

# Alternative Funds Industry

*Quarterly Update*

January to March 2022



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

The European alternative investment funds (AIF) market is one of the fastest growing industries in the financial sector. It is all the more important to keep up to date with developments in this dynamic industry. To help financial market participants stay on top of current trends in the AIF space, AKD quarterly updates provide information on selected Luxembourg and Dutch legal, tax and regulatory matters within the AIF industry.

In this quarterly update covering Q1 2022, you will learn about the latest news and updates on *inter alia* the emergency of virtual assets regulation, the new disclosure requirements in terms of marketing and ESG, as well as the impact of Ukraine crisis, the reinforcement of AML/ CFT requirements and tax reporting in the funds industry.

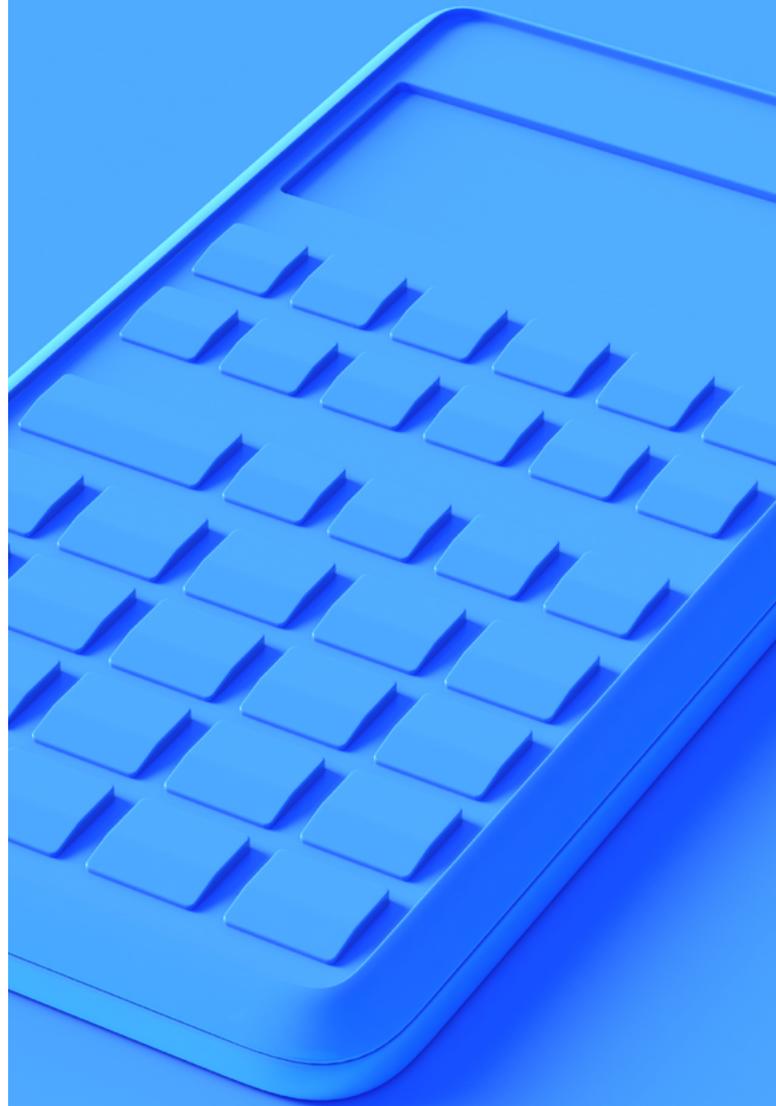
Enjoy the read and get in touch with us if you have any questions.

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# Table of Contents

<i>Luxembourg</i>	4
Virtual Assets	4
Marketing	5
ESG	8
Ukraine	8
AML/CFT	10
Other developments	11
Tax	12
<i>Netherlands</i>	14
Regulatory	14
Tax	14
<i>Glossary</i>	16
<i>Contacts</i>	17



# Luxembourg

## Virtual assets

### CSSF updates its FAQ on virtual assets

On 4 January 2022, the CSSF updated its [FAQ](#) on virtual assets in the context of undertakings for collective investment (i) clarifying the scope of AIFs entitled to invest directly or indirectly in virtual assets and (ii) adding a fifth question relating to depositaries of virtual assets and (iii) a sixth question for the AML/CFT due diligence expected by AIFM (the “**Updated FAQ**”).

