CHEVALIER & SCIALES
LUXEMBOURG LAW FIRM

Q2

INVESTMENT MANAGEMENT

Quarterly newsletter 2022 - Q2

APRIL TO JUNE

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INVESTMENT FUNDS

'Direct engagement with the partners. Specialised in setting up investment funds in Luxembourg.'

'The team provides impressive responsiveness and an outstanding expertise in relation to investment fund matters.'

'The team is friendly, (not arrogant at all) and very open to work for new business opportunity, especially in the world of crypto/blockchain.'

'It is a human scale firm where you are not considered as a small client.'

'Olivier Sciales has the ability to translate "law-speak" into clear common language.'

BANKING, FINANCE & CAPITAL MARKETS

'Although the firm is undoubtedly best known for its investment funds expertise, Chevalier & Sciales also handles capital markets and securitisation work. Rémi Chevalier is the main contact.'

'Well-positioned to handle alternative funds, whether first-time managers or historical players, the firm advises on time-to-market vehicles with a high demand for RAIFs and SCSps. Concerning asset classes, Chevalier & Sciales practice covers a diversity of assets, such as PE and real estate and is increasingly active in relation to crypto, hedge and debt funds.'

'Chevalier & Sciales Litigation practice with values of certain litigations exceeding a billion US dollars, has successfully created a strong and reputable presence in the Luxembourg courts as well as abroad. Combining creative litigation strategies with business practicality, the boutique consistently resolves high-stake disputes for private entities, companies, and investors in sectors such as investment funds and private banking.'

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MANDATORY REPORTING FOR THE REAL ESTATE INCOME LEVY FOR LUXEMBOURG RAIFS, SIFS AND PART II UCIS

Following the introduction of a real estate income levy as of January 1, 2021, a reporting obligation applies to all reserved alternative investment funds (RAIFs), specialised investment funds (SIFs) and alternative investment funds (AIFs) that have legal personality (see below).

The real estate levy applies to the funds of these types that receive or realise income from real estate (immovable property as defined by the Civil Code) located in Luxembourg. The levy is an exemption from the tax provisions set out in the SIF law of February 13, 2007, the investment fund law of December 17, 2010, in particular Part II funds, and the RAIF law of July 23, 2016.

The *Prélèvement immobilier* circular from the director of the Direct Taxation Authority (PRE_IMM n°1) was published on January 20, 2022, informing investment vehicles about the levy and the related reporting obligation. The authority is in charge of supervision, assessment and collection of the levy.

Which investment funds are covered by the real estate levy?

The investment funds covered by the levy are those with a legal personality distinct from that of their partners (SA, SCA or Sàrl), covered by Luxembourg's legislation on Part II funds, SIFs and RAIFs, except for those constituted as a common limited partnership (SCS). Funds in the form of an SCS, SCSp or FCP are outside the scope of the levy.

What is the scope of the levy?

The levy applies to income from real estate located in Luxembourg, as defined below, received or earned by one of these investment vehicles, including when the income is received or realised indirectly by a fund through an FCP or transparent entity in which the investment vehicle holds shares or a stake in the course of the calendar year.

In addition, the receipt or realisation of income by a FCP or a transparent entity is also assessed directly and indirectly, as the income may be received directly or indirectly through one or more tax-transparent entities or FCPs.

What does income from real estate in Luxembourg mean?

Income from real estate is defined as income from the rental of real estate located in Luxembourg, any capital gain resulting from the sale of a property in Luxembourg, or income from the disposal of shares.

What are the reporting and payment obligations?

The rate of the real estate levy is 20%. Investment funds subject to the levy must declare all income from real estate subject to the real estate levy, received or realised during the calendar year, to the interest income withholding tax office by May 31 of the following year. Thus reporting on income for 2021 must be made by May 31, 2022 at the latest and the levy paid by June 10, with no possibility of deduction or offsetting.

What does the notification obligation contain?

RAIFs, SIFs and Part II AIFs with legal personality (except for those constituted as SCS) have an obligation to report to the interest income withholding tax office for the years 2020 and 2021. They must report whether or not, during any time in 2020 or 2021, they owned real estate in Luxembourg, either directly or indirectly, through one or more tax-transparent entities or FCPs. The reporting obligation applies to funds even if they did not invest directly or indirectly in real estate.

The reporting obligation also apply to funds with a legal personality separate from that of their partners and covered by Luxembourg's Part II fund, SIF or RAIF legislation (except for SCSs) that changed their form during 2020 or 2021 to a fiscally transparent entity or to an FCP while they held at least one property in Luxembourg, either directly or indirectly through fiscally transparent entities or FCPs.

What is the penalty for non-compliance with the information obligation?

A fund that falls within the scope of the reporting obligation but fails to comply may be fined a flat-rate penalty of €10,000.

The Direct Taxation Authority's Circular PRE_IMM n°1 (in French) can be found at: https://impotsdirects.public.lu/dam-assets/fr/legislation/legi22/2022-01-20-PRE-IMM-1-du-2012022.pdf

NEW CSSF FAQ ON AML/CFT RC REPORTS FOR LUXEMBOURG INVESTMENT FUNDS AND MANAGERS

The CSSF published on March 18, 2022 a new frequently-asked questions document on the completion and transmission of the AML/CFT compliance officer's summary report, as defined in articles 42 (6) and 42 (7) of the amended CSSF Regulation 12-02 of December 14, 2012 on measures to curb money laundering and financing of terrorism.

Who is required to prepare and submit the report?

The compliance officer (in French, responsable du contrôle) of Luxembourg AIFMs, Luxembourg-domiciled investment funds that have appointed a foreign AIFM and self-managed funds are required to prepare the report and present it to the entity's management board, and submit it to the CSSF. The report must be dated and signed by the compliance officer (RC). It must be prepared even if the inquiries and due diligence carried out by the RC revealed no shortcomings.

When and how should the report be submitted?

The AML/CFT RC report must be submitted within five months following the end of the entity's financial year either via e-file or Sofie for entities subject to CSSF Circular 19/708, or via the edesk module for registered AIFMs.

What should the report contain?

The AML/CFT report should be a consistent and accurate description of the work performed by the RC and of related findings.

For entities subject to CSSF Circular 18/698, the report must at least:

- Results of the identification and assessment of money laundering and financing of terrorism risks and measures taken to mitigate them, as well as the AIFM's risk level tolerance.
- Results of due diligence conducted on clients, fund initiators, portfolio managers to whom management is delegated and investment advisers, including ongoing due diligence.
- Results of enhanced due diligence conducted on intermediaries acting on behalf of their clients in accordance with the provisions of article 3 of CSSF Regulation 12-02, including ongoing due diligence.
- Results of enhanced due diligence on individuals identified as politically exposed persons in according to article 3-2(4)(d) of the amended law of November 12, 2004 on money laundering and financing of terrorism.
- Results of due diligence conducted on fund assets, including ongoing due diligence.

- Monitoring any positions blocked due to AML/CFT concerns in the registers of fund unit-holders and/or intermediaries involved in the marketing of funds.
- Periodic review of all business relationships according to their risk level.
- In cases of delegation of tasks relating to professional obligations to third parties, results of monitoring carried out on the compliance of services provided by the third parties, not only with legal and regulatory provisions but also the contractual provisions; and where relevant, reasons why the fund manager has chosen new third parties during the year.
- Statistical history concerning transactions identified as suspicious that inform the number of suspicious transaction cases reported to the Financial Intelligence Unit by the fund manager, as well as the total volume of funds involved.
- Statistical history concerning transactions reported due to financial sanctions relating to financing of terrorism and those relating to implementation of United Nations Security Council resolutions and acts adopted by the European Union as well as the volume of funds involved.
- The number of identified breaches of AML/CFT professional obligations, even if the number is zero.
- The number of AML/CFT actions carried out notably as a result of Circular CSSF 18/698, from the work of the RC, the internal audit, external audit or CSSF's inspections., with a description of the main actions, and the deadline for their implementation, under article 7(2) of the Grand-Ducal Regulation of February 1, 2010 and article 42(5) of CSSF regulation 12-02. If the number is zero, this must be clearly stated.

