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LUXEMBOURG LAW FIRM

Q4

INVESTMENT MANAGEMENT

Quarterly newsletter 2022 - Q4

OCTOBER TO DECEMBER

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CSSF UPDATE OF FAQ MARKET ENTRY FORM FOR INVESTMENT FUNDS AND IFMS

The CSSF updated on 4 October 2022 its Frequently Asked Questions regarding the AML/CFT market entry form for investment funds and investment fund managers (the "**IFMs**") (the "**FAQ**"). A market entry form shall be completed by supervised funds (UCITS, UCI Part II, SIF, SICAR, or when asking authorization of a label (ELTIF, EUSEF, EUVECA or MMF) in relation to the set-up but also in case of approval of new sub-fund. It shall al
so be completed for the set-up of an authorized IFM or the registration of an IFM and adapted by such IFM in case of (i) approval of an additional license, a license extension including the request to manage an ELTIF, (ii) entry of a qualified shareholder in the shareholding structure of the IFM and/or (iii) merger (only if the merger leads to a change to the information provided in the Market Entry Form for the absorbing IFM).

The FAQ aims to assist with the proper completion of the AML/CFT market entry form on eDesk.

The updated FAQ clarifies the situation of the reporting of indirect shareholders, each holding less than 10% of the shareholdings of an IFM. In such a situation, it is not required to report such shareholders to the CSSF, but the CSSF requests to be provided with the following:

- A written confirmation (from the IFM, the shareholder, the proposed acquirer or its representative) that each non-reported indirect shareholder is individually and, on an aggregate basis, holding less than 10% of the indirect shareholding of the IFM;
- The maximum percentage that the most non-reported shareholder(s) is/are holding in the IFM;
- A written confirmation that there is no shareholder agreement in place at the level of non-reported shareholders;
- A written confirmation (from the IFM, the shareholder, the proposed acquirer or its representative) that there has been no AML/CFT sanction over the last five years for the indirect non-reported shareholders; and
- Any other document requested by the CSSF.

UPDATE OF THE LAW OF 5 AUGUST 2005 ON FINANCIAL COLLATERAL ARRANGEMENTS

Introduction

The law of 5 August 2005 on financial collateral

arrangements, as amended from time to time (the "Collateral Law"), has been updated by the Luxembourg Parliament on 7 July 2022 with some precisions and amendments according to the Luxembourg market practice and a creditor-friendly approach. The revised Collateral Law entered into force on 20 July 2022. Most modifications to the Collateral Law follow the current market practice.

Find below some explanations relating to the updated Collateral Law and the set-up of security interests.

Q.1 What are the new definitions?

Some definitions of the Collateral Law have been updated. The definition of "enforcement event" has been amended with reference to "whatsoever". Indeed, "enforcement event means an event of default or any other event whatsoever as agreed between the parties on the occurrence of which," […], "the collateral taker is entitled to realise or appropriate financial collateral" […]. The addition of the word "whatsoever" is an emphasis from the Luxembourg Parliament on the contractual freedom for the parties concerning the determination of events which may lead to the triggering of the collateral without the "relevant financial obligations" having to be due. In this regard, the following paragraph (article 11 (5)) has been added:

"Where the relevant financial obligations are not due at the time the pledge is realised following an event agreed between parties as constituting an enforcement event, the proceeds of the realisation shall be, unless otherwise agreed, applied to satisfy the relevant financial obligations". Thereby, the parties may contractually agree otherwise.

Moreover, now, "a payment institution or an electronic money institution" is a financial institution according to article 1 12) (c) of the updated Collateral Law. Such a financial institution is part of the list of financial sector professionals (article 1 12)) of the revised Collateral Law. Therefore, the scope of financial institutions entitled to be the fiduciary in a transfer of title to collateral for security purposes, by way of fiduciary transfer, is clarified and extended to payment institutions and money institutions.

The definition of trading venue has been added. It is "a regulated market, a Multilateral Trading Facility or an Organised Trading Facility". This is a welcomed precision as a trading venue may be used to assign or cause a pledged collateral to be assigned and to appropriate pledged financial instruments or have pledged financial instruments appropriated by a third party.

Q.2 How have the means of enforcement been modernised?

Firstly, shares or debt securities admitted to trading on a trading venue, as defined above, may be sold on such a trading venue at the market price as enforcement into such pledged financial instruments. The Collateral Law only referred to an unclear "sale over a stock exchange".