- (i) In the initial FAQ, investing in virtual assets was only open to AIFs managed by authorised AIFMs. In this Updated FAQ, a door is now opened for registered AIFMs as AIFs may invest directly or indirectly in virtual assets under the condition that the units are marketed to professional investors only.
- (ii) The Updated FAQ confirms that Luxembourg depositaries may be mandated to act as depositaries for investment funds investing directly in virtual assets subject to certain conditions. In this context, fund depositaries must implement adequate organisational arrangements as well as an appropriate operational model, taking into account the specific risks associated with the safekeeping of virtual assets. Furthermore, a depositary must notify the CSSF in advance if it intends to act as depositary for an investment fund that invests directly in virtual assets. Consequently, if a depositary does not offer safekeeping or administration type of services and the investment fund or its manager directly appoints a specialised virtual asset service provider (“**VASP**”) offering a “custodian wallet type of service”, the VASP rather than the depositary bears the liability for the restitution of assets. To that effect, the AIFM/investment fund is required to have a direct contractual relationship with the specialised service provider. In addition, the depositaries envisaging to directly safeguard virtual assets are required to register as VASPs and to inform the CSSF of such plans in a timely manner.

- (iii) The AIFM must compute an AML/CFT risk score for the asset and perform AML/CFT due diligence in accordance with the calculated risk score, taking into account the [virtual risk assessment](#) on virtual service providers. The key outcome of virtual asset due diligence is to understand where the asset is coming from and/or going in order to mitigate the risk of investment abuse from money launderers.

### The CSSF issues white paper on DLT and blockchain

On 21 January 2022, the CSSF published a [white paper](#) on the technological risks and recommendations for the financial sector relating to distributed ledger technologies (“**DLT**”) and Blockchain. This document, while being non-binding, should guide professionals in their due diligence process related to the use of DLT and its application in the Luxembourg financial sector. This white paper primarily targets financial and non-financial institutions providing or intending to provide services to the Luxembourg financial sector and invites any stakeholder to consider the concrete implications of the use of a DLT in the provision of its services. The CSSF observes that while the proper use of DLT may bring advantages and opportunities to the financial sector, its integration in a constantly developing environment constitutes a challenge, which is why the CSSF promotes a constructive and open dialogue with the financial sector to ensure that both risks and advantages are adequately and appropriately taken into consideration by the respective actors of the financial services industry.

The CSSF shared its recommendations on assessing the risks when designing, implementing or seeking to offer services based on DLT with the aim to:

- Identify the key components of a DLT and the different types of DLT available,

The CSSF defines DLT as “technology allowing a network of independent and often geographically dispersed computers to update, share and keep a definitive record of data (e.g. information, transactions) in a common decentralised database in a peer-to-peer way, without the need for a central authority” and specifies the use of a consensus mechanism through the network of nodes.

- Highlight the roles and responsibilities of the different actors in the use of a DLT:
  - The DLT developer who develops the application code for running the DLT,
  - The infrastructure service provider (ISP) delivers the infrastructure on which the DLT runs and provide nodes on which the ledger is distributed,
  - The solution provider (or software designer) is the designer of the business solution which is based on the DLT,
  - The users. This participant is the user of the software developed by the solution provider
  - The end-users could be the investors of a fund managed on the DLT-based fund distribution platform.
- Emphasise some of the main risks related to the DLT, both in terms of governance and technical risks.

To provide financial services, the professional should determine the risks and benefits of the use of DLT (the risk analysis should at least cover strategic risks, legal and regulatory risks, security risks, performance risks, confidentiality risks) and the DLT model chosen should suit the business needs.

The professional should assess how changes at the DLT level may affect the continuity and validity of its business. As a result, it is recommended that a person be designated as the point of contact for any claims relating to DLT malfunctions.

### *Marketing*

#### **Summary of Luxembourg legal marketing requirements for AIFs**

On 27 January 2022, further to the ESMA's request that NCAs of all EU and EEA Member States provide a summary of their national laws, regulations and administrative provisions governing the marketing requirements of AIFs in their jurisdiction, the CSSF issued its [summary](#), divided in two main parts: (i) the marketing procedures with a passport under the AIFM Law, and (ii) the other marketing procedures without a passport under the AIFM Law.

### **CSSF Circular 22/795 on marketing communications disclaimer**

On 31 January 2022, the CSSF published a [circular](#) (the “**Circular**”), for the application of the [ESMA guidelines](#) on marketing communications (ESMA34-45-1272) (the “**ESMA Guidelines**”) under Regulation (EU) 2019/1156 on facilitating cross-border distribution of collective investment undertakings (the “**CBDF Regulation**”).

The Circular will apply as from 2 February 2022 to UCIs/UCITS management companies and authorised and registered AIFMs, as well as managers of EuVECAs and EuSEFs.

Please be reminded that the ESMA Guidelines apply to all marketing communications addressed to investors or potential investors for UCITS and AIFs, including when they are set up as EuVECAs, EuSEFs, ELTIFs and MMFs.

The ESMA guidelines list the requirements on the fair, clear and not misleading nature of marketing communications on information such as consistency with other documents, the risks and rewards, the costs, the past and expected future performance as well as sustainability-related aspects.

