

## Relaying the news

# Luxembourg Financial Services Summer Update

15 July – 15 September 2021

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**As the schools and offices re-open in Luxembourg, our Luxembourg financial services team round up recent regulatory developments to help you hit the ground running.**

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## CSSF reminds financial market participants about the ESMA Guidelines on article 25 AIFMD

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On 31 August 2021, the Luxembourg Financial Supervisory Authority (the “**CSSF**”) published a [communiqué](#) (the “**Communiqué**”) reminding market participants about the [guidelines issued by the European Securities and Markets Authority \(ESMA\) on article 25 of AIFMD](#) concerning leverage-related systemic risk in the alternative investment funds sector (the “**ESMA Guidelines**”). The Communiqué points out that the ESMA Guidelines apply from 23 August 2021, two months after the publication of their official translations on 23 June 2021.

### Scope of the ESMA Guidelines

The ESMA Guidelines are applicable to national competent authorities (“**NCA**s”) and relate to the assessment of leverage-related systemic risk. Their aim is to ensure that NCAs adopt a consistent approach when assessing whether the conditions for imposing leverage-related measures are met. They set out a two-step approach which NCAs should adopt when carrying out their risk assessment: first identify the level, source and different uses of leverage and second identify leverage-related systemic risk.

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## CSSF: Funds in non-judicial liquidation no longer required to submit requests for extension

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On 31 August 2021, the CSSF published a [communiqué](#) stating that, effective immediately, funds in non-judicial liquidation are no longer required to submit requests for extension of the liquidation period.

With new arrangements, the CSSF will monitor the status of the liquidation process through semi-annual reports submitted by the fund’s liquidator in the [form](#) available on the CSSF’s website. The semi-annual reports must be submitted: (i) no later than 30 September for the period covering the first half of the year (1 January – 30 June); and (ii) no later than 31 March following year for the period covering the second half of the year (1 July – 31 December).

The CSSF reminded liquidators that they are still obliged to report any significant issues with the liquidation process without delay. Additionally, the nine month deadline for liquidation period extension requests for sub-funds of funds which are not subject to non-judicial liquidation remains in force.

## The CSSF postpones entry into force of Circular 21/769 on telework

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On 30 August 2021, the CSSF published a [communiqué](#) on working arrangements. The CSSF pointed out that while coronavirus remains active, firms supervised by the CSSF are free to make such operational working arrangements as they wish provided that business continuity and safety of employees are ensured.

At the same time, the entry into force of the [CSSF Circular CSSF 21/769](#) on telework (the "**Circular**"), which was expected to be 31 September 2021, is now postponed until the end of the pandemic.

The Circular, addressed to all financial sector firms supervised by the CSSF, sets out governance and security requirements firms must comply with when permitting staff to work remotely.

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## The CSSF publishes Circular 21/780 implementing ESMA Guidelines on stress test scenarios under Article 28 of the Money Market Fund Regulation

On 26 August, the CSSF published [Circular CSSF 21/780k](#) (the "**Circular**") implementing updated European Securities Markets Authority (ESMA) guidelines on stress test scenarios under Article 28 of the Money Market Funds Regulation published on 16 December 2020 ("**ESMA Guidelines**").

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## Background and changes introduced by the ESMA Guidelines

The ESMA Guidelines apply to money market funds, their managers, and the national competent authorities as defined in the Money Market Funds Regulation (EU) 2017/1131. They address liquidity issues faced by money market funds in a wake of the Covid-19 pandemic caused by a large number of redemption requests. ESMA changed the calibration of redemption shock for the weekly liquidity stress tests from 30% to 40% for professional investors and from 15% to 25% for retail investors). It also updated the parameters for stress tests calibrating the shocks to be severe, plausible and consistent with projections of the European Central Bank and the European Systemic Risk Board. In addition, the ESMA Guidelines updated the scenario calibration to reflect important systemic risks identified by the General Board of the European Systemic Risk Board, including widespread defaults.

### The Circular

The Circular implements all changes introduced by the ESMA Guidelines in Luxembourg and replaces Circular CSSF 20/735 adopting the 2019 version of the ESMA Guidelines. The Circular came into force on 30 August 2021. The CSSF expects all firms falling under the scope of the Circular to apply it to their money market funds reporting from 30 September 2021.

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## CSSF updates its frequently asked questions related to Covid-19

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On 17 August 2021, the CSSF published an [updated version of frequently asked questions related to Covid-19](#) ("**Covid-19 FAQ**") and applicable to financial services sector firms supervised by the CSSF.