Secondly, if the pledged financial instruments are units or shares of an undertaking for

collective investment (a "UCI"), they may be appropriated by either the pledgee or a third party at the market price or "at the price of the last net asset value (the "NAV") published by or for this UCI, provided that the last publication of such NAV does not exceed one year.

Thirdly, if an enforcement event occurs, the pledgee may request the redemption of the pledged units or shares of a UCI at the redemption price pursuant to the instruments of incorporation of the UCI. This may be useful if the pledge cannot be enforced with appropriation or private sale.

Fourthly, if an enforcement event occurs, the pledgee may "exercise all the rights arising under the pledged insurance contract, including, in the case of a life insurance contract or a capital redemption operation, the right to surrender, or request the insurance undertaking to pay any sums due pursuant to the insurance contract".

These precisions and additions in relation to the means of enforcement provide clarity and specific enforcement methods concerning units or shares of UCIs and insurance contracts.

Q.3 What are the amendments relating to public auction?

The Luxembourg Stock Exchange is no longer imposed in the public auction regime. Indeed, the pledgee can appoint a sworn notary or bailiff to manage the public auction. The new public auction regime also applies when the parties do not refer to another public auction regime. Before the update of the Collateral Law, the Luxembourg Stock Exchange had to intervene unless otherwise agreed. Now, detailed terms and conditions of the public auction are set out in the updated Collateral Law. The enforcement with the Luxembourg Stock Exchange was obsolete and based on the law of 1 June 1929 on pledging of transferable securities. Although the use of public auction was rarely used in practice, the updated public auction regime is more agile.

Q.4 Does sequestration apply to collateral financial arrangements and netting agreements?

No, sequestration measures do not apply to collateral arrangements governed by the updated Collateral Law, and therefore their enforcement is not impeded by such sequestration measures (article 19 (b)). Attachment, whether civil, criminal or judicial, and penal confiscation may also not be relied upon to hamper the enforcement of collateral financial arrangements and netting agreements, but it was already the case in the Collateral Law.

Furthermore, Part V: Netting and insolvency proceedings of the Collateral Law has been amended (articles 18, 19, and 21 of the Collateral Law) to precise that insolvency remoteness applies to national and foreign law insolvency proceedings concerning set-off arrangements and security interests.

Q.5 Does the Collateral Law prejudice the application of Regulation (EU) 2021/23 of 16 December 2020 on a framework for the recovery and resolution of central counterparties (the

"Recovery and Resolution Regulation")?

No, the Collateral Law has been amended with several references to the Recovery and Resolution Regulation in article 2-1 of the updated Collateral Law to clarify that it does not prejudice the application of this regulation. Thus, the revised Collateral Law "shall apply without prejudice to […] Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132".

Q.6 Are there any relevant changes relating to fungible precious metals?

Yes, the amendment of the Grand-Ducal Regulation of 18 December 1981 on fungible deposits of precious metals (the "amended Grand-Ducal Regulation") provides legal certainty and effectiveness regarding pledges over fungible precious metals. Indeed, article 6 of the amended Grand-Ducal Regulation provides the application of the updated Collateral Law to pledges over fungible precious metals (i.e. gold, silver, and platinum) unless there is a specifically applicable regime or the nature of the precious metals does not entitle it.

Conclusion

The Collateral Law update confirms Luxembourg's creditor-friendly approach, with an emphasis on contractual flexibility regarding the financial collateral law arrangements. The amended Collateral Law is now in line with Luxembourg's market trends and practices.

LUXSE EURO MTF FASTLANE ADMISSION PROCEDURE

The Luxembourg Stock Exchange (the "**LuxSE**") has launched a new procedure concerning the listing of certain securities on the Euro MTF by updating the Rules & Regulations of the LuxSE (the "**Rules & Regulations**") on 10 October 2022 (the "**FastLane Admission**"). Certain types of securities issued by In-Scope Issuers, as defined below, may be fully exempted from

the need to provide a prospectus approved by the LuxSE under the Luxembourg law of 16 July 2019 on prospectuses for securities, as amended. The FastLane Admission process complements the other exemptions from the publication of a prospectus, among other things, item 203.3 of the Rules & Regulations. The FastLane Admission further improves the competitiveness of the LuxSE, particularly in relation to debt securities issued by issuers whose shares are admitted to trading on an EU-regulated market or equivalent.