It is essential to identify the marketing communication as such by including sufficient information to make it clear that the communication has a purely marketing purpose and is not a contractually binding document. For instance, ESMA has suggested the following disclaimer “This is a marketing communication. Please refer to the [prospectus of the [UCITS/AIF/EuSEF/EuVECA]/Information document of the [AIF/EuSEF/EuVECA] and to the [KIID/KID] (delete as applicable)] before making any final investment decisions”.

This disclaimer should appear on different supporting media such as messages advertising for a UCITS or an AIF, messages broadcasted on any social media platform including any characteristics of a UCITS or an AIF, including the name of the UCITS or the AIF, marketing material addressed individually to investors or potential investors.

Any reference to a UCITS or an AIF in a press article, advertisement, or press release on the internet or any other medium may only be published after obtaining the CSSF’s approval. For this purpose, the CSSF will conduct testing to ensure compliance with the applicable requirements under Article 4 of CBDF Regulation and the ESMA Guidelines.

Exempted are all legal and regulatory documents/information of a fund, such as the prospectus or the information (i.e. the KIID and/or KID, the annual and half-yearly reports of a UCITS or an AIF, the Memorandum & Articles of Association, By-Laws, Trust Deed) which are to be disclosed to investors, as well as short messages broadcast online, in particular on social media platforms and information or communication issued in the context of pre-marketing.

The practical and/or technical aspects (including frequency, formats, channel of submission) of the implementation of the collection of information (if any) will be communicated by means of additional annexes to the circular and supplemented by a FAQ.

### **Cross-border distribution of investment funds in EU – summary of national rules governing marketing requirements**

On 4 February 2022, in accordance with Regulation (EU) 2019/1156 on facilitating cross-border distribution of collective investment, the ESMA published a [document](#) containing the links to the websites of national competent authorities (NCAs) where they publish the complete and up-to-date information on the applicable national laws, regulations and administrative provisions governing marketing requirements for AIFs and UCITS. The below links lead to the CSSF’s website:

- Hyperlink to the CSSF’s website where it publishes the complete and up-to-date information on the applicable national laws, regulations and administrative provisions governing marketing requirements for AIFs and UCITS,
- Regarding the hyperlink to the summaries of the applicable national laws, regulations and administrative provisions governing marketing requirements for AIFs and UCITS, it is noted that the hyperlink to the CSSF’s

website relating to the summary of marketing requirements for UCITS is available unlike the one for AIF,

- Hyperlink to the CSSF's website where it publishes the complete and up-to-date list of the fees and charges it levies for carrying out its duties in relation to the cross-border activities of fund managers.

### **CSSF FAQ on the data collection on commercial real estate for investment fund managers**

Please be reminded that on 8 June 2021 the CSSF published a [statement](#) relating to the data collection on commercial real estate (“**CRE**”) for investment fund managers in order to identify and monitor vulnerabilities that arise from the interplay between the real estate market and the financial system (the “**CSSF Statement**”).

The requests for data collection of CRE are addressed to AIFM who manage funds with an exposure to the real estate market.

On 31 March 2022, the CSSF published a [FAQ](#) on the data collection on CRE for investment fund managers (“**Data Collection FAQ**”).

This Data Collection FAQ clarifies some definitions of the CSSF Statement as:

- The amount to be reported: the property value as estimated by its fair market value,
- The interpretation of “Net new Investments”; it should reflect the net amount of acquisitions and disposals made during the data reference period,
- The interpretation of “loans to CRE”: is a loan extended by the fund and aimed at acquiring CRE or a loan extended by the fund and secured by a CRE property
- the scope of this CSSF Statement: Investments into residential properties can still be considered as CRE,
- The currency of the reporting: it should be always in euro, and
- The entities in the scope: includes funds of funds, feeder funds investing in non-Luxembourg master funds. Co-investments unregulated funds with CRE investments and/or CRE loans.



## ESG

### ESG - Sustainable finance update

On 2 February 2022, the EU Commission published a [proposal](#) for a taxonomy complementary climate delegated act on climate change mitigation and adaptation covering certain gas and nuclear activities ("**Taxonomy Complementary Climate Delegated Act**").

The Taxonomy Complementary Climate Delegated Act introduces:

- additional economic activities from the energy sector into the EU Taxonomy, and
- specific disclosure requirements for businesses related to their activities in the gas and nuclear energy sectors.

### ESMA publishes sustainable finance roadmap 2022-2024

ESMA published on 10 February 2022 [a sustainable finance roadmap](#) (SFR) setting priority areas and related actions for the ESMA in sustainable finance for the period 2022-2024.