In relation to undertakings for collective investment ("**UCI**") supervised by the CSSF, the Covid-19 FAQ introduced the following changes:

- four new questions (section 16) applicable to UCITS in relation to passive investment breaches and breaches of VaR limits. Those questions are answered by a cross-reference to the updated frequently asked questions on Luxembourg Law of 17 December 2010 relating to undertakings for collective investment (please refer to topic number 6 for more details regarding the UCITS FAQ)
- three new questions in relation to the swing pricing mechanism applicable to all Luxembourg funds supervised by the CSSF. Those questions are answered by a cross-reference to the updated frequently asked questions on the swing pricing mechanism (please refer to topic number 7 for more details regarding the Swing Pricing FAQ)

In addition, the Covid-19 FAQ withdrew the following questions in relation to the UCI:

- question 15 explaining the CSSF's position on annual and semi-annual reporting under the AIFMD and UCITS Directive
- question 7 providing an extensive list of deadlines for various UCIs reporting and their optional postponement

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## CSSF updates its frequently asked questions on the UCITS Law

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On 17 August 2021, the CSSF published a [revised version of frequently asked questions](#) ("**UCITS FAQ**") on Luxembourg Law of 17 December 2010 relating to undertakings for collective investment ("**UCITS Law**").

The UCITS FAQ added four (4) new questions related to treatment of breaches of the UCITS global exposure limits:

- first, it clarified that passive investment breaches of the global exposures limits in accordance with article 42(3) of the UCITS Law and, more generally, investment restrictions applicable to undertakings for collective investment do not need to be notified to the CSSF
- second, that breaches of the VaR limits (either maximum limits laid down by applicable law or more restrictive limits set for a specific UCITS) resulting from increase of volatility in financial markets can be considered as passive breaches
- third, it clarified the expectations of the CSSF in relation to passive breaches (understood as breaches caused by circumstances beyond the control) of the VaR limit. In this respect, the CSSF requires the investment fund managers to take appropriate steps to meet the VaR limit within reasonable period of time taking into account prevailing market conditions and best interest of the investors. Upon occurrence of a passive breach, any additional risk exposure increasing the overall level of risk in the portfolio should be regarded as an active breach
- in case of an active breach of the VaR limit the following information should be communicated by [email](#) to the CSSF:
  - legal name of the notifying person or entity and corresponding CSSF identifier
  - legal name of the UCITS or UCITS sub-fund concerned and corresponding CSSF identifier(s)
  - VaR communication method (absolute or relative)
  - the internal VaR limit (if set out)
  - the VaR limit consumption
  - the date when the active breach occurred and ended
  - the reasons for the breach

For such notifications investment fund managers are not obliged to use standard notification forms required under Circular CSSF 02/77.

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## CSSF updates its frequently asked questions on swing pricing

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On 17 August 2021, the CSSF published a revised version of [frequently asked questions on swing pricing](#) ("**Swing Pricing FAQ**") applicable to all regulated funds domiciled in Luxembourg which apply the swing pricing mechanism.

The Swing Pricing FAQ covered the following points:

- UCIs are permitted to increase the swing factor applied on NAV up to the maximum level laid down in the UCI's prospectus without first notifying the CSSF
- on increases of the applied swing factor beyond the maximum swing factor laid down in the UCI's prospectus:
  - if the UCI's prospectus permits the board of directors of the UCI to increase the swing factor, the UCI is obliged to provide the CSSF with a detailed notification including reasons for such decision. In addition, the board must communicate that decision to current and prospective investors and provide a copy of that communication to the CSSF
  - if the UCI's prospectus does not permit the board of directors of the UCI to increase the swing factor, the CSSF does not permit the UCI to exceed the maximum swing factor unless the prospectus is formally amended. This is a significant change to the rules introduced in April 2020, which provided, in the event of market disturbance, the CSSF could exceptionally permit UCI's boards of directors to increase the maximum swing factors even if the UCI's prospectus did not provide for the possibility of increasing the maximum

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## The CSSF adopts the ESMA Guidelines on certain aspects of the MiFID II compliance function requirements