The report must be accompanied by documentation on the identification, assessment and mitigation of money laundering and financing of terrorism risks.

For entities not subject to CSSF Circular 18/698, the AML/CFT RC report should cover at least cover the following:

- Overall residual money laundering and financing of terrorism risk assessment, including risk appetite, identified risks and mitigation measures put in place, emerging risks and their severity in terms of impact.
- Results of AML/CFT due diligence on investors.
- Results of AML/CFT due diligence on high-risk clients such as politically exposed persons, if any.
- Results of AML/CFT due diligence on fund initiators, including group initiators.
- Results of AML/CFT due diligence on investment advisors, if any.
- Results of AML/CFT due diligence on distributors, if any.
- Results of AML/CFT due diligence on delegates and service providers such as registrars and transfer agents or external portfolio managers, if any.
- Results of AML/CFT due diligence on cross-border intermediaries, if any.
- Results of AML/CFT due diligence on assets.
- Results of AML/CFT due diligence on blocked accounts, if any.
- Results of targeted financial sanctions

screening.

- Outcome of verification by the RC that all appropriate staff have been trained on AML/CFT issues.
- List of co-operation with Luxembourg authorities on AML/CFT issues.
- Dedicated money laundering and financing of terrorism shortcomings section, including remediation plan, if any.

What is the RC's liability in the event of failure to submit the report?

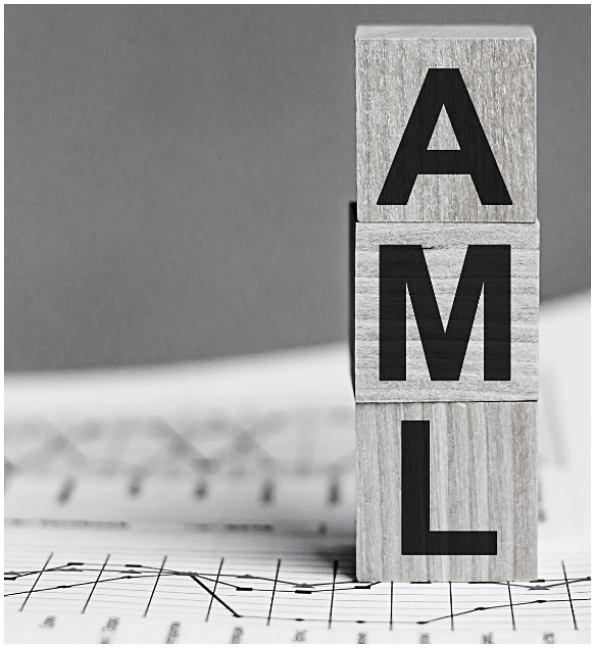
A professional who fails to provide the AML/CFT report may be subject to sanctions as detailed in article 8-4 of the amended AML law of November 12, 2004.

If a recently appointed RC identifies that the outgoing RC failed to file the annual AML/CFT report, the CSSF expects the incoming RC to ensure that the report is submitted. Additionally, if the new RC finds that the exiting RC has performed no AML/CFT due diligence, the CSSF expects the entity's board to submit a letter to explain the situation and the oversight performed by the board or compliance manager (RR) on the work of the outgoing RC.

What about entities being dissolved and placed in non-judicial liquidation?

Entities being dissolved and placed in non-judicial liquidation must submit the AML/CFT report to the CSSF until the effective start date of liquidation. AML/CFT reports are no longer required after the start of liquidation. However, since money laundering and financing of terrorism risks remain present during the liquidation, the liquidator is responsible for the entity's AML/CFT controls, notably regarding co-operation with the authorities.

The CSSF's FAQ can be found at: https://www.cssf.lu/wp-content/uploads/FAQ_RC_Report.pdf



SECURITY TOKENS NOW ADMITTED ON LUXEMBOURG EXCHANGE'S SECURITIES OFFICIAL LIST

What are security tokens?

The Luxembourg Stock Exchange defines security tokens as "financial instruments that are issued and exist on a distributed ledger, allowing for a fully digital issuance and servicing process. Financial instruments issued as security tokens offer investors similar investment characteristics to financial instruments issued in a more conventional way".

Issuance of financial instruments using distributed ledger technology – popularly known as blockchain – is intended to make transactions more secure and resilient. It offers the potential to improve efficiency and transparency in capital markets significantly as a growing number of market participants adopt the technology (see our article on the CSSF's white paper on risks and opportunities of blockchain at https://www.cs-avocats.lu/investment_management/cssf-publishes-white-paper-on-risks-and-opportunities-of-blockchain-technology/).

What is the benefit of registering a security token on the official list?

Registering a security token on the exchange's Securities Official List provides issuers with enhanced visibility. The security tokens and investors benefit from the dissemination of indicative prices and guaranteed access to the token's information notice.

What kind of security tokens can be admitted?

Only crypto-assets qualifying as debt financial instruments can be admitted on the official list for the time being. Security tokens cannot be traded on the regulated Bourse de Luxembourg market nor on the exchange-regulated Euro MTF market.

What conditions apply to the admission of security tokens on the official list?

Security tokens that qualify as debt instruments must be priced in fiat currency and offers must be limited to qualified investors as defined by the EU's Prospectus Regulation of June 14, 2017 and/or issued in wholesale denominations (i.e. €100,000). Only experienced issuers or applicants with a proven track record can use the new service. All security tokens must respect the Securities Official List rulebook and the exchange's guidelines for the registration of blockchain instruments on the Securities Official List.

What information should be disclosed when issuing distributed ledger technology securities?

The information notice should contain the following additional information:

- The processes.
- The distributed ledger technology used.
- Confirmation that a contingency procedure exists in the event of a failure in the distributed ledger technology that allows identification of securities holders, as well as a responsibility and liability statement.
- Reasoned confirmation that the financial instruments qualify as bonds or other debt securities issued by a company, a state or its regional or local authorities, or by an international public body, under the governing law of the instruments.
- Description of the parties involved in issuance, recording, safekeeping, transfer and verification of the financial instruments.
- Description of the payment process if such process encompasses the transfer of settlement tokens.
- Description of the risk factors linked specifically to the financial instruments, the settlement process and the underlying technology.
- Environmental considerations regarding the technology used.

What information on environmental considerations should be disclosed by the issuers of security tokens?

As a minimum, the information notice should state distributed ledger technology used, the consensus mechanism used by this blockchain, and how it is used, whether it provides specific environmental benefits or disadvantages, and/or reasons why this may not need to be considered. This information will be examined by LuxSE.

What are the next steps?

The exchange plans to adapt and improve its services to meet the needs of customers and the emergence of new technological opportunities. For example, the guidelines already cover the use of central bank money in tokenised forms as settlement tokens, although this is not yet available for the time being.

EUROPEAN COURT OF JUSTICE ISSUES CLARIFICATION ON LUXEMBOURG BUSINESS REGISTERS AND FUNDAMENTAL RIGHTS OF BENEFICIAL OWNERS

The EU's fourth Anti-Money Laundering Directive established a new regime for public access to registers of beneficial owners of companies and other legal entities incorporated in member states, requiring their governments to obtain and maintain adequate, accurate and up-to-date information on beneficial owners. In Luxembourg, the directive was transposed by the law of January 13, 2019 establishing a register of beneficial owners.

