8 and 9 SFDR to financial products, the comply-or-explain mechanism of Article 4 SFDR with respect to financial groups, and the application of the SFDR with respect to tailored portfolio management mandates.

New ESMA Q&As concerning EU Climate Transition Benchmarks and EU Paris-Aligned Benchmarks

On 16 and 29 July 2021, ESMA published an updated version of its Q&A concerning the Benchmark Regulation (EU) 2016/1011 ([ESMA70-145-114](#)). A new Q&A on EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks was added to the Q&A.

Among other issues, the new Q&A addresses:

- (i) whether an administrator should have to take into account in the key elements of the methodology all the ESG factors listed in Annex II of the [Delegated Regulation 2020/1816](#) and is allowed to take into account in the key elements of the methodology the additional ESG factors which are not listed in the Delegated Regulation 2020/1816;
- (ii) what an administrator should disclose in the key elements of the methodology and the benchmark statement if it provides benchmarks that do not take into account any of the ESG factors listed in Annex II of the Delegated Regulation 2020/1816;
- (iii) what the disclosure requirements are that an administrator of an EU Climate Transition Benchmark (EU CTB) or an EU Paris-aligned Benchmark (EU PAB) should comply with.



III. AML/CFT

1. LUXEMBOURG

CSSF Circular 21/782 implementing revised guidelines of the European Banking Authority on money laundering and terrorist financing risk factors.

On 24 September 2021, CSSF published its [Circular 21/782](#) integrating the revised EBA guidelines on money-laundering and terrorist financing risk factors into its regulatory approach (the “**ML/TF Guidelines**”).

The ML/TF Guidelines take into account changes to the EU AML/CFT legal framework and respective risks, among other things. The general section provides recommendations on the respective risk assessments, customer due diligence for beneficial owners and compliance with the provisions on enhanced customer due diligence related to high-risk countries.

Fund managers and investment funds should focus in particular on guideline 16, which provides indications regarding the criteria that increase and reduce:

- (i) product, service or transaction risk factors;
- (ii) customer risk factors (examples of unusual customer’s behaviour);
- (iii) distribution channel risk factors; and
- (iv) country or geographical risk factors.

Furthermore, the ML/TF Guidelines describe the measures that fund managers and investment funds should implement to comply with their customer due diligence obligations, indicate what enhanced customer due diligence measures a fund or a fund manager should apply in high-risk situations and what simplified customer due diligence obligations apply to lower risk situations.

CSSF FAQ regarding the AML/CFT Market Entry Form

On 21 September 2021, CSSF published [FAQ](#) relating to [AML/CFT Market Entry Form](#), providing further welcome clarifications to the financial market participants.

These FAQ include explanations on such issues as when the AML/CFT Market Entry Form should be completed and submitted, featuring the different cases and types of requests expected on eDesk, who can initiate, contribute and / or submit the AML/CFT Market Entry Form, which type of signature is accepted by the CSSF, etc. Furthermore, the FAQ provide clarification as to certain practical questions arising during the process around the AML/CFT Market Entry Form completion.

2. EUROPEAN UNION

New initiative from the European Commission enhancing the AML/CFT regime

On 20 July 2021, the European Commission introduced a [new package](#) of legislative proposals to strengthen the EU’s AML/CFT regime, consisting of four legislative proposals:



- A regulation establishing a new EU AML/CFT authority, transforming AML/CFT supervision in the EU and enhancing cooperation among financial intelligence units;
- A regulation on AML/CFT, containing directly applicable rules, including in the areas of customer due diligence and beneficial ownership and setting an EU-wide limit for large cash payments;
- A sixth Directive on AML/CFT replacing the existing AML directive and containing provisions that will be transposed into national law, such as rules on national supervisors and financial intelligence units Member States; and
- A revised version of Regulation 2015/847/EU that should enable tracing transfers of crypto-assets.

IV. MARKETING OF FUNDS

New rules on pre-marketing and marketing of investment funds.

The Luxembourg law of [21 July 2021](#) transposing Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending Directives 2009/65/EC and 2011/61/EU with regard to the cross-border distribution of collective investment undertakings (the “**CBDF Directive**”) and amending the AIFM Law, has been published in the *Mémorial A*.

One of the key changes to the currently applicable funds marketing regime is the introduction of a “pre-marketing” definition. In accordance with Article 1 (58-1) of the AIFM Law, pre-marketing means a provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM or on its behalf, to potential professional investors domiciled or with a registered office in the Union in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with Article 31 or 32 of the AIFMD, in that Member State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or

placement to the potential investor to invest in the units or shares of that AIF or compartment.

Furthermore, the CBDF Directive puts in question the contentious reverse solicitation method by introducing a rule that any subscription by professional investors, within eighteen months of the start of the pre-marketing by the manager, of units or shares of an AIF referred to in the information provided in the context of a pre-marketing or an AIF established as a result of pre-marketing, is considered to result from marketing and is subject to the notification procedures.

The new legal regime under CBDF Directive introduces further a formal procedure to deregister *inter alia* AIFs from marketing by their AIFMs. Following such de-notification, the AIFM shall be prohibited from undertaking any pre-marketing of the de-notified AIF's interests or in respect of similar investment strategies or investment ideas for a period of 36 months.

Luxembourg notification letter forms for pre-marketing by Luxembourg AIFMs, EU AIFMs and non-EU AIFMs, De-notification letter form.

