EVERSHEDS SUTHERLAND

International Funds Net

Country updates

February 2023

Europe

European Union

ECON votes to adopt draft report on proposed Directive amending AIFMD and UCITS Directive

On 24 January 2022, the European Parliament's Economic and Monetary Affairs Committee ("**ECON**") published a document which included the result of a vote relating to the proposed Directive amending the Alternative Investment Fund Managers Directive (*2011/61/EU*) ("**AIFMD**") and the UCITS Directive (*2009/65/EC*) relating to delegation arrangements, liquidity risk management, supervisory reporting, provision of depositary and custody services, and loan origination by alternative investment funds (2021/0376(COD)).

ECON has voted to adopt a report containing a draft European Parliament legislative resolution, the text of which sets out suggested amendments to the proposed Directive.

ECON also voted to enter into interinstitutional negotiations with the Council of the EU. The Council agreed its general approach on the Directive in June 2022.

European Parliament adopts proposed Regulation amending ELTIF Regulation

On 16 February 2023, the European Parliament published the provisional edition of the text of the legislative resolution adopted by it at first reading on the proposed Regulation amending the Regulation on European long-term investment funds ("**ELTIFs**").

The Parliament announced that it had adopted the proposed Regulation on 15 February 2023. The next step is for the Council of the EU to formally adopt the proposed Regulation. It will enter into force 20 days after its publication in the *Official Journal of the European Union* and will apply nine months after that date.

Information kindly provided by Thomson Reuters.

Albania

Regulation adopted on investment fund statistical reporting

On 21 December 2022, the Supervisory Council of Bank of Albania adopted Decision No. 63 "On Adoption of Regulation 'On Statistical Reporting of Assets and Liabilities of Investment Funds'" ("**Regulation**"), governing the reporting requirements regarding statistical information of assets and liabilities of investment funds that conduct activity in Albanian territory.

According to the Regulation, all existing investment fund management companies are subject to statistical reporting requirements envisaged into the Regulation. Investment fund management companies shall deliver quarterly reports to Financial Supervisory Authority for each investment fund, or sub-fund in case assets of an investment fund management company are divided into sub-funds in such way that the shares/quotas related to each sub-fund are supported independently from different assets.

The reporting information includes but is not limited to, information on stock, assets/liabilities, shares/investment fund issued units etc., as per the accounting rules provided into the relevant national accounting rules and international standards.

The first reporting will begin with quarterly data for the 4th quarter of 2023 and must be delivered not later than 45 days from the end of the reporting period.

The Regulation was published with Official Gazette on 5 January 2023.

Information kindly provided by Karanovic Partners in Albania.

Belgium

Belgian regulator issues Communication providing regulatory technical standards for SFDR

The Belgian regulator ("**FSMA**") has published a Communication on the entry into force of Commission Delegated Regulation (EU) 2022/1288 of 6 April 2022, supplementing the SFDR with regulatory technical standards.

The Communication takes the form of Q&As and covers, for example, the content and presentation of the information relating to the promotion of environmental or social characteristics and objectives for sustainable investments in precontractual documents, on websites and in periodic reports. These Q&As bring together the clarifications published by the European Commission and the European Supervisory Authorities on the subject and sets out the FSMA's expectations in this regard.

Information kindly provided by Janson in Belgium.

Luxembourg

New CSSF FAQ on Sustainable Finance Disclosure Regulation

On 2 December 2022, the CSSF issued a FAQ (the "**CSSF FAQ**") in relation to the Sustainable Finance Disclosure Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector ("**SFDR**") and Commission Delegated Regulation (EU) 2022/1288 ("**SFDR RTS**"). The CSSF FAQ:

- defines which financial market participants ("**FMPs**") and which financial products are covered; and
- aims at providing further clarity on the SFDR.

The CSSF FAQ was published a few weeks after the publication of a Q&A on SFDR by the European Supervisory Authorities (the "**ESAs**").