Any member of the public has access to the information on beneficial owners contained in the registers without the requirement to prove a personal interest. Until this year, the validity of this regime in the light of the fundamental right of respect for privacy and family life and the protection of personal data, enshrined in articles 7 and 8 respectively of the EU Charter of Fundamental Rights of the European had never been examined.

However, Luxembourg's district court (*Tribunal d'arrondissement de et à Luxembourg*) submitted two references for a preliminary ruling to the European Court of Justice questioning whether access to personal data complied with the principles of the European legislation and whether access provided sufficient protection for economic beneficiaries without representing illegal intrusion. The decision in these linked cases is of significant importance regarding potential restrictions applicable to information in the Register of Beneficial Owners.

Challenge to Luxembourg's beneficial ownership register regime

Case C-37/20

In case C-37/20, an individual brought an action against Luxembourg Business Registers, the economic interest group that has been managing the country's Register of Beneficial Owners (*Registre des bénéficiaires effectifs* or RBE) since March 1, 2019. The proceedings before the Luxembourg court were to limit access to information about the plaintiff, a corporate officer of an entity listed in the register. The applicant argued that publication of this information would expose him and his family to "a disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation".

The legal ground for this action was article 15 of the 2019 law, which states that a registered

entity or beneficial owner may request, on a case by case basis with appropriate justification, that the manager limit access to the information referred to in article 3 to national authorities, credit and financial institutions, and court bailiffs and notaries acting in their capacity as public officers, in exceptional circumstances where access would expose the beneficial owner to a disproportionate risk of fraud, abduction, blackmail, extortion, harassment, violence or intimidation, or where the beneficial owner is a minor or is otherwise incapacitated.

The applicant argued that disclosure of the economic beneficiary information would place him in a dangerous position. He could become subject to the pressure of an economic struggle for control of his companies and endanger his safety due to his travels in hostile territories. However, the LBR rejected the application on the grounds that article 15 should be interpreted narrowly and that the applicant's activities were in the public domain. The plaintiff appealed the decision before the Luxembourg district court.

Case C-601/20

In a parallel procedure, the alleged insufficient protection of information available at the register was also challenged by a Luxembourg company, SOVIM SA, which criticised the Luxembourg legislature for failing to incorporate adequate security measures to establish the identity of persons accessing the information in the register.

According to the claimant, Luxembourg's beneficial ownership register regime would infringe the right to protection of the beneficial owner's private and family life, as provided for in article 8 of the European Convention on Human Rights on protection of private and family life, home and correspondence, article 7 of the EU's Charter of Fundamental Rights and article 11(3) of the Luxembourg Constitution.

SOVIM also asserted that public access to personal data contained in the register is a breach of various fundamental principles set out in the EU's General Data Protection Regulation of April 27, regarding the processing and free movement of personal data.

Interpreting 'exceptional circumstances', 'risk', 'data protection' and 'private family life'

Issues at stake

In case C-37/20, the Luxembourg judge, responding to the application for annulment of the decision not to restrict access to information regarding the claimant in the RBE, noted a divergence in interpretation of the scope of the exception provided for in article 15 of the 2019 law. Noting that the preparatory work of the EU directive did not allow exceptions to the publication of beneficial ownership information, in particular with regard to the concepts of exceptional circumstances and risk, the judge concluded it was necessary to refer the question to the ECJ for a preliminary ruling.

Furthermore, it was unclear whether publication of the information solely involved beneficial owners, or whether it also applied to the corporate officers of an entity, as in the

C-37/20 case. The question at issue is therefor whether a corporate officer is entitled to invoke a derogation not to be listed in the register.

In case C-601/20, the issue concerned public access to the RBE and the claimants' argument that open access is not necessary to achieve the goal of combating money laundering and financing of terrorism. They say the existing requirements entail a serious and disproportionate interference in the private lives of beneficial owners, criticising the Luxembourg law for not creating security measures to establish the identity of persons seeking access to the information in the register, for example by requiring them to create an account on its website.

They argued that any person could obtain access to the register in total anonymity with prejudice to the claimant, raising the risk of economic profiling – that the Register of Beneficial Owners could be exploited by private economic intelligence or strategy firms to conduct data mining, for example in view of a possible hostile takeover bid.

The position of the court's advocate-general

The court's advocate-general, Giovanni Pitruzzella, noted in his opinion that the principle of transparency, as enshrined in European primary law, can lead to a delicate balancing act. He also recalled that the philosophy of the EU directive was to "set out a comprehensive and effective legal framework to combat the collection of property or money for terrorist purposes, requiring member states to identify, understand and mitigate the risks of money laundering and financing of terrorism".

The advocate-general concluded that the actions to identify beneficial owners do constitute an infringement of the fundamental rights guaranteed in articles 7 and 8 of the Charter of Fundamental Rights. However, he pointed out that the data available in register is linked to the civil (date of birth, name) and economic (interest shares) status of the beneficial owner and therefore appears less sensitive than other categories of personal data.

Although access to such data may provide a limited view of a person's wealth, it does not generally allow accurate conclusions to be drawn regarding the individual's total wealth nor to draw precise conclusions about their investment profile. Therefore, according to the advocate-general, the potentially harm to persons affected by such infringement may be regarded as moderate.

Nonetheless, Mr Pitruzzella pointed out that member states may, under certain conditions determined by national law, give access to additional information allowing the identification of the beneficial owner (at least, date of birth or contact details, depending on data protection rules). This ability to extend the amount of data concerning beneficial owners that is accessible to the public could potentially give rise to additional infringement of the fundamental rights guaranteed in articles 7 and 8 of the charter.

He concluded that the provision under which member states may make additional data

available to the general public, which is not precisely defined or determinable, does not satisfy the requirement that the information is sufficiently precise, as laid down by the directive itself. As a result, his opinion was that the fourth Anti-Money Laundering Directive is invalid in this respect.

Turning to the data protection issue, the advocate-general concluded that the GDPR does not object as such to the creation of a register containing personal data that is accessible to the general public, therefore to an unlimited and indeterminate number of persons, without control and justification, and without the subject of the data being able to know who has access to it.

On the question of the proportionality of disclosure of data on beneficial owners, Mr Pitruzzella referred to the principle of data minimisation. He considered that indicating the name, month and year of birth can be considered a minimum and sufficient set of data to precisely identify the beneficial owner, while nationality appears relevant and necessary information for determining potential money laundering or financing of terrorism risks.

Regarding the indication of the nature and extent of beneficial interests held, these constitute a minimum and sufficient set of data to identify the scope of the investment or participation, which is also relevant for the assessment of the risk of misuse of companies and other legal entities for money laundering or financing of terrorism. In the advocate-general's view, this regime does not result in disproportionate interference with the fundamental rights of the subjects of the data, in particular their right to respect for private life and the protection of personal data, as guaranteed by articles 7 and 8 of the charter.

The provisions of the GDPR must also be interpreted as not precluding a register from being partially accessible to the public, without any requirement to demonstrate a legitimate interest or limitation as to the location of those accessing data, he concluded. However, according to Mr Pitruzzella, the transfer of data from a register may be carried out only in accordance with article 49(1)(g) of the GDPR, if the conditions for consultation of the register provided for by law are fulfilled and provided that the consultation does not involve the entire register.

On interpretation of the notion of exceptional circumstances, the advocate-general advised that the Luxembourg judge is required to interpret the AML directive in a manner consistent with the fundamental rights guaranteed by the charter, specifying that the derogations are of strict interpretation.