The SFR identifies three primary objectives:

- Combating greenwashing and increasing transparency,
- Increasing the capacity of both National Competent Authorities (NCA) and ESMA in the field of sustainable finance, and
- Monitoring, assessment and analysis of ESG markets and risks.

### ESMA's consult on MIFID sustainability guidelines

The recent MiFID II amendments aim to integrate sustainability preferences into the advisory and portfolio management processes, ensuring that firms take clients' sustainability preferences into account.

The proposed ESMA guidelines will ensure that the objectives of MiFID II can be efficiently achieved by pursuing the goal of ensuring consistent and harmonised application of the requirements in the area of suitability, including on the topic of sustainability with the following main proposed amendments:

- Firms will need to gather information from clients about their preferences for various types of sustainable

investment products and the amount invested;

- Once the firm has identified a range of suitable products for the client, it shall identify – in a second step – the product(s) that satisfy the client's sustainability preference; and
- Firms must provide appropriate sustainability training to their employees and maintain appropriate records of the client's sustainability preferences.

The proposed ESMA [guidelines](#) are applicable to the following firms:

- investors and consumer organisations;
- investment firms and credit institutions providing investment advice or discretionary portfolio management services;
- UCITS management companies and external AIFMs when providing the investment services of investment advice or individual portfolio management; any relevant trade association; and
- investment firms and credit institutions when providing the investment services of investment advice and portfolio management listed in Section A of Annex I of MiFID II.

## Ukraine

### The Ukraine crisis and its impact on EU Financial Markets - ESMA coordinates regulatory response

On 14 March 2022, the ESMA published a [public statement](#) regarding the coordination of regulatory responses to the crisis in Ukraine and its impact on EU financial markets to ensure the orderly functioning of markets, financial stability and investor protection. It made the following recommendations:

- Financial market participants should ensure they comply with the relevant EU sanctions and monitor for any further restrictions,
- Issuers should disclose inside information about the effects of the Ukrainian crisis on their fundamentals, prospects, and financial situation,
- Issuers should provide transparency, to the extent possible on both a qualitative and quantitative basis, on the actual and foreseeable direct and indirect impacts of the crisis on their business activities, exposures to the affected markets, supply chains, financial situation and economic performance in their 2021 year-end financial report.

## **Ukraine crisis: CSSF FAQ on the application of Liquidity Management Tools by investment funds**

On 31 March 2022, the CSSF provided [guidance](#) to investment fund managers which encounter the impact of the Ukraine crisis on investments funds holding Russian and Belarusian assets that have become illiquid/non tradeable as a consequence of this crisis and the restrictive measures taken by the EU.

The new FAQs on the application of liquidity management tools (“**LMTs**”) by investment funds from the CSSF (the “**FAQ**”) aims at providing further guidance to the governing body of the fund in their own assessment of each investment fund’s individual situation, to provide further insights on the different options available to the governing body of the fund and to decide on the best way forward.

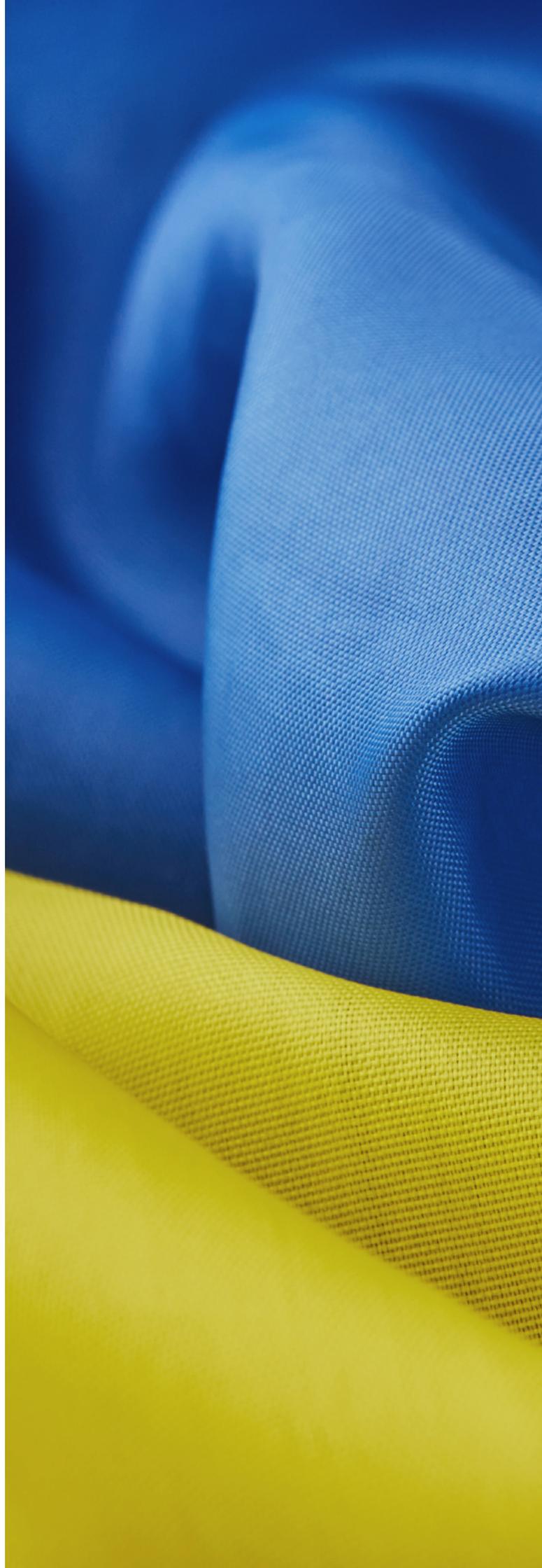
While the FAQ mainly provides guidance to UCITS, it might also have some application for AIFs.