1. Scope

Indeed, the procedure of FastLane Admission is detailed in Chapter 4: Admission to trading without the approval of a prospectus of Part 2 of the Rules & Regulations. The FastLane Admission concerns the following type of issuers and securities:

- Non-equity securities and equity convertible bonds issued by issuers whose shares are admitted to trading on an EU-regulated market or equivalent;
- Non-equity securities issued or guaranteed by states (Member States excluded), their regional or local authorities;
- Non-equity securities issued by or guaranteed by Member States' regional or local authorities;
- Non-equity securities issued by multilateral institutions which are not public international bodies, as defined in the Rules and Regulations, and of which at least one OECD Member State is a member;
- Securities issued by central banks; and
- Securities issued by associations with legal status or non-profit-making bodies, recognized by a Member State or an OECD Member State, in order to obtain the means necessary to achieve their non-profit-making objectives. (Each being referred to as an "**In-Scope Issuer**", altogether being the "**In-Scope Issuers**")

2. Admission Document and FastLane Admission procedure

The In-Scope Issuers shall publish an admission document, being any disclosure document that at least contains the terms and conditions of the securities for which admission to trading on the Euro MTF is sought and is prepared in a searchable, electronic format (the "**Admission Document**"). The draft of the Admission Document shall be submitted at least three business days before the expected listing date. At the latest at the beginning of the admission to trading of the securities, the final version of the Admission Document must be submitted by the In-Scope Issuer for publication on the LuxSE's website.

The LuxSE does not approve the Admission Document, but the In-Scope Issuer may opt for the approval of the prospectus voluntarily.

Furthermore, the In-Scope Issuer shall fill out an application form which mentions the public sources for information about the In-Scope Issuer and the securities.

Attention should be put on the fact that when deemed necessary, the LuxSE may require submission of any other document for the examination of the request for admission to

trading, according to the particular conditions and nature of the operation and the financial position of the Issuer or guarantor.

Finally, the admission to trading of its securities based on the FastLane Admission does not exempt the In-Scope Issuer from complying with all applicable ongoing disclosure obligations, such as the Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse, as amended from time to time (commonly referred to as the Market Abuse Regulation).

AML/CFT SUPERVISION OF UNREGULATED ALTERNATIVE INVESTMENT FUNDS (EXCLUDING RAIFS) BY THE AED

The Luxembourg Registration Duty, Estate and VAT Authority (in French, l'administration de l'enregistrement, des domaines et de la TVA or "**AED**") has under its anti-money laundering and counter financing of terrorism ("**AML/CFT**") supervision Luxembourg alternative investment funds being unregulated and not supervised financial vehicles by any other Luxembourg supervisory authority ("**unregulated AIFs**").

In such respect, the AED has recently added a specific section on its website regarding these unregulated AIFs (https://pfi.public.lu/fr/blanchiment/questionnaire/vehicules-financiers-non-reglementes/fia.html). Indeed, the AED requests the unregulated AIFs to complete and file:

(i) an identification form related to (a) the person responsible for the control of the compliance of the AML/CFT obligations at the appropriate hierarchical level (in French, "responsable du contrôle du respect des obligations" or the "**RC**") and (b) the responsible for the compliance with the professional obligations as regards the AML/CFT (in French "responsable du respect des obligations" or the "**RR**") (the "**RR/RC Form**") (https://pfi.public.lu/fr/blanchiment/questionnaire/vehicules-financiers-non-reglementes/fia/rr-rc-identification.html) ; and

(ii) a yearly AML/CFT Questionnaire covering the financial year 2021 (the "**Questionnaire**") (https://pfi.public.lu/fr/blanchiment/questionnaire/vehicules-financiers-non-reglementes/fia/aml-cft-questionnaire.html).

In order to correctly complete the RR/RC Form and the Questionnaire, the AED has published frequently asked questions and guidelines documents on its website.

Certain unregulated AIFs have received communication from the AED asking them to complete and file the RR/RC Form and the Questionnaire by 12 November 2022 at the latest. In case you have not received such a communication, it is recommended

to anticipate AED's request and, therefore, to prepare the RR/RC Form and the Questionnaire together and to submit such documents in advance to the AED. In addition, the RR/RC Form must be transmitted to the AED without delay in the following situations:

- Initial appointment of the RC and/or RR of the unregulated AIF; and
- Change of the RR and/or RC of the unregulated AIF.