Potential consequences for Luxembourg's RBE regime

The advocate-general concludes, first, that article 30(5a) of the fourth Anti-Money Laundering Directive, read in the light of articles 7, 8 and 52(1) of the Charter of Fundamental Rights, must be interpreted as meaning it is incumbent on member states to ensure that the national bodies or authorities responsible for keeping registers of beneficial owners are aware of the identity of individuals or entities

that access the register. The open data system of the Luxembourg register could be illegal in this respect.

Secondly, the existence and disproportionate or otherwise nature of such a risk may be determined by considering links between the beneficial owner in question with companies and other legal entities, as well as with trusts and legal arrangements with a similar structure or functions, in their capacity as beneficial owner of such entities, other than the one for which an exemption from public access to information concerning them is requested.

It is for the beneficiary or entity requesting an exemption from public access to information to demonstrate that these links constitute a factor that justifies or supports the existence of a disproportionate risk of harm to the fundamental rights of the beneficial owner. Article 30(9) excludes the granting of an exemption from public access to information concerning a beneficial owner where that information is easily accessible to third parties through other information channels.

To conclude, if the European Court of Justice follows the reasoning of the advocate-general, it is likely that new identification measures will be required to obtain access to the Luxembourg Register of Beneficial Owners. The derogation provided for in article 30(9) will not be granted if the economic links and interests of the beneficial owners are accessible to third parties through other information sources such as newspaper articles or online news.

A final decision from the European Court of Justice is expected shortly.

AED GUIDE ON THE AML/CFT PROFESSIONAL OBLIGATIONS FOR RAIFS

In order to prevent and raise awareness among reserved alternative investment funds ("RAIFs") which are all subject to the law on the fight against money laundering and terrorist financing of 12 November 2004, as amended from time to time (the "AML/CFT law"), the Administration de l'enregistrement, des domaines et de la TVA ("AED"), in its capacity as supervisory and control authority, has just published a guide, in order to better assist RAIFs in the implementation of their AML/

CFT professional obligations (the "Guide"). The Guide has an indicative nature describing the minimum requirements for RAIFs. The purpose of the Guide is first and foremost to raise awareness among FIARs of the risks of money laundering and terrorist financing, but also to provide guidance to RAIFs to avoid transactions linked to risk of money laundering and terrorist financing, which could result in liability.

Access to the Guide (in French): https://pfi.public.lu/content/dam/pfi/pdf/blanchiment/prevention-et-sensibilation/guides/pour-en-savoir-plus/guide-version-2022-fonds-dinvestissement-alternatif-reserve.pdf

Should you need our assistance in respect of AML_CFT requirements for RAIF including RR and RC requirements, please contact our investment management team.

REFORM OF ARBITRATION LAW IN LUXEMBOURG

On September 15, 2020, the Luxembourg government addressed the modernisation of the country's arbitration law by tabling bill No. 7671 to the Chamber of Deputies. Since their incorporation in France's Napoleonic-era Code of Civil Procedure of 1806, the rules relating to arbitration procedures have been modified only occasionally, with a major change in 1981 that notably updated the regime for appeals against awards. The current reform comes at the right time because the grand duchy has manifest advantages as a hub for arbitration, in particular the favourable attitude of judges toward international law.

The modernisation of arbitration has multiple goals, not only to relieve the national courts of some cross-border disputes but also to make Luxembourg more attractive as a jurisdiction by providing parties to a dispute access to the legal expertise. Many operating companies and holding entities have their headquarters in Luxembourg and incur additional costs when their disputes are heard in arbitration forums abroad. Additional risks arise when the legal advisers and judges in annulment proceedings are not specialists in Luxembourg law.

The draft legislation is inspired by French law and the model law of the United Nations Commission on International Trade Law, and seeks to provide liberal and arbitration-friendly provisions. Within the seven new chapters that will be integrated into Luxembourg's New Code of Civil Procedure (NCPC), the draft does not make a distinction between national and international arbitration.

Its principles are widely accepted in comparative law: they notably include a broad scope of whether disputes can be settled by arbitration, the absence of formalism for the arbitration agreement, the principle of autonomy of the arbitration clause, the positive and negative effect of the principle of competence-competence – whether a legal body has jurisdiction to rule on its own competence in matters before it – as well as

the obligation of disclosure on the arbitrator (economic links with companies, former mandates, appointments as arbitrator or as lawyer of a party involved) in order to minimise the risk of conflicts of interest.

Nevertheless, the draft legislation innovates on certain points by comparison with French law, notably by introducing an obligation of confidentiality, sanctioned by the award of damages. It also strengthens the powers of the support judge and requires collaboration between the state judge and the arbitral tribunal to maximise the effectiveness of the arbitration proceedings.

The legislation also aims to extend the international jurisdiction of Luxembourg judges by giving him or her a jurisdictional head in the name of denial of justice. The arbitration award has the force of res judicata – a settled matter that may not be relitigated – regarding the dispute it resolves and must include its reasoning.

Regarding recourse against the award, the proposal distinguishes between awards made in Luxembourg and those made abroad:

• Awards handed down in Luxembourg may be subject to an action for annulment on the basis of the new article 1238 of the NCPC, which lists seven grounds for annulment. Article 1243 adopts the revision system in French law, and article 1244 deals with third-party opposition.

• For awards delivered abroad, it is impossible to initiate annulment proceedings, but revision of the award is permissible. The innovation of the Luxembourg law is the introduction of a preventive action for unenforceability (recours préventif en inopposabilité), as required by French doctrine. It allows a party to an award to oppose the exequatur – recognition and enforcement of a foreign judgment – procedure at an early stage, provided it can demonstrate a sufficient interest.

Scope of eligibility for arbitration

Art. 1224. (1) All persons may compromise on rights which they freely dispose of. (2) Compromises may not be made in matters concerning the status and capacity of persons, marital relations, the representation of incapable persons, the causes of incapable persons and those of absent or presumed absent persons. 3) The arbitral tribunal shall apply the rules of public policy.

Art. 1225. The following may not be submitted to arbitration: 1° disputes between professionals and consumers; 2° disputes between employers and employees; 3° disputes relating to residential leases. This prohibition remains applicable even after the end of the contractual relations referred to above.

The new article 1224 of the NCPC refers to the nature of the disputes that can be settled by arbitration, which excludes weaker parties who must be protected, as in consumer law. In labour law, the question of whether disputes relating to an employment contract may be settled by arbitration is not resolved and is still the subject of parliamentary debate. Finally, disputes arising from bankruptcy proceedings cannot be adjudicated by an arbitral tribunal. However, the receiver of a company may, for example, conclude an arbitration agreement

to settle a dispute with a debtor. Similarly, an arbitral tribunal may hear a dispute covered by an arbitration agreement stipulated in a contract that was to be performed before the initiation of bankruptcy proceedings.

Arbitration agreement

Art. 1227. (1) An arbitration agreement is an agreement by which the parties decide to submit to arbitration all or some of the disputes which have arisen or may arise between them in respect of a particular legal relationship, whether contractual or not. It is not subject to any formality requirements.
(2) It may be concluded in the form of an arbitration clause or a settlement agreement. An arbitration clause is an agreement by which the parties to one or more contracts undertake to submit to arbitration any disputes which may arise in connection with that contract or those contracts. An arbitration agreement is an agreement by which the parties to a dispute submit it to arbitration.

The arbitration clause or arbitration agreement is not subject to any requirement regarding form; it can be concluded orally.

Art. 1227-2. The arbitral tribunal may rule on its own jurisdiction, including any objection to the existence or validity of the arbitration agreement. For this purpose, an arbitration clause which forms part of a contract shall be treated as an agreement separate from the other terms of the contract. It is not affected by the nullity, lapse or termination of the contract. Where it is null and void, the arbitration clause shall be deemed not to have been written.