On 29 July 2021, in line with the regime introduced by the CBDF Directive, CSSF updated the notification letter forms in the view of harmonisation of pre-marketing rules between NCAs, the particular aim being to minimise disadvantages of EU AIFMs vis-à-vis non-EU AIFMs. The CSSF has considered that the same conditions and notification procedure provided by Article 30a of the AIFMD and transposed in the AIFM Law should apply to non-EU AIFMs when they engage in pre-marketing to potential professional investors in Luxembourg

[Luxembourg-based authorised AIFMs, EU AIFMs and non-EU AIFMs](#) engaging in pre-marketing activities towards potential professional investors in Luxembourg must send a duly completed and signed pre-marketing notification letter, within two weeks of having begun pre-marketing, to the CSSF.

Furthermore, relevant de-notification letter forms for an AIF / AIF compartment are available at <https://www.cssf.lu/en/Document/aif-de-notification-letter-aif-compartment/>

CSSF FAQ Update: introduction of pre-marketing rules (CBDF Directive)

On 10 August 2021, CSSF updated its [FAQ in relation to the CBDF Directive](#) regarding the new notifications process in respect of the launch of pre-marketing rules. Two main changes for AIFM notifications introduced by the CBDF Directive are as follows:

- In case of fees, the contact address has to be indicated in the notification letter, should it be different to that of the AIFM.
- Luxembourg AIFMs, EU AIFMs and non-EU AIFMs have to notify the CSSF for pre-marketing activities further to new pre-marketing notifications letters issued by the CSSF supported by new submission rules as well as the introduction of a de-notification letter with specific submission rules.

2. EUROPEAN UNION

Marketing requirements and communications prior the CBDF Directive (ESMA)

On 1 July 2021, ESMA submitted to the European Parliament, the Council and the European Commission its first report on national rules governing the marketing of investment funds under the CBDF Directive ([ESMA34-45-1219](#)).

In this report, ESMA provides an overview of the marketing requirements across the national competent authorities of all EU Member States to provide a panorama of national rules, regulations and administrative provisions governing the marketing requirements for AIFMs in their jurisdiction.

Key findings:

- Marketing requirements are typically conducted in accordance with the AIFMD although NCAs' replies suggest that some additional national laws, regulations, and regulations may apply.
- Only very few NCAs carry out ex-ante or ex-post verification or marketing communications.

ESMA will submit to the European Parliament, the Council and the Commission a new iteration of the report in two years.

V. NCA UPDATES

CSSF Circular 21/777 on cloud service providers

On 12 July 2021, CSSF published its [Circular 21/777](#) implementing the guidelines of ESMA on outsourcing to cloud service providers (ESMA50-164-4285). This circular extends the scope of the amended CSSF Circular 17/654 on cloud outsourcing to include certain financial market participants, such as AIF depositaries, data reporting service providers, central securities depositories, etc. Investment fund managers subject to Circular CSSF 18/698 and AIFMs within the meaning of Article 4 (1) (b) of the AIFMD fall within the scope of CSSF Circular 21/777 as from 31 July 2021.

New financial market participants within the scope of CSSF Circular 21/777 should review and amend accordingly the existing cloud outsourcing arrangements with a view to ensuring that they comply with the requirements of Circular CSSF 17/654 by 31 December 2022.

CSSF press release on submission of liquidation period extension requests for funds in non-judicial liquidation

On 31 August 2021, CSSF published a [press release](#) clarifying that liquidation period extension requests for funds in non-judicial liquidation will no longer be required, effective immediately.

The CSSF will monitor the status of the liquidation via the semi-annual reports on the progress of the liquidation submitted by the liquidator, who will use the form available on the CSSF website ([Periodical report from the liquidator on the progress of the liquidation](#)).

The submission of the half-yearly progress report covering the period from 1 January to 30 June should take place no later than on 30 September of the same calendar year, while submission of the report covering the period from 1 July to 31 December should be made no later than on 31 March of the following year.

It is reminded that the liquidator must report to the CSSF any significant issue without delay and should not wait until issuing the semi-annual report.

Furthermore, it should be noted that liquidation period extension requests for sub-funds of those funds that are on the official list and consequently not in non-judicial liquidation are still required when the nine-month deadline is reached.

CSSF press release on optimisation of the authorisation process relating to new funds and sub-funds

On 30 July 2021, CSSF published a press release announcing procedural changes as further described below, seeking to optimise the authorisation process for new funds and new sub-funds added to existing fund structures, applicable from 16 August 2021.

- (i) A new “[Fund Pre-Inception Readiness Review](#)” questionnaire covering numerous confirmations that were previously requested separately has been introduced and published on the CSSF website. This questionnaire should provide a confirmation by the Management Company/AIFM that all preparatory work and required assessments have been completed and that the Management Company/AIFM is ready to onboard the new fund or sub-fund(s) after authorisation.
- (ii) Furthermore, the CSSF no longer requests during the application process the service provider agreements entered into by the fund and respective service providers. At the end of the [examination process](#), the applicant will submit to the CSSF a copy of fundamental agreements in final executed form, along with a [standardised letter](#) confirming compliance of these agreements with applicable legal and regulatory requirements.
- (iii) Finally, in two additional new guiding notes published on the CSSF website, the regulator clarified what is expected in terms of documentation required to support an application in order to give [general considerations](#) to be followed when submitting documents and to provide an [overview table](#) of all the documents required when submitting a fund approval file.

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4. About AKD

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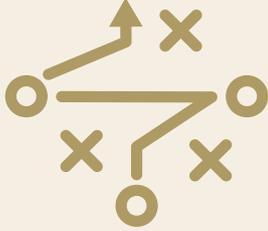


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