As a general reminder, all Luxembourg investment funds and Luxembourg investment fund managers shall establish an AML_CFT governance framework (AML_CFT policy, risk assessments, appointment of RR/RC etc.).

TAXONOMY: EU COMMISSION PUBLISHES FAQ TO CLARIFY THE CONTENT OF THE DISCLOSURES DELEGATED REGULATION UNDER ARTICLE 8

The EU Commission published on 6 October 2022 the updated FAQs to clarify the content of the Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 (the "**Disclosures Delegated Regulation**") under Article 8 of Regulation (EU) 2020/852 of 18 June 2020 (the "**Taxonomy Regulation**") to assist with its implementation. Article 8 of the Taxonomy Regulation applies to undertakings which are subject to an obligation to publish non-financial information according to Article 19a or Article 29a of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, as amended (the "**Directive 2013/34**"). Therefore, large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year should pay attention to the updated FAQs. Idem for the public-interest entities, which are parent undertakings of a large group exceeding on its balance sheet dates, on a consolidated basis, the criterion of the average number of 500 employees during the financial year. The terms large undertakings and public-interest entities are defined in Directive 2013/34.

The prior version of the updated FAQs dated January 2022 contained 22 frequently asked questions on how financial and non-financial undertakings should report taxonomy-eligible economic activities and assets under the Disclosures Delegated Regulation. The Disclosures Delegated Regulation contains disclosure provisions for non-financial undertakings, assets managers, credit institutions, investment firms, insurance and reinsurance undertakings, as well as disclosure rules common to all financial undertakings

and disclosure rules common to all financial undertakings and non-financial undertakings concerning the implementation of Article 8 of Taxonomy Regulation.

The 33 frequently asked questions are separated into the following 9 points:

- General FAQs;
- Non-financial undertakings;
- Financial undertakings;
- Asset managers;
- Insurers;
- Credit institutions;
- Debt market;
- Interaction with other regulations;

The EU Commission clarifies the following points in the updated FAQs:

- How is "Taxonomy-eligible economic activity" defined;
- How may asset managers weigh their holdings in a portfolio to report Taxonomy-eligible assets?;
- How to identify Taxonomy-eligible activities of which activity descriptions contain qualifiers, such as 'low carbon' and 'climate-related perils?;
- How should a credit institution with a Markets in Financial Instruments Directive (MiFID) investment firm license report its Taxonomy-eligible economic activities?;
- How to assess and report the Taxonomy-eligibility of a debt asset such as a bond or loan?;
- Can green debt instruments from non-EU entities be reported as Taxonomy-eligible?;
- Can green sovereign debt be reported as Taxonomy-eligible?;
- What activities should an insurer and a reinsurer consider when reporting their underwriting activities in the context of Taxonomy-eligibility reporting?; and
- How does the Disclosures Delegated Regulation interact with the proposed requirements on corporate sustainability reporting ('the CSRD proposal')?

The updated FAQ is available here.

CROSS BORDER DISTRIBUTION OF FUNDS - CSSF FAQ GUIDANCE ON MARKETING

Introduction

The CSSF published the CSSF FAQ - Cross Border Distribution of Funds - GUIDANCE ON MARKETING COMMUNICATIONS (the "**CBDF FAQ**") on 20 September 2022. The CBDF FAQ brings further clarity about the supervisory expectations of the CSSF relating to the application of Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings (the "**CBDF Regulation**") and the Guidelines of ESMA on marketing communication (ESMA34-45-1272) (the "**ESMA Guidelines**"). In particular, the CBDF FAQ deals with marketing communications as mentioned in section 1 of the ESMA Guidelines and article 4 of the CBDF Regulation (the "**MCs**").

On an indicative basis, article 4 of the CBDF Regulation requires that MCs are identifiable and describe the risks and rewards of purchasing units or shares of the fund in an equally prominent manner. Moreover, all information included in MCs shall be fair, clear and not misleading. If an AIF publishes a prospectus according to Regulation (EU) 2017/1129 of the European Parliament and the Council on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, as amended (commonly referred to as the 'Prospectus Regulation'), its MCs must not contradict or diminish the significance of the information contained in the prospectus but must indicate that a prospectus exists and provide hyperlinks to or a web address for it.