The Luxembourg legislation enshrines the principle of competence-competence, which is universally accepted in comparative law. It also refers to the principles of severability and autonomy of the arbitration clause, by which the dispute resolution clause is independent of the main contract and is not affected by the defects of the latter or its possible nullity. The effect of such a provision is to protect the power of arbitrators to rule on their own jurisdiction in a matter to override delaying tactics.

Art. 1227-3. Where a dispute arising out of an arbitration agreement is brought before a state court, the latter shall declare that it lacks jurisdiction, unless the arbitration agreement is unlawful because of the non-applicability of arbitration the case, or if it is void or unenforceable for any other reason. The state court may not declare at its own initiative that it lacks jurisdiction. If the arbitral tribunal declares itself incompetent, or if the arbitration award is set aside for a reason that excludes resubmission of the case to an arbitral tribunal, the case shall be continued before the court to which it was originally submitted as soon as one or more of the parties has notified the registry and the other parties of the relevant event.

The legislation enshrines the positive effect of the jurisdictional principle, which prevents the judge from reviewing the applicability of an arbitration agreement. The second element of the jurisdictional principle is the negative effect, under which the arbitrators must be the first (but not the only) judges of their own jurisdiction; the oversight of the Luxembourg judge is postponed to the stage of any action

involving enforcement or annulment of the arbitration award made on the basis of the arbitration agreement.

When a dispute to be resolved by arbitration is addressed to a national court, it will decline jurisdiction only if one of the respondents invokes this exception, unless the arbitration agreement is manifestly null and void or unenforceable. The wording of Article 1227 (3) of the draft legislation nevertheless appears confusing and could jeopardise the arbitration process. The first paragraph of article 1227-3 of the bill misleadingly extends this exception with the clause "if for any other reason it is void or unenforceable", which could undermine the effectiveness of the arbitration procedure.

It is not yet certain whether the Chamber of Deputies will correct this article or take inspiration from French law and the opinion of the Association Luxembourgeoise d'Arbitrage, which in its opinion of July 27, 2021 recommended enshrining in law the negative effect of the jurisdictional principle to the maximum extent.

Art. 1227-4. As long as the arbitral tribunal has not yet been constituted or once it appears that the arbitral tribunal cannot grant the relief sought, the existence of an arbitration agreement shall not prevent a party from bringing an action before a court or tribunal with jurisdictional competence for the purpose of obtaining a measure of inquiry or an interim measure of protection.

Before the constitution of the arbitral tribunal, only the state court may order urgent measures. Certain measures, such as garnishments, cannot be granted by an arbitral tribunal because of its lack of enforcement powers, in particular against third parties.

The arbitral tribunal

Art. 1228. The parties are free to determine the seat of the arbitration or to delegate this determination to the person entrusted with the organisation of the arbitration. In the absence of such determination, the seat shall be determined by the arbitral tribunal, taking into account the circumstances of the case, including the convenience of the parties. The arbitration shall be deemed to be legally conducted at the seat of the arbitration. Unless otherwise agreed, the arbitral tribunal may hold hearings, take evidence, certify its decisions and meet at any place it considers appropriate. Arbitration decisions shall be deemed to have been handed down at the seat of the arbitration.

This article echoes the practice of delocalisation of arbitration: fixing the seat of the proceedings in Luxembourg does not necessarily require holding the hearings in Luxembourg. But by determining the seat of the arbitration, the parties agree on the place where the award is deemed to be made, which has a direct impact on remedies and review of the award.

Art. 1228-3. Any dispute relating to the constitution of the arbitral tribunal shall be settled, in the absence of agreement of the parties, by the person responsible for organising the arbitration or, failing that, by the support judge.

Art. 1228-4. In the absence of an agreement of the parties on the modalities for the appointment of an arbitrator, the following procedure shall apply:
1. In the case of arbitration by a sole arbitrator, if the parties do not agree on the choice of the arbitrator, the arbitrator shall be appointed by the person in charge of organising the arbitration or, failing that, by the support judge.
2. In the case of arbitration by three arbitrators, each party shall choose one arbitrator and the two arbitrators so chosen shall appoint the third arbitrator; if a party fails to choose an arbitrator within one month of receipt of the request by the other party or if the two arbitrators fail to agree on the choice of the third arbitrator within one month of acceptance by the last arbitrator of their appointment, the person responsible for organising the arbitration or, failing that, the support judge shall make the appointment.
3. Where the dispute is between more than two parties and they do not agree on the modalities of constitution of the arbitral tribunal, the person responsible for organising the arbitration or, failing that, the support judge, shall appoint the arbitrator(s).
4. All other disagreements concerning the appointment of arbitrators shall likewise be settled by the person responsible for organising the arbitration or, failing that, the support judge.

As noted during the preparatory work on the draft legislation, the one-month period stipulated for a party to choose an arbitrator, after which the support judge may proceed to appoint them, seems more appropriate than the eight-day period provided for in the current Luxembourg law.

Art. 1228-7. An arbitrator may be challenged only if there are circumstances likely to raise legitimate doubts as to their impartiality or independence, or if they do not possess the qualifications required by the parties. In the event of a dispute over a challenge to an arbitrator, this shall be resolved by the person responsible for organising the arbitration or, failing that, decided by the support judge, who shall refer the matter to the court within a month of the disclosure or discovery of the contentious information.

This article imposes a disclosure obligation on arbitrators. This is a welcome provision in order to prevent potential conflicts of interest.

Art. 1228-8. An arbitrator may be dismissed only with the unanimous consent of the parties. In the absence of unanimity, the decision shall be taken by the person in charge of organising the arbitration or, failing that, by the support judge, who shall refer the matter to the court within a month of the disclosure or discovery of the contentious information.

As regards the time limit for lodging an objection, the Luxembourg draft law takes its inspiration from the French model by extending the period to one month, contrary to the United Nations Commission on International Trade Law model legislation, which provides for a time limit of 15 days.

The support judge

Art. 1229. The support judge of the arbitration proceedings is the Luxembourg judge when

the seat of the arbitration has been fixed in Luxembourg, or, if the seat has not been fixed, when:
1. The parties have agreed to submit the arbitration to Luxembourg procedural law;
2. The parties have expressly given jurisdiction to the Luxembourg courts to hear disputes relating to the arbitral proceedings; or
3. There is a significant link between the dispute and Luxembourg. The Luxembourg support judge always has jurisdiction if one of the parties is exposed to a risk of denial of justice.

Article 1229 sets out four connecting factors and grounds for international jurisdiction of the Luxembourg judge in arbitration, primarily when the seat is located in Luxembourg. The other three criteria are alternative: by the will of the parties in choosing Luxembourg law as procedural law for the arbitration (lex curia; where there is a significant link between the dispute and Luxembourg, such as the place of performance of a disputed contract or the domicile of a defendant; or in the event of the risk of denial of justice.

The arbitration proceedings

Art. 1231. The arbitral tribunal shall decide the dispute in accordance with the applicable rules of law. In the case of an international dispute, the applicable rules are those chosen by the parties or, failing that, those which the tribunal considers appropriate. The tribunal shall decide the dispute as an 'amiable composition' if the parties have entrusted it with this task.

According to the preparatory work on the legislation, "international matters" should be understood not with reference to the French definition of international arbitration, but the ordinary rules of private international law. The arbitrator(s) will be able to rule as in the capacity of amiable compositeur – with the power to seek an equitable solution to the dispute, by setting aside if necessary the legal rules otherwise be applicable or the strict application of a contract – offering an opportunities for the renegotiation of contracts, for example.