The FMPs to which the CSSF FAQ applies are alternative investment fund managers, management companies of undertakings for collective investment in transferable securities, managers of a qualifying venture capital fund and managers of a qualifying social entrepreneurship fund. The CSSF FAQ applies further to alternative investment funds ("**AIFs**") and undertakings for collective investment in transferable securities ("**UCITS**").

According to the CSSF, the CSSF FAQ is to be read in conjunction with the Q&A issued by the EU Commission (the "**Commission Q&A**"), clarifications of the ESAs and *CSSF Communiqués* on SFDR.

The CSSF FAQ covers the following topics: updates of prospectuses/issuing documents, website disclosures, pre-contractual disclosures and periodic disclosures.

<u>Updates of prospectus/issuing documents</u>

The CSSF FAQ states that changes follow the same regime as any other changes made to the prospectus/issuing document. The mere introduction of Article 8 and Article 9 SFDR RTS pre-contractual templates following the entry into force of SFDR RTS to a prospectus shall not necessarily be considered as a "material change". However, a "material change" may occur if the inclusion of the said SFDR RTS annex results in a change to:

- figures such as minimum committed percentages;
- the binding elements of the investment strategy; and/or
- the benchmark.

Such changes are assessed on a case-by-case basis by the CSSF.

<u>Website disclosure</u>

The investment fund manager ("**IFM**") is and remains responsible for the website disclosure requirements of Article 10 SFDR in relation to the relevant financial product for which it acts as FMP, even if the portfolio management function has been delegated to a portfolio manager. The IFM is also responsible for ensuring that all relevant information under Article 10 of the SFDR is available on its website or on another website if this is where fund-related documentation is usually made available to investors.

<u>Pre-contractual disclosures</u>

As clarified in the Commission Q&A, the CSSF FAQ clarifies that "sustainable investments" made by funds disclosing under Article 9 SFDR must be qualified as such, in accordance with the conditions of Article 2(17) SFDR, at all times i.e. from the date of the current investment and on an ongoing basis during the life cycle of the fund. Funds disclosing under Article 8 SFDR shall provide a description of how the investment strategy meets the environmental and/or social characteristics. Should only an exclusion strategy be applied as a key element of the ESG strategy applicable to the relevant fund, the CSSF would expect the detailed exclusion strategy to allow investors to understand how the fund's environmental and/or social characteristics are being met. For funds disclosing under Article 9 SFDR, the sole application of an exclusion strategy is not acceptable. Such funds must invest in "sustainable investments" which requires a positive investment selection process in order to demonstrate how all underlying investments meet the conditions of Article 2(17) SFDR. Minimum thresholds of investment disclosed by funds under Article 8 or Article 9 SFDR in their prospectus shall be considered as binding commitments of the investment strategy of the fund. IFMs must ensure ongoing compliance with all the rules set out in the prospectus/issuing document of the fund they manage, with the depositary being in charge of monitoring the compliance of investment restrictions according to applicable legal provisions.

<u>Periodic disclosures</u>

The CSSF states that UCITS and AIFs disclosing pursuant to Article 8 or Article 9

SFDR must comply with periodic disclosure requirements under Article 11 SFDR and the SFDR RTS (using the prescribed templates set out in the Annexes to the RTS) in their annual reports issued after 1 January 2023.

New reduced subscription tax for sustainable UCIs

On 23 December 2022, the Law of 23 December 2022 concerning the State revenue and expenditure budget for 2023 (the "**Law**") was published.

As a reminder, under the Law on the State revenue and expenditure budget for the year 2021, a reduced subscription tax was introduced for investment funds, with a share of invested assets corresponding to the criteria of the European taxonomy, defining economic activities which are considered sustainable.

Through an amendment to Annexes I and II of the Delegated Regulation (EU) 2021/2139, which was published in the Official Journal of the EU on 15 July 2022, the European Commission decided to define natural gas and nuclear power as sustainable economic activities in the taxonomy.