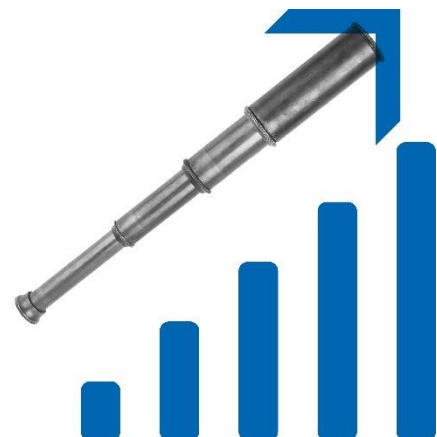
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On 30 July 2021, the CSSF published [Circular 21/779](#) complementing Circulars 12/552, 18/698 and 20/758 (the "**Circular**") and informing the public that it applies the [Guidelines of ESMA on certain aspects of the MiFID II compliance function requirements](#) (the "**ESMA Guidelines**").

The CSSF stated that, with immediate effect, it expects all firms falling into the scope of the Circular to comply with the ESMA Guidelines.

### Scope of the ESMA Guidelines

The ESMA Guidelines were published in relation to the application of organisational requirements in accordance with Article 16(2) of MiFID II (2014/65/EU) and Article 22 of the MiFID II Delegated Regulation (EU) 2017/565.



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## The CSSF notifies financial market participants about SFDR-related developments

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On 30 July 2021, the CSSF issued [a press release](#) drawing the attention of financial markets participants to the SFDR-related publications made by the European Commission during the course of July ("**SFDR press release**").

### Q&As on the interpretation of SFDR

The SFDR press release pointed out that on 26 July 2021, the European Commission published questions and answers on the interpretation of SFDR (the "**Q&As**"). The Q&As address the letter of 12 March 2021 from the European Supervisory Authorities identifying the areas of ambiguity on the application of SFDR. We will shortly be publishing a client briefing with more information on the content of the Q&As.

### Deferral of SFDR RTS

The SFDR press release noted that in its letter to the European Parliament dated 8 July 2021, the European Commission announced that it is planning to postpone entry into force of regulatory technical standards under SFDR from 1 January 2022 until 1 July 2022.

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## Publication of law of 21 July 2021 transposing the Cross-Border Distribution of Funds Directive

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On 26 July 2021, [the law of 21 July 2021](#) implementing [Directive \(EU\) 2019/1160](#) with regard to cross-border distribution of collective investment undertakings ("**CBDF Directive**") and amending the law of 17 December 2010 on undertakings for collective investment, and the law of 12 July 2013 on alternative investment fund managers (the "**Law**"), was published on the official Luxembourg gazette. The Law transposed the CBDF Directive into Luxembourg law and came into effect on 2 August 2021.

The Law introduced several changes to the cross-border distribution of collective investment undertakings framework currently applicable in Luxembourg, including:

- an official concept of pre-marketing of AIFs, clearly defining the conditions for it to occur, and imposing an obligation on the AIFM or on the regulated entity acting on its behalf, to notify the CSSF within two weeks of beginning pre-marketing activity
- providing that any subscription made within eighteen months after the beginning of a pre-marketing activity will be considered as a result of marketing, and will be therefore subject to the notification procedures per Article 29 and 30 of the law of 12 July 2013 on alternative investment fund managers
- an official procedure for management companies or AIFMs to de-register AIFs or UCITS from marketing
- stating there is no obligation for AIFs or UCITS to have a physical presence in Luxembourg, but that facilities must be available for processing subscriptions, repurchasing and redemption of orders, making other payments to unit-holders, handling complaints, making available information and documents about the fund and acting as a contact point for communicating with the competent authority. For such purposes, it is possible to appoint, by written agreement, a third party agent



For more information on the CBDF framework and its impact on alternative investment funds, please see our client briefing "[The final AIFMD cross-border fund distribution package: delivering freedom?](#)".

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## CSSF communique on the publication of the Law of 21 July 2021 transposing the Cross-Border Distribution of Funds Directive

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On 30 July 2021, the CSSF published a [communique in relation to the publication of the Law of 21 July 2021 transposing Directive \(EU\) 2019/1160](#) (the "**Law**"). The CSSF stated that CSSF Circular 11/509 has been updated in order to include amendments relating to the Law with regard to cross-border distribution of collective investment undertakings, and in particular the process of de-notification of Luxembourg-based UCITS.

The CSSF published a list of [frequently asked questions](#) specifying the impacts relating to the receipt of the notifications in the context of the cross-border distribution of collective investment undertakings framework.