The FAQ considers that fund managers when addressing the issue of illiquid assets in the context of the Ukraine crisis should do the distinction between:

- (i) funds having a limited exposure to illiquid assets; these would continue to operate normally by expecting that managers implement fair valuation adjustments of the affected assets further to inter alia their nature, currency and place of listing and as subsequent measure by creating segregation of the assets, commonly called “side pockets”;
- (ii) funds having higher exposure to illiquid assets; the CSSF invites managers to suspend the fund as a first immediate measure to protect the interests of the investors and as subsequent measure by creating side pockets.

When funds have higher exposure to illiquid assets, the FAQ provides three options to segregate the illiquid assets from the liquid assets as follows:

**Option 1:** creation of a side pocket by allocating the illiquid assets to a new share class with the aim to realise them in the best interest of the investors.



**Option 2:** split the impacted sub-fund in two sub-funds creating a side pocket, the initial sub-fund retaining the illiquid assets, and the liquid assets being transferred to a new sub-fund to be created.

**Option 3:** split the impacted sub-fund in two sub-funds, creating a side pocket, the initial sub-fund retaining the liquid assets, and the illiquid assets being transferred to a new sub-fund to be created. In this latter case, the new sub-fund with the illiquid assets will be put into immediate liquidation.

The FAQ further highlights the following points to be considered when implementing segregation of assets which remain the ultimate responsibility of the fund's governing body.

The choice of adequate action remains the ultimate responsibility of the fund's governing body for dealing with assets that have become illiquid as a result of the Ukraine crisis restrictive measures and hence should cover the following aspects:

- (i) Necessary analysis before choosing an option: managers should perform legal analysis, compliance with the sanction regime, implementation with the fund documentation, conditions of the investors' approval and the costs,
- (ii) Necessary information to investors: impacted investors should be informed about the implemented option in accordance with the provisions set forth in the prospectus, and
- (iii) Prior notification to the CSSF with a view to authorisation: the implementation of the options mentioned before requires prior notification with a view to authorisation by the CSSF and the provision of the necessary information to the CSSF as listed in the FAQ

### *AML/CFT*

#### **Luxembourg's vertical assessment of anti-money laundering risks**

The Luxembourg's Ministry of Justice conducted a risk assessment on legal persons and legal arrangements and

issued on 23 February 2022 its [first vertical assessment](#) of money laundering (ML) and terrorist financing (FT) report (the "**Report**").

Regarding the investment funds industry, the main risk is the difficulty to identify the ultimate beneficial owner. The CSSF chose to address this situation by playing an important role in the oversight of these investment vehicles. Most investment vehicles are either supervised by the CSSF or must be managed by an authorised or registered AIFM. In this case, the CSSF is kept up to date on the activities of the investment vehicle through its Luxembourg AIFM, which is subject to regular reporting requirements and AML/CFT controls. Furthermore, the Luxembourg Registration Duties, Estates and VAT Authority (Administration de l'enregistrement, des domaines et de la TVA) is in charge of RAIF's AML/CFT supervision.

#### **CSSF FAQ – Annual transmission of the AML/CFT RC report**

Please be reminded that AIFs and AIFMs supervised by the CSSF in relation with AML/CFT purpose are required to appoint a responsible person for compliance (*responsable du respect des obligations* - RR) and a compliance officer (*responsable du contrôle du respect des obligations* - RC)).

On 18 March 2022, the CSSF published a new [FAQ](#) in relation to the AML/CFT RC report for the CSSF supervised AIF and AIFM including:

- (i) the form of this report:
  - The AML/CFT RC report must include quantitative results. For the section regarding the investors, the AML/CFT RC report must include the number of newly accepted or rejected investors for the reference period, as well as the total number of investors within the shareholder register. In addition, the AML/CFT RC report must include the type of initial and ongoing due diligences performed on the investors, as for example an enhanced due diligence on higher-risk investors. The investor's file review frequency based on its risk scoring must also be included. In addition, the AML/CFT RC report must provide information of a qualitative nature to explain the assessment by the

RC of all the work performed.