Q.1 Which Luxembourg entities are in the scope of article 4 of the CBDF Regulation?

The following managers are in the scope of article 4 of the CBDF Regulation and of the ESMA Guidelines concerning the funds they manage:

- 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 from time to time ("2010 Law");
- management companies incorporated under Luxembourg law and subject to Article 125-2 of Chapter 16 of the 2010 Law;
- investment companies which did not designate a management company within the meaning of Article 27 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 from time to time ("2013 Law");
- internally managed alternative investment funds ("AIFs") within the meaning of point (b) of Article 4(1) of the 2013 Law;
- managers of European qualifying

venture capital funds ("EuVECA") within the meaning of Regulation (EU) No 345/2013;

- managers of European qualifying social entrepreneurship funds ("EuSEF") within the meaning of Regulation (EU) No 346/2013 (all together referred to as the "**IFMs**").

However, article 4 of the CBDF Regulation shall not apply to IFMs when they act as distributors or intermediaries for funds they do not manage, although they may be impacted by such an article (see Q.3 below).

Q.2 Which funds are in the scope of article 4 of the CBDF Regulation?

MCs addressed to investors or potential investors of regulated and non-regulated funds managed by an IFM are in scope, as well as MCs addressed to investors or potential investors of Luxembourg and non-Luxembourg funds managed on a national, respectively, cross-border basis by an IFM.

Therefore, all UCITS and AIFs, including when they are set up as EuVECAs, EuSEFs, European long-term investment funds (the "**ELTIFs**")1 and money market funds (the "**MMFs**")2 managed by an IFM, are in the scope of article 4 of the CBDF Regulation.

But MCs addressed to investors or potential investors who are not residents of the European Economic Area are not in the scope of article 4 of the CBDF Regulation.

Q.3 Are the distributors or intermediaries involved in the distribution of funds managed by the IFM impacted by article 4 of the CBDF Regulation?

"Fund managers are responsible for the compliance with Article 4 of CBDF Regulation, irrespective of who is the actual entity marketing the fund, and of the relationship it has with the third-party distributor (whether it is contractual or not)."3

Q.4 Are MCs in relation to a Luxembourg or non-Luxembourg EU fund which is managed by a Luxembourg IFM and distributed only in Luxembourg in the scope of article 4 of the CBDF Regulation?

Yes. Article 4 of the CBDF Regulation does not limit the scope to funds which have been solely notified for distribution on a cross-border basis but also include funds which are distributed in Luxembourg.

Q.5 Are MCs targeting professional investors in the scope of article 4 of the CBDF Regulation?

Yes, MCs addressed to all types of investors or potential investors of UCITS and AIFs, including when they are set up as EuVECAs, EuSEFs, ELTIFs and MMFs, are in the scope.

Q.6 What kind of information should be provided to the CSSF upon request?

There is **no periodic reporting to the CSSF in relation to the MCs**.

IFMs in the scope of Circular CSSF 22/795 of 31 January 2022 on the application of ESMA Guidelines (the "**Circular 22/795**") shall, **as of 16 September 2022, be ready to provide the**

following information with regards to the MCs used in relation with the funds under their management:

- types of MC used;
- country(ies) of dissemination of the MC (European Economic Area only); and
- targeted investors.

Furthermore, as of 1 April 2023, IFMs in the scope of Circular 22/795 must be able to link the above information to their relevant Fund(s) (respectively sub-funds) and identify if the MC entails information with regards to ESG in the context of the application of article 13 of Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainabilityrelated disclosures in the financial services sector, as amended (commonly referred to as 'SFDR'), and of the ESMA Supervisory briefing on Sustainability risks and disclosures in the area of investment management (ESMA34-45-1427).

THE END OF THE UNRESTRICTED ACCESS TO THE LUXEMBOURG REGISTER OF BENEFICIAL OWNERS - ECJ JOINED CASES C-37/20 AND C-601/20

As we reported in our newsletter dated 27 May 2022, the European Court of Justice (the "**ECJ**") had to rule for several months on the compatibility of access to the Luxembourg Register of Beneficial Owners (the "**RBO**") system with European law.

The legal opinion of Advocate General Pitruzzella raised in 2022 the issue of the open-data system: anyone, without specifying his or her identity, could have access to the RBO, which the Advocate General considered incompatible with the duties of the Member States concerning privacy.