Art. 1231-3. The arbitral tribunal shall always guarantee equality of the parties and respect of the adversarial principle.

This enshrines in Luxembourg arbitration law the principle of equality of opportunity to present one's case and respect for the adversarial process. This principle must be applied in the light of Article 6 § 1 of the European Convention on Human Rights and may be applicable in particular in matters of clandestine evidence.

Art. 1231-5. In the absence of legal obligations to the contrary or unless otherwise agreed by the parties, the arbitration proceedings shall be confidential.

This is one of the main advantages of the reform, which addresses the preference of economic players regarding business secrets or banking and financial transactions. It is specified in the preparatory work that this obligation will not invalidate the procedure and that breaches may be sanctioned by damages.

Art. 1231-6. If the arbitration agreement does not set a time limit, the duration of the mission

of the arbitral tribunal shall be limited to six months from acceptance of the mission by the final arbitrator to do so. The legal or contractual time limit may be extended by agreement of the parties or by the person in charge of organising the arbitration if they have been authorised to do so by the parties, or, failing that, by the support judge.

Once the arbitrators accept their mission, the time limit for rendering an arbitration award is six months, as in France; Belgian law does not impose a time limit.

The arbitration award

Article 1232 establishes the principle that the deliberations of arbitration tribunals are secret and may be accompanied by a separate or dissenting opinion.

Art. 1232-2. The arbitration award shall state the reasons on which it is based, unless the parties have given the arbitral tribunal a dispensation from stating the reasons.

Unless the parties have agreed otherwise, the failure to state reasons for an arbitration award shall result in the award being null and void.

Art. 1232-3. The arbitration award shall have the force of res judicata as soon as it is made. The arbitral tribunal shall deliver a signed copy of the award to each party. The award may be served by a party. Such service shall start the time limits provided for in the following articles. The parties may, however, agree that this effect shall be attached to another method of service designated by themselves.

As soon as it is made, the arbitral award is res judicata in relation to the dispute that it settles.

Enforcement of the award and remedies

Arbitration awards handed down in Luxembourg

Art. 1233. An arbitration award may be enforced only through an enforcement order issued by the president of the district court in whose jurisdiction the award was made. The procedure relating to application for enforcement is not adversarial. The application must be filed by the earliest party at the registry of the competent court together with the original or a copy of the award and the arbitration agreement. The claimant must elect domicile in the district of the court addressed. Service on the claimant relating to enforcement of the award or recourse may be carried out at the address elected. A copy of the award shall be attached to the enforcement order.

Under the new article 1233 of the NCPC, the judge of exequatur for awards made in Luxembourg is the president of the district court in whose jurisdiction the award was handed down, of Luxembourg or Diekirch. The exequatur order must state the court's reasoning and may be appealed against under the new article 1235 of the code.

Art. 1234. Enforceability may not be granted if the award is manifestly contrary to public policy. No appeal may be accepted to an order granting enforcement.

A clear violation of public policy is the only

ground for refusing enforcement. However, there are seven grounds for annulment of the award under article 1238, which must be examined in the annulment appeal. The procedure for appeal to the Court of Appeal against the award has been abolished, leaving as the only recourse against the award an annulment appeal to the Court of Appeal.

Art. 1238. An action for annulment is only available if:
1. The arbitral tribunal has wrongly declared itself competent or incompetent.
2. The arbitral tribunal has been improperly constituted.
3. The arbitral tribunal has ruled without compliance with its terms of reference.
4. The principle of adversarial proceedings has not been respected.
5. The award is contrary to public policy.
6. The award does not state its reasoning, unless the parties have dispensed with the need for the reasoning of the arbitrators.
7. There has been a violation of the rights of defence.

Article 1238 lists the seven grounds for annulment through an action for annulment (lack of jurisdiction of the court, the court was improperly constituted, the court ruled without complying with the terms of reference given by the parties, non-compliance with the adversarial process, infringement of public policy, failure to state reasons unless otherwise agreed by the parties, and violation of the rights of the defence).

The ground of failure to state reasons is expressed in a more flexible manner than in French law. Article 1241 provides that this recourse is not suspensive, but that the enforcement of the award may be adjusted by the Court of Appeal. Article 1243 adopts the revision system from French law and Article 1244 enshrines the third-party objection.

Arbitration awards handed down abroad

Art. 1246. A decision on an application for enforcement of an arbitration award made abroad may be appealed. The appeal must be lodged within one month of the service of the decision; the time limit may not be extended because of distance. The Court of Appeal may refuse to enforce the arbitration award only in cases provided for under article 1238, subject to the provisions of international conventions.

Only courts of the territory where the foreign award was made can rule on an appeal for annulment. However, if the award is the subject of an exequatur ruling in Luxembourg, it can be reviewed by the Luxembourg appeal court through an appeal against the exequatur decision. The exequatur ruling of an arbitration award handed down abroad can be refused on the same seven grounds that apply to the annulment of awards delivered in Luxembourg as set out in the new article 1238. Moreover, article 1247 opens up the right to apply for revision of arbitration awards made abroad.

Art. 1248. Provided that it can demonstrate a sufficient interest, each party to an award made abroad may request, as a precautionary measure, that the Court of Appeal declare the award unenforceable against it for one of the reasons for refusing enforcement cited in article

1246 or for revising the enforcement order cited in article 1247, paragraph 1. An appeal for non-enforceability is lodged, investigated and judged according to the rules relating to the procedure of common law before the Court of Appeal sitting in accordance with the civil procedure.

The final innovation of the new Luxembourg arbitration law is the introduction of a preventive action for unenforceability, which allows a party to an award to take preventive action before the courts to avoid the award being granted exequatur, provided a sufficient interest is demonstrated.

Art. 1251. The enforcement order is subject to third-party proceedings under the conditions set out in article 1244, before the Luxembourg court having jurisdiction under article 613 of this code. An arbitration award made abroad cannot itself be subject to third-party proceedings before a Luxembourg court. However, provided they can demonstrate a sufficient interest, a third party against whom the award is likely to be opposed may argue, before the competent Luxembourg court, that the award is ill-founded and cannot be invoked against them.

Third-party proceedings remain available to protect the rights of third parties affected by an arbitral award.

Conclusion

The wide-ranging reform undertaken by the Luxembourg law-maker proposes a coherent regime of rules designed to promote efficient arbitration proceedings in Luxembourg that respect the fundamental rights of the parties choosing this mode of dispute resolution. It should be noted that the issue of the negative effect of the jurisdictional principle needs to be resolved. By introducing more flexibility and balancing the rules on arbitration agreements and proceedings, the objective remains to promote the integrity of the Luxembourg marketplace while ensuring the full effectiveness of awards.

CSSF CIRCULAR 22/811 ON UCI ADMINISTRATORS

On May 16, 2022, the CSSF issued a new circular 22/811 regarding the authorisation and organisation of entities acting as UCI administrator (the "**Circular**") replacing Chapter D of Circular IML 91/75. The Circular clarifies the activity of UCI administrators by specifying the principles of sound governance, the CSSF requirements on internal organisation, and good practices applicable to them.

What are the activities covered by the Circular?

The UCI administration activity may be split into three main functions:

(i) The registrar function

The registrar function encompasses all tasks necessary to maintain the UCI's unit-/ shareholder register. The reception and execution of orders relating to units/shares subscriptions, redemptions, and income distribution (including the liquidation proceeds) are part of the registrar function.

(ii) The NAV calculation and accounting function
The NAV calculation and accounting function covers legal and fund management accounting services, valuation, and pricing (including tax returns).

(iii) The client communication function.