- (ii) the submission deadline:  
the AML/CFT RC report should be submitted within five months following the end of the professional's financial year.
- (iii) the RC's liabilities:  
the RC has the liability to submit the AML/CFT RC report.
- (iv) the CSSF sanctions:  
in event of non-compliance, the CSSF has a range of sanctions, from a simple warning to administrative fines of EUR 1,000,000.

### *Other developments*

#### **ESMA launches a common supervisory action with National Competent Authorities (NCAs) on the valuation of UCITS and AIFs**

On 20 January 2022, ESMA announced the launch of [Common Supervisory Action \(CSA\)](#) on valuation of UCITS and open-ended AIFs.

The CSA will be conducted throughout 2022, with a focus on authorised fund managers of UCITS and AIFs who invest in less liquid assets: unlisted equities, unrated bonds, corporate debt, real estate, high yield bonds, emerging markets, listed equities that are not actively traded, bank loans.

One key objective is to ensure that supervised entities' valuation methodologies, policies, and procedures are consistent and effective to ensure that less liquid assets are valued fairly in both normal and stressed market conditions, in accordance with applicable rules.

#### **ESMA becomes supervisor of EU data reporting for service providers**

According to Articles 27b and 54a of Regulation (EU) No 600/2014 (MiFIR), as amended by Regulation (EU) 2019/2175, the ESMA took on its new mandate on 1 January 2022 as direct supervisor of the largest EU Data Reporting Service Providers (DRSPs) (the "**New Mandate**").

Its New Mandate gives ESMA direct authorisation and supervisory powers over DRSPs, except for those entities that, due to more limited market impact, will continue to be supervised by their Member State authorities.

#### **Luxembourg transposition of PEPP Regulation**

On 3 March 2022, the [law of 25 February 2022](#) transposed the Regulation (EU) 2019/1238 on a pan-European Personal Pension Product (the "**PEPP Regulation**") amending the UCI law, the PRIIPs law, the law of 16 July 2019 laying down the rules on the EuVECA, EuSEF, MMF, ELTIF and STS securitisations regulations (the "**New Law**").

This New Law provides for:

- (i) the designation of the CSSF and the Commissariat aux assurances (CAA) as the competent authorities to supervise compliance with the PEPP framework; and
- (ii) the description of the powers attributed to the CSSF and the CAA, including sanctioning powers applicable.

#### **CSSF reactivation of the monitoring of AIFM on fund issues and large redemptions**

On 8 March 2022, in response to the crisis in Ukraine and its impact on the financial market, the CSSF published a [communication](#) regarding the reactivation of the monitoring of the largest AIFM on fund issues and large



redemptions via eDesk (the “**Communication**”).

Since 25 February 2022, the largest AIFMs have to notify the CSSF of significant developments and issues as well as on related decisions and measures taken, if any of the following events occurs:

- significant events/issues affecting the functioning of the AIFM or the investment funds managed by the AIFM (e.g. valuation, liquidity), including the impact of restrictive measures in response to the current situation in Ukraine if applicable
- larger redemptions at the level of Luxembourg regulated investment funds (UCITS, Part II UCI, SIF) managed by the IFM (i.e. daily net redemptions exceeding 5% of the NAV, net redemptions over a calendar week exceeding 15% of the NAV and/or application of gates/ deferred redemptions), or
- manage individual sub-fund(s) with a combined direct or indirect exposure (including exposure gained through derivatives) exceeding 10% of their total net assets to Russian and/or Ukrainian issuers

#### **Reports of investment funds foreseen by Circular CSSF 21/790 now available in eDesk**

On 22 December 2021, the CSSF issued a reminder [communication](#) on the publication of CSSF circulars [21/788](#), [21/789](#) and [21/790](#), in order to improve the CSSF’s risk-based supervision.

On 10 January 2022, the new module “Collective Investment Sector Reporting Tool” (CISERO) was made available on the CSSF eDesk platform in order to prepare the AML/CFT external report issued by the CSSF circular 21/788 and the AIFM self-assessment questionnaire issued by the CSSF Circular 21/789 to be submitted to the CSSF.

On 31 March 2022, the CSSF informed that reports issued from the CSSF circular 21/790 (i.e. the self-assessment questionnaire (SAQ), the separate report (SR) and the management letter (ML)) were available in the CISERO module on the CSSF eDesk platform.