The ECJ recently ruled in a judgment of 22 November 2022 that public access to beneficial ownership information under the amended AML Directive (the Directive (EU) 2018/843 of the European Parliament and of the Council of 30

May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing) constitutes a serious interference with the fundamental rights to privacy and personal data protection enshrined in Articles 7 and 8 respectively of the Charter of Fundamental Rights of the European Union (hereinafter the "**Charter**").

More specifically, the data that anyone could find on the RBO allows:

- to draw up a profile of certain **personal identification data**, the state of wealth of the person concerned and the specific economic sectors, countries, and companies in which he or she has invested.
- this information becomes accessible to a potentially unlimited number of persons so that such processing of personal data is likely to also allow persons who, **for reasons unrelated to the purpose of this measure, seek information on the material and financial situation of a beneficial owner**, to have free access to this information.
- the potential consequences for data subjects resulting from possible **misuse** of their data are aggravated by the fact that once made available to the general public, they can not only be freely consulted, but also stored and disseminated and that it thus becomes all the more difficult, or even illusory, for those persons to defend themselves effectively against misuse.

The open-data system of the RBO affects the privacy rights of the listed beneficial owners. Therefore, the ECJ held that this serious interference can be derogated from and that in this respect the interference is justified by a **general interest objective** because the Directive at the source of the RBO institution: "*aims at preventing money laundering and terrorist financing by creating, through increased transparency, an environment less likely to be used for these purposes.*"

Firstly, the ECJ found that serious interference, even if justified, is not confined to what is **strictly necessary**. The conditions of access to the RBO go beyond what is strictly necessary, even if the press and the usefulness of the RBO to criminal investigations are not in dispute. Secondly, the ECJ finds that the interference **is not proportionate** either. In this respect, the Court finds that the substantive rules governing that interference do not meet the requirement of clarity and precision.

The fight against money laundering and terrorist financing is **primarily the responsibility of the public authorities as well as of entities, such as credit or financial institutions, which, because of their activities, have specific obligations in this respect** (the "**KYC duties**"). For this reason, the amended AML Directive provides that information on beneficial owners must be accessible, in all cases, to the competent authorities and financial intelligence units, without any restriction, as well as to reporting entities, in the context of customer due diligence.

In comparison with the previous regime, which provided access to information on beneficial owners not only for the competent authorities and certain entities but also for **any person**

or organisation able to demonstrate a legitimate interest, the regime introduced by Directive 2018/843 represents a considerably more serious infringement of the fundamental rights guaranteed by Articles 7 and 8 of the Charter, without this aggravation being offset by the possible benefits, which could result from the latter regime compared to the former, as regards the fight against money laundering and terrorist financing.

Following this decision, access to the RBO was immediately suspended in Luxembourg as of 22 November 2022.

PROVISIONAL AGREEMENT RELATING TO ELTIF II

On 19 October 2022, the negotiators from the Council and the European Parliament reached a provisional agreement on a revision of the European Long-Term Investment Fund (ELTIF) Regulation. The changes are intended to make the framework more attractive to asset managers and especially retail investors for a fund framework that has hitherto struggled to gain traction.

On 25 November, 2021, the EU Commission presented its Capital Markets Union package, including the proposal to amend Regulation (EU) 2015/760 of 29 April 2015 on European long-term investment funds (the “Proposal”). The Council adopted its position on the Proposal on 24 May 2022. Negotiations with the European Parliament to reach an agreement on a final version of the text started on 14 September 2022 and resulted in the provisional agreement of 19 October 2022.

The purpose of the Council and the European Parliament is to make ELTIFs more attractive and to facilitate investment in these funds. One of the Council’s key priorities is now reflected in the text, namely an overhaul of the ELTIF framework that will allow channelling more funding to small and medium-sized enterprises (the “SMEs”) and long-term projects to help achieve the digital transition. The SMEs

represent 99% of all businesses in the EU. Moreover, ELTIFs can help with financing the ecological transition, among others. Thus, ELTIFs can be an important means of financing long-term projects such as transport infrastructure, sustainable energy production or distribution.