The CSSF also informed the public that a new dedicated web page "[Pre-marketing by AIFMs](#)" is available in relation to the AIFM pre-marketing notifications. In addition to procedural requirements for pre-marketing notifications made by EU AIFMs, the web page also provides rules applicable to non-EU AIFMs obliging them to notify pre-marketing to professional investors located in Luxembourg to the CSSF.

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## CSSF publishes Circular 21/778 to comply with the de-notification requirements of the Cross-Border Distribution Directive

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On 28 July 2021, the CSSF published [circular 21/778](#) amending [CSSF Circular 11/509](#) on notification procedures applicable to UCITS.

The aim of the circular is to implement certain technical requirements for marketing notifications of UCITS put in place by the Cross-Border Distribution Directive [Cross-Border Distribution Directive \(EU\) 2019/1160](#) implemented in Luxembourg by [Law of 21 July 2021 transposing directive 2019/1160](#).

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## CSSF FAQ on notification procedures under CBDF framework

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On 30 July 2021, the CSSF published a [list of frequently asked questions](#) (the "**FAQ**") on notification procedures to be followed pursuant to the [Cross-Border Distribution Directive \(EU\) 2019/1160](#), transposed into Luxembourg law by [the law of 21 July 2021](#) (the "**CBDF Framework**").

The FAQ was divided into two sections: UCITS notifications; and AIFM notifications.

In relation to UCITS, the following points were clarified:

- the main differences introduced by the CBDF Framework for UCITS notifications

- new information which should be included in the initial notification letter
- how to effect de-notifications
- some practical aspects in relation to matters such as the supported package size, the language to be used, error messages, nomenclatures, required attestation, and contacts

In relation to AIFs, the following points were clarified:

- the main differences introduced by the CBDF Framework for AIFs notifications
- the procedure to notify the CSSF for pre-marketing
- how to effect de-notifications
- some practical aspects in relation to the supported package size for notifications

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## CSSF communication on AML/CFT controls applied to unregulated AIFs by the IFM

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On 29 July 2021, the CSSF published a [communiqué](#) presenting the results of the thematic review carried out by its UCI On-site Inspection department in June and July 2021. The review focused on the anti-money laundering and counter terrorism financing ("**AML/CFT**") controls applied to unregulated AIFs managed by five authorised Luxembourg investment fund managers.

The main finding was that indirect supervision of unregulated AIFs works properly.

The weaknesses found in the review were similar to those previously found during inspections of investment fund managers of regulated investment funds:

- weaknesses in the risk assessment at the IFM and the unregulated AIFs level
- weaknesses in the oversight of the delegated portfolio managers
- weaknesses with regard to the risk-based approach on investments
- weaknesses of name screening on control framework in relation to targeted financial sanctions on investments

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## CSSF reports on IFM's compliance with the Benchmarks Regulation

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On 29 July 2021, the CSSF published a [communiqué](#) presenting results of the thematic review carried out by its UCI On-site Inspection department in 2020. The review focused on Luxembourg investment fund managers ("**IFMs**") and their obligations under the Benchmarks Regulation (EU) 2016/1011 (the "**Benchmarks Regulation**").

The CSSF's findings show a low level of Benchmark Regulation compliance among inspected IFMs, especially in the following areas:

### Eligible benchmarks

The IFMs are obliged to check whether the benchmark (or combination of benchmarks) or their administrator is included in the ESMA Benchmark Register. The CSSF noted that such checks must be carried out on a frequent basis to ensure effective monitoring. Annual checks are not considered sufficient.

### **Contingency measures**

The CSSF noted that under article 28(2) Benchmark Regulation, benchmark users are obliged to produce and maintain robust written plans setting out the actions to be taken when a benchmark materially changes or ceases to be provided. If IFMs decide not to define alternative benchmarks, the CSSF recommends this decision to be explained and approved by the management or governing body of an IFM.

### **Disclosure**

The CSSF also pointed out that UCITS prospectus must include clear information stating whether the benchmark is provided by an administrator included in the ESMA Register. It should also reflect benchmark contingency plans or indicate how investors can access them.

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## **CSSF brings to an end IFMs' Covid-19 reporting obligations**

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On 16 July 2021, the CSSF published a [communiqué](#) bringing to an end the additional reporting obligations it imposed on IFMs in the wake of the Covid-19 pandemic. Please see our client briefing "[CSSF brings to an end IFMs' COVID-19 reporting obligations](#)".





## How Eversheds Sutherland can help

Please do not hesitate to get in touch to discuss the details of the CSSF publications and see how they impact your business.

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