In addition, specific information that regulated UCIs must

submit to the CSSF in the event that the approved statutory auditor issues a modified audit opinion has been made available on the CSSF website in a section dedicated to the periodic transmission of information for the type of UCI falling within the scope of the CSSF Circular 21/790.

#### *Tax*

#### **Real estate levy for certain Luxembourg investment funds holding Luxembourg real estate**

The [2021 Budget Law](#) introduced a real estate levy (prélèvement immobilier – the “Levy”) of 20% for certain Luxembourg investment funds holding real estate in Luxembourg.

The targeted Luxembourg investment funds must report information to the tax authorities by the end of May 2022.

#### *Concerned Luxembourg investment funds*

The Levy is due by a Luxembourg investment fund meeting all the following conditions:

- (i) The fund is (i) a SIF, (ii) a RAIF RAIF Law, or (iii) a UCI
- (ii) The fund has the legal form of a public limited company (*société anonyme* – S.A.), a partnership limited by shares (*société en commandite par actions* – S.C.A.), or a limited liability company (*société à responsabilité limitée* – S.à r.l.), and
- (iii) The fund holds, directly or through a transparent entity, Luxembourg real estate.

For the purpose of the Levy, a transparent entity is understood to include: a common limited partnership (*société en commandite simple* – S.C.S.), a special limited partnership (*société en commandite spéciale* – S.C.Sp.), a real estate partnership (*société civile immobilière* – S.C.I.) and a common fund (*fonds commun de placement* – F.C.P.).

#### *Taxable base*

The 20% Levy applies to

- Gross rental and leasing income deriving from Luxembourg real estate
- Gains deriving from the transfer of Luxembourg real estate
- Gains deriving from the transfer of units held in a

tax-transparent entity holding Luxembourg real estate

#### *Filing requirements*

An investment fund must perform the following obligations by 31 May 2022 at the latest:

- One-time inventory for 2020 and 2021

An investment fund meeting conditions (i) and (ii) must file a specific form (statement of information on the holding or the absence of holding of real estate located in Luxembourg or on the change of legal form) with the tax authorities to inform them whether it has held (directly or through a transparent entity) or not held real estate in Luxembourg in the course of 2020 and 2021

An investment fund meeting conditions (i), (ii) and (iii) that was converted into a transparent entity in the course of 2020 and 2021 must inform the tax authorities about the conversion in the same form.

Investment funds failing to comply with the one-time inventory may face a lump-sum fine of EUR 10,000.

An investment fund filing a 2021 Levy return (as detailed below) is exempt from the one-time inventory statement.

- Annual reporting for 2021

An investment fund meeting conditions (i), (ii) and (iii) must file a dedicated return (statement on the levy on real estate) to share details about its real estate income.

Investment funds failing to comply with the annual reporting may receive deviating tax assessments. The late payment of the Levy may further be subject to late payment interest penalties.

Going forward, the annual Levy return for year N will need to be filed at the latest by 31 May N + 1.



# Netherlands

## Regulatory

### AFM applies the guidelines for marketing communications for funds

As from 2 February 2022, marketing communications must comply with specific European guidelines. These guidelines promote investor protection with regard to correct, clear and non-misleading marketing communications. These guidelines specifically aim at:

- marketing communication being recognisable as such
- describing risks and advantages in the same way (i.e. attracting attention to risks and advantages in the same way), and
- presenting marketing communications in a correct, clear and non-misleading way, taking into account online aspects of such communications.

These guidelines apply to AIFMs, EuVECA-managers and EuSEF-managers as well as ICBE's.

The Dutch Authority for Financial Markets (AFM) has indicated it will apply the guidelines to communications aimed at (potential) investors. For example, this includes marketing for funds placed online, included in radio messages or on social media. For the avoidance of doubt, the guidelines are not intended to replace Dutch provisions describing information to be included in marketing communications. The guidelines are derived from article 4 of the CBDF regulation.

## Tax

### ATAD 3 – EU Directive targeting shell companies

As previously announced, on 22 December 2021 the European Commission published a Directive to combat the misuse of shell entities for tax purposes ('ATAD 3'). This [proposal](#) should ensure that EU shell companies with no or minimal economic activity are denied tax benefits of EU tax directives and double tax treaties by Member States involved, resulting in an increased (withholding) tax burden. Once the proposal has been adopted, it will enter into force on 1 January 2024.

ATAD 3 targets entities that are tax residents in an EU Member State meeting the following "gateways":

- (i) More than 75% of the entity's revenues in the preceding two tax years is considered passive income (such as dividends, interest, royalties or rent);
- (ii) The entity is mainly (60%) engaged in cross-border activities; and
- (iii) The entity has outsourced its day-to-day operations and the decision-making on significant functions in the two preceding tax years.