The co-legislators intend to overcome several supply and demand side limitations, such as the constraints to the distribution process and the strict investment rules. Among other things, they have clarified the definition of eligible assets and investments, portfolio composition and diversification requirements, conditions for borrowing and lending liquidity and other rules for funds, including sustainability aspects. The Proposal also includes rules to make it easier for retail investors to invest in ELTIFs while ensuring strong investor protection.

CSSF CLARIFICATION ON THE USE OF ELECTRONIC MONEY INSTITUTIONS AND PAYMENT INSTITUTIONS BY AIFS

On 18 October 2022, the CSSF published a clarification regarding the eligible entities for opening cash accounts concerning alternative investment funds ("**AIF**").

The CSSF states that, based on its observations, some AIFs, particularly those having appointed as their single depositary a professional depositary of assets other than financial instruments (the "**PDAOFI**"), as defined in article 26-1 of the Law of 5 April 1993 on the financial sector, as amended, use or intend to use for the purpose of holding their cash accounts, the services of :

- An electronic money institution (the "**EMI**") within the meaning of the Law of 10 November 2009 on payment services (the "**Payment Services Law**"). EMI is defined as a legal person that has been granted authorisation by the competent authorities of a Member State under Title II of Directive 2009/110/EC to issue

electronic money. In Luxembourg, this refers to any legal person that has been granted authorisation to issue electronic money under the Payment Services Law; or

- a payment institution (the "**PI**") within the meaning of the Payment Services Law, defined as legal persons or persons that have been granted authorisation following Articles 7 and 22 of the Payment Services Law to provide and execute payment services.

As a consequence of the preceding, the CSSF reminds that all cash of an AIF has to be booked in cash accounts opened (i) in the name of the AIF, (ii) in the name of their alternative investment fund manager (the "**AIFM**") acting on behalf of the AIF, or (iii) in the name of the depositary acting on behalf of the AIF with an entity as specified under Article 19(7) of the Law of 12 July 2013 (the "**AIFM Law**"). In particular, as per point 18 of circular 18/697, a PDAOIF acting as depositary must ensure the appointment of one or more entities with which all cash of the AIF shall be booked in cash accounts.

Article 19(7) of the AIFM Law, Article 86(a) of the Commission Delegated Regulation (EU) 231/2013 and article 18(1) (a), (b) and (c) of the Directive 2006/73/EC provide that the only eligible entities (the "**Eligible Entities**") qualified for the holding of cash accounts for AIF operation's purpose are:

1. central bank ;
2. credit institution authorised per Directive 2000/12/EC; and
3. a third country-authorised bank.

Therefore, AIFs for which an EMI or PI has been appointed to hold a cash account shall, as soon as possible but no later than **30 June 2023**:

1. appoint a depositary within the meaning of Article 19(3)(i) of the AIFM Law; and
2. appoint an Eligible Entity concerning such AIF's cash accounts.

The CSSF forbids the set-up of new sub-funds of AIFs for which an Eligible Entity does not currently hold cash accounts. Any new AIF must ensure that an Eligible Entity will hold the cash accounts.

CSSF STANDARDISED MODEL PROSPECTUS FOR UCITS

The CSSF issued on 17 November 2022 a communication on the launch of a standardised prospectus template for UCITS (the "**Standardised Model Prospectus**"), to be used when applying for authorisation of a new UCITS.

The aim of the Standardised Model Prospectus is to facilitate the drafting of the fund's issuing document for a proposed UCITS launch and enable the CSSF to carry out an easier examination of the application for authorisation.

The use of the Standardised Model Prospectus is intended for the constitution of any UCI which cumulatively meets the following four conditions:

- a UCITS subject to Part I of the law of 17 December 2010 concerning undertakings for collective investment;
- a UCITS to be constituted in the form of an investment company with variable capital (SICAV);
- a UCITS to be managed by a management company domiciled in Luxembourg or by a management company domiciled in another EU Member State in accordance with the freedom to provide services on a cross-border basis; and
- an umbrella UCITS of low to medium complexity.

The Standardised Prospectus Model should not be considered a regulatory requirement nor a guarantee for approval. Indeed, the Standardised Model Prospectus is intended to serve as guidance and good practice to reduce the overall processing time. Therefore, the approval process (i.e. the submission of the application, the exchange of comments and the approval decision) will not differ.

This document is made available with information of a general nature. It may need to be customised to fit the context, circumstances and specificities of a fund and/or sub-fund project.

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
LUXEMBOURG LAW FIRM

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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