The client communication function is comprised of the production and delivery of the confidential documents intended for investors.

To whom does the Circular apply?

The Circular applies to all entities carrying out the activity, or part of the activity, of UCI administration as listed above.

It should be noted that the following UCIs (undertaking for collective investment) and IFMs (investment fund managers) are eligible to act as UCI administrator :

- Management companies incorporated under Luxembourg law and subject to Chapter 15 of the Law of 17 December 2010 relating to undertakings for collective investment, as amended (the 2010 Law);

- Management companies incorporated under Luxembourg law and subject to Chapter 16 of the 2010 Law;

- Alternative investment fund managers authorised under Chapter 2 of the Law of 12 July 2013 on alternative investment fund managers, as amended (the 2013 Law);

- Foreign IFMs pursuing the activity of UCI administrator for UCIs established in Luxembourg;

- Regulated Luxembourg UCIs, for themselves

but not to other UCIs.

Luxembourg reserved alternative investment funds (RAIFs) and non-regulated alternative investment funds (AIFs) are not within the scope of the Circular if they have internalised the UCI administration unless they use an external UCI administrator which is subject to the Circular.

The UCI administration activity may further also be performed by the following external service providers established under the Law of 5 April 1993 on the financial sector, as amended (the 1993 Law):

- Credit institutions authorised under Part I, Chapter 1 of the 1993 Law;

- Luxembourg branches of credit institutions governed by foreign laws and authorised under Part I, Chapter 3 of the 1993 Law;

- Registrar agents authorised under Part I, Chapter 2 of the 1993 Law;

- Client communication agents authorised under Part I, Chapter 2 of the 1993 Law, but only for the client communication function as described in section 2.2.5 of the Circular; and

- Administrative agents authorised under Part I, Chapter 2 of the 1993 Law, only for the NAV calculation and accounting function and client communication function as described, respectively, in sections 2.2.4 and 2.2.5 of the Circular.

Before acting as an administrator for a given UCI, the preceding entities and service providers must assess whether the carrying out this activity by them is permitted, taking into account applicable legal provisions.

What are the requirements in terms of organisation?

The UCI administrator must have an adequate internal organisation (including an adequate and appropriate environment of control) and sufficient resources (e.g. human resources, technical infrastructure and IT means). The UCI administrator must act independently and be functionally and hierarchically separated from the depositary. Its name shall be disclosed in the offering documents of any UCI for which the UCI administrator acts in such capacity.

The UCI administrator's premises must be of sufficient size, adequate and secure. Access must be restricted to its staff and approved persons such as clients or visitors. To that effect, physical documents and records must be kept secure to warrant data confidentiality and protection. It is the responsibility of the UCI administrator to keep and safeguard physical records for the UCIs it services.

The data necessary to keep adequate records of the UCI's activity and encompassing the core UCI documentation shall be retained on a medium that allows for the storage of information in a way for it to be accessible for future reference by the UCI, the IFM when applicable, the statutory auditor of the UCI and the CSSF or any other national competent authority of the UCI. The UCI administrator

must keep all accounting and other documents that constitute the core UCI documentation and are necessary to properly perform its obligations. The documents mentioned above of the UCI may be kept electronically by the UCI administrator. A UCI administrator must establish, implement and maintain systems and procedures that are adequate to safeguard the security (confidentiality, integrity and availability) of information, taking into account the nature of the information in question.

The UCI administrator must be organised so as to minimise potential or actual conflicts of interest. Where such conflicts of interest cannot be avoided, they must be disclosed to the management body of the UCI, its IFM, when applicable, and where appropriate and relevant, to investors in order to prevent them from adversely affecting the interests of those parties.

The UCI administrator may delegate to third parties (i.e. delegates) the performance of one or more of its UCI administration tasks (but is shall not create additional or increased risks for the UCIs, in particular legal or operational risks or be detrimental to it notably in terms of quality and/or costs). The delegation of tasks must be detailed in a dedicated written contract. The delegation of tasks does not relieve the UCI administrator of its responsibilities. In particular, with respect to the delegation in the area of the NAV calculation and accounting function, any final NAV, respectively its publication, must be controlled and validated by the UCI administrator.

A written contract must be concluded between the UCI administrator and the UCI and/or the IFM, when applicable. The agreement must clearly state each party's roles, responsibilities, rights and obligations. Such contract must not prevent the UCI or its IFM, when applicable, from giving instructions at all times to the entity to which UCI administration functions have been delegated or from withdrawing the mandate with immediate effect when this is in the best interest of investors. The UCI administrator must grant a right of access for the UCI and, when applicable, the IFM, the statutory auditor of the UCI, the liquidator, the CSSF or any other national competent authority of a UCI, where applicable, to the documents and data relating to its administration upon simple request. Moreover, the UCI administrator must allow the UCI or its IFM, when applicable, to conduct on-site visits at a frequency and under the terms to be laid down in the contract for exercising its due diligence and ongoing monitoring activities. The UCI administrator must communicate proactively the information, documents and data necessary to perform its duties to the UCI or its IFM, when applicable.

When does the Circular come into force?

The Circular entered into force with immediate effect on May 16, 2022. However, the requirement of authorisation set in section 2.2.1 of the Circular does not apply to entities already acting as UCI administrator at the date of entry in force of the Circular.

Additionally, a grandfathering period until June 30, 2023 has been granted to entities already

acting as UCI administrators at the date of entry in force of the Circular to comply with the remaining provisions of the Circular. Starting from June 30, 2023, the UCI administrators must also file their annual reporting regarding their business activities and resources at the latest five months after their financial year-end.

The Circular is available by clicking on the following link: https://www.cssf.lu/wp-content/uploads/cssf22_811eng.pdf

NEW REPORTING OBLIGATIONS FOR RAIFS AND UNREGULATED AIFS - UPDATE OF THE CRS FAQ BY THE LUXEMBOURG TAX ADMINISTRATION

Key takeaway

RAIFs and unregulated AIFs (e.g. SCSp and SCS) are now considered reportable financial institutions since they can no longer benefit from the exempt CIV status. They must file a (nil) report by 30 June 2022 to avoid penalties.

Introduction

On 4 April 2022, the Luxembourg direct tax administration ("ACD") updated its frequently asked questions ("FAQ") on the common reporting standard ("CRS"). Such FAQ now includes two new questions, providing a list of Investment Entities (I) and a clarification relating to the scope of the exempt Collective Investment Vehicle ("exempt CIV") status (II). They are important, in particular, for reserved alternative investment funds ("RAIFs") and unregulated alternative investment funds ("AIFs"). As a reminder, CRS is an automatic exchange of information relating to financial accounts in tax matters with the Member States of the European Union and the other partner jurisdictions of Luxembourg as implemented by the amended law of 18 December 2015 relating to the automatic exchange of information in tax matters ("CRS Law"). The CRS Law requires Reporting Financial Institutions ("RFIs") to declare some information in relation to certain accounts and the holders of such accounts. The RFIs are defined as all financial institutions which are not non-reporting financial institutions ("NRFIs"). One element of the definition of the NRFIs is the exempt CIV status. Therefore, such exempt CIVs do not have to report to the ACD concerning CRS matters. The updated FAQ narrows the scope of the exempt CIV status, which was interpreted as including RAIFs and other unregulated AIFs until now.

Please find below the two Q&A of the ACD in the updated FAQ on CRS.