To determine if a company falls within the scope of the Directive, a two-year (year meaning financial year) look-back term applies. Considering that ATAD3 should enter into force on 1 January 2024, an entity's current position may already be relevant. Entities meeting these gateways will in principle be subject to the reporting rules specified in the proposed Directive. The entity will be required to specify whether it meets certain minimum substance requirements in its annual tax return. The information collected on substance will be shared automatically with other EU Member States.

The proposal provides for an exemption for regulated funds (e.g. companies established as Alternative Investment Funds (AIFs) managed by an AIFM). It should be noted that this exclusion does not extend to intermediate holding companies held by funds. Furthermore, general partner vehicles are likely to be in scope of ATAD3. In light of this proposal, it is recommended to review the corporate (fund) structures.

### Amendment of Dutch entity classification rules postponed

Due to the different legal system for the classification of Dutch and foreign entities in the Netherlands, 'hybrid entity mismatches' may occur in international matters (i.e. situations in which the Netherlands consider a legal entity as taxable/non-transparent for Dutch tax purposes, whereas another jurisdiction classifies the entity as non-taxable/transparent, or vice versa). As a consequence, some entities may face double (non)taxation. To prevent these double (non)taxations, the Dutch government

published a draft legislative proposal open for consultation in March 2021. The Dutch government proposed the following three amendments to the Dutch classification rules for domestic and foreign entities. First of all, existing open Dutch limited partnerships ('commanditaire vennootschappen' or CVs), will become transparent for Dutch tax purposes. Furthermore, the relevant criteria for transparency of funds for joint account ('fondsen voor gemene rekening' or FGRs) will be modified. Lastly, two supplementary methods to classify foreign legal entities without an equivalent Dutch legal form will be introduced. The implementation of the legislation was planned for 2022. However, the implementation (and the amended draft legislation) has been postponed to the third quarter of 2023 with likely entry into force in 2024.

To the extent (fund) structures have not been reviewed in light of these rules, this should be done as soon as possible.



# Glossary

<b>AFM</b>	Netherlands authority for the financial markets.
<b>AIF</b>	Alternative investment fund.
<b>AIFM</b>	Alternative investment fund manager.
<b>AIFM Law</b>	Luxembourg law of 12 July 2013 on alternative investment fund managers, as may be amended from time to time.
<b>AML/CFT</b>	Anti-money laundering and counter terrorism financing.
<b>CSSF</b>	Luxembourg supervisory authority for financial services (Commission de Surveillance du Secteur Financier).
<b>DLT</b>	Distributed ledger technology.
<b>eDesk</b>	The CSSF dedicated Internet portal allowing the fund industry to submit their requests.
<b>ELTIF</b>	European long term investment funds.
<b>ESA</b>	European supervisory authorities.
<b>ESG</b>	Environmental, social, and governance.
<b>ESMA</b>	European securities and markets authority.
<b>EU</b>	European Union.
<b>EUSEF</b>	European social entrepreneurship funds.
<b>EUVECA</b>	European venture capital funds.
<b>FAQ</b>	Frequently asked question.
<b>KIID/KID</b>	Key Investor Information Document.
<b>MMF</b>	Money market funds.
<b>NCA</b>	National competent authorities.
<b>PRIIP</b>	Packaged retail and insurance-based investment products.
<b>Q&amp;A</b>	Question and answers.
<b>RAIF</b>	Reserved alternative investment fund.
<b>RTS</b>	Regulatory technical standards.
<b>SIF</b>	Specialised investment fund.
<b>UCITS</b>	Undertaking for collective investment in transferable securities.

# Contacts

## Luxembourg



**Jevgeniy Nesch**

Funds Partner  
jnesch@akd.lu



**Virginie Leroy**

Funds Partner  
vleroy@akd.lu



**Ayzo Van Eysinga**

Tax Partner  
avaneysinga@akd.lu



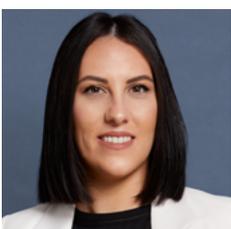
**Stéphanie Viot**

Tax Counsel  
sviot@akd.lu



**Lissie Goldbach**

Senior Associate  
lgoldbach@akd.lu



**Astrid Vaillant**

Lawyer  
availlant@akd.lu

## The Netherlands



**Anton Akimov**

Tax Advisor  
aakimov@akd.eu



**Huub Laauwen**

Tax Partner  
hlaauwen@akd.eu



**Jasper Verhoog**

Financial regulatory law and  
Securities law Partner  
jverhoog@akd.lu

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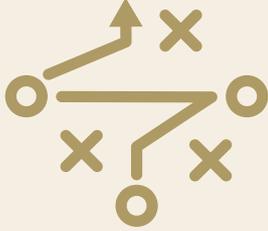


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