Nevertheless, the Government of the Grand Duchy of Luxembourg has long pursued a policy of opposition to nuclear power, so that the purpose of this Law is to exclude natural gas and nuclear investments from the tax benefit of the reduced subscription tax for investment funds by the amendment of Article 174(3) of the amended Law of 17 December 2010 (regarding undertakings for collective investment).

<u>How to benefit from the new reduced subscription tax</u>

If the proportion of the net assets of an undertaking for collective investment ("**UCI**") or of an individual compartment of an umbrella UCI, invested in sustainable economic activities represents:

- at least 5% of the total net assets of the UCI or of the individual compartment of an umbrella UCI ► this rate is 0.04% for the share of net assets invested in such sustainable economic activities;
- at least 20% of the total net assets of the UCI or of the individual compartment of an umbrella UCI ► this rate is 0.03% for the share of net assets;
- at least 35% of the total net assets of the UCI or of the individual compartment of an umbrella UCI ► this rate is 0.02% for the share of net assets;
- at least 50% of the total net assets of the UCI or of the individual compartment of an umbrella UCI ► this rate is 0.01% for the share of net assets.

As a reminder, an *economic activity qualifies as environmentally sustainable* where that economic activity:

- contributes substantially to one or more of the following environmental objectives:
  - climate change mitigation;
  - climate change adaptation;
  - sustainable use and protection of water and marine resources;
  - transition to a circular economy;
  - pollution prevention; and
  - control and protection and restoration of biodiversity and ecosystems.
- does not cause significant harm to any of these environmental objectives;
- is carried out in accordance with the minimum safeguards of the procedures that a company engaged in economic activity implements to comply with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights; and
- complies with the technical screening criteria established by the Commission.

<u>When is the benefit of a reduced subscription tax excluded?</u>

By way of exception, the following will not benefit from a reduced *taxe d'abonnement*. The share of the net assets of the UCI or of an individual compartment of an umbrella UCI invested in:

- economic activities which concern natural gas and nuclear power. This includes economic activities based on:
  - the pre-commercial stages of advanced technologies for the production of energy from nuclear processes with minimal waste from the fuel cycle;
  - the construction and safe operation of new nuclear power plants, for the generation of electricity or heat, including for hydrogen production, using best-available technologies;
  - the electricity generation from nuclear energy in existing

installations;

- the electricity generation from fossil gaseous fuels;
- the high-efficiency co-generation of heat/cool and power from fossil gaseous fuels;
- the production of heat/cool from fossil gaseous fuels in an efficient district heating and cooling system.

- and if this economic activity does not cause significant harm to any of the other environmental objectives.

When is the new reduced subscription tax to be implemented?

The law enters into effect as of January 1, 2023. However the legislator clarified:

- certified certificates, which have already been submitted by UCIs to the relevant tax administration, before the entry into force of this amendment (before 1st January 2023) remain valid, i.e. the tax rate resulting from the percentage of the net assets stated in the submitted certificate remains applicable for a total of four quarters; and
- tax returns for the subscription tax filed after the entry into force of this amendment (after 1st January 2023) shall take into account the exclusion of economic activities involving natural gas and nuclear power.

Information kindly provided by Bonn Steichen & Partners in Luxembourg.

Malta

Establishment of a framework for notified professional investor funds proposed

On 16 January 2023, the Malta Financial Services Authority ("**MFSA**") launched a stakeholder consultation on the proposed establishment of a novel framework for Notified Professional Investor Funds. The aim behind such framework is to improve the regulatory platform for professional investment funds by means of streamlined, pragmatic and risk-based policymaking. Notified Professional Investor Funds will be subject to a notification process and will therefore not be licensed by the MFSA. Interested parties were encouraged to send their comments by email on this consultation document by not later than 31 January 2023, which date was later extended to 17 