I) A non-exhaustive list of Investment Entities (Q 2.3)

Except in special circumstances, the following entities are, in principle, considered Investment Entities:

- any undertaking for collective investment subject to Part I or II of the amended law of 17 December 2010 relating to undertakings for collective investment;
- any specialized investment fund subject to the amended law of 13 February 2007 relating to specialized investment funds;
- any venture capital company governed by the amended law of 15 June 2004 relating to venture capital companies (SICAR);
- any securitisation undertaking subject to the authorisation and supervision of the Commission de Surveillance du Secteur Financier (the "CSSF") in accordance with the amended law of 22 March 2004 relating to securitisation;
- any RAIF falling within the scope of the amended law of 23 July 2016 relating to reserved alternative investment funds;
- any AIF whose management falls within the scope of the amended law of 12 July 2013 relating to alternative investment fund managers;
- any pension fund governed by the amended law of 13 July 2005 relating to institutions for occupational retirement provision in the form of SEPCAV and ASSEP;
- any pension fund governed by the amended Grand-Ducal Regulation of 31 August 2000 implementing Article 26, paragraph 3, of the amended law of 6 December 1991 on the insurance sector and relating to pension funds subject to the prudential supervision of the Commissariat aux assurances;
- any management company subject to part IV of the amended law of 17 December 2010 relating to undertakings for collective investment;
- any manager of alternative investment funds governed by the amended law of 12 July 2013 relating to managers of alternative investment funds; and
- any investment firm governed by the amended law of 5 April 1993 relating to the financial sector which carries out any of the following activities: (i) execution of orders on behalf of clients, (ii) portfolio management.

II) Unregulated entities such as RAIFs and other unregulated AIFs and the exempt CIV status (Q 2.4)

The ACD indicates in the FAQ that unregulated entities can no longer benefit from the exempt CIV status, as only entities directly supervised by the CSSF may opt for this status if the other applicable conditions are fulfilled. As a result of the answers mentioned above, the RAIFs and the unregulated AIFs should now submit every year a nil report to the ACD if there is no CRS reportable account. Indeed, RAIFs and unregulated AIFs may not qualify as NRFI anymore. Therefore, RAIFs and unregulated AIFs qualifying as RFI must respect the reporting and due diligence CRS obligations. They should review their CRS qualifications and applicable CRS reporting obligations.

Based on the fact that neither the CRS law nor the ACD refer to the legal form of the entities,

the same reasoning applies to unregulated AIFs under the form of a common limited partnership (société en commandite simple – SCS) or a special limited partnership (société en commandite spéciale - SCSp). RAIFs and unregulated AIFs should, in principle, have no CRS reportable accounts. If so, a nil report should be filed by 30 June 2022 for the two fiscal years 2020 and 2021 in order to avoid any penalties.

There are two types of penalties:

- a Luxembourg RFI omitting to comply with due diligence rules or to introduce procedures in view of reporting is liable to a penalty up to EUR 250,000; and

- a Luxembourg RFI omitting to file the required report or if it files a late, incomplete or inaccurate report, it may be liable to a penalty of 0,5% of the amounts that should have been reported, with a minimum of EUR 1,500.

GLOSSARY OF TERMS

AIF: Alternative Investment Fund as defined by article 1 (39) of the AIFM Law, namely collective investment undertakings, including investment compartments thereof, which (a) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and (b) do not require authorization pursuant to article 5 of Directive 2009/65/EC (i.e. UCITS).

AIFMD: Directive 2011/61/EU on alternative investment fund managers.

AIFMD registration regime: An AIFM that wishes to make use of the registration regime must have assets under management of less than EUR 100 million, or EUR 500 million if it manages only funds closed for at least 5 years not using leverage.

AIFM: A legal person whose regular business is managing one or more AIFs.

AIFM Law: Luxembourg law of 12 July 2013 on alternative investment fund managers (transposing the AIFM directive into Luxembourg law).

AIFM Law threshold: the thresholds provided for in article 3 (2) of the AIFM Law.

CSSF: The Luxembourg Supervisory Authority of the Financial Sector *(Commission de Surveillance du Secteur Financier)*.

CLO: Collateralised Loan Obligation.

Company Law: The Luxembourg law of 10th August 1915 on commercial companies, as amended from time to time.

FCP: Common fund *(fonds commun de placement)*.

Part II UCI: Undertaking for collective investment established under Part II of the Luxembourg law of 17 December 2010.

RAIF: Reserved alternative investment fund *(fonds d'investissement alternatif réservé)*.

S.A.: Public limited liability company *(société anonyme)*.

S.à r.l.: Private limited liability company *(société à responsabilité limitée)*.

SAS: Simplified stock company *(société par actions simplifiée)*.

S.C.A.: Corporate partnership limited by shares *(société en commandite par actions)*.

SCoSA: Cooperative company organised as a public limited company *(société cooperative organisée comme une société anonyme)*.

SCS: Common limited partnership *(société en commandite simple)*.

SCSp : Special limited partnership *(société en commandite spéciale)*.

SICAF: Investment company with fixed capital *(société d'investissement à capital fixe)*.

SICAR: Investment company in risk capital *(société d'investissement en capital à risqué)*.

SICAV: Investment company with variable capital *(société d'investissement à capital variable)*.

SIF: Specialised investment fund *(fonds d'investissement spécialisé)*.

SPF: Private wealth management company *(société de gestion de patrimoine familial)*.

UCITS : Undertakings for collective investments in transferable securities.

Well-informed investors: A well-informed investor is an institutional investor, a professional investor or any other investor who has stated in writing that s/he adheres to the status of well-informed investor and invests a minimum of 125,000 Euro in the SIF/SICAR/RAIF, as applicable, or has been subject of an assessment made by a credit institution, by an investment firm or by a management company certifying his/her expertise, his/her experience and his/her knowledge to adequately appraise an investment in the SIF/SICAR/RAIF, as applicable.

HOW CAN WE ASSIST YOU?

Our team:

- Supports clients in finding appropriate investment vehicles to meet their requirements and goals from a marketing, regulatory and legal perspective.
- Introduces clients to service providers that meet their requirements, including custodian banks, AIFMs, fund administrators, registrars and transfer agents, auditors, paying agents and listing agents.
- Assists with the establishment of UCITS and alternative investments funds such as SIFs, RAIFs, SICARs, special limited partnerships (SCSp and common limited partnerships (SCS) as well as securitisation companies and securitisation funds including drafting of PPMs, assistance with incorporation of the fund, the general partner, carried interest vehicles, the co-investment vehicles and SPVs and regulatory filing with the CSSF.
- Assists with the migration of offshore funds to Luxembourg.
- Provides corporate support services throughout a fund's lifetime, including amendment of fund documents, restructuring, and launch or closure of sub-funds or share classes.
- Assists with changes of service provider.
- Assists with the clearing and the listing of shares, units, notes and bonds on the Luxembourg Stock Exchange's regulated or EURO MTF markets.
- Supports registration of the fund in other jurisdictions, in co-operation with local service providers.
- Advises on AIFMD-related issues.
- Advises fund promoters on domestic private placement rules for marketing their funds in Luxembourg.
- Keeps clients up to date with legal and regulatory developments.

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Chevalier & Sciales is a Luxembourg law firm established 17 years ago with specialist expertise in investment management, corporate transactions, banking and finance as well as high-level litigation and dispute resolutions. Our dynamic litigation and transaction teams have an international reputation for bringing together excellence and intellectual rigour with a practical and business-minded approach in serving our clients.

Our aim is to offer a one-stop-shop service to our clients and to provide tailored solutions to meet their needs, responsively and cost-effectively. Our practice areas are structured to ensure a comprehensive understanding of our clients' business and markets. We work with recognised tax experts and other service providers to provide you with the assistance and services you require through every aspect of your transactions and business.

Chevalier & Sciales is recommended and listed in the area of investment funds, litigation and dispute resolution and banking and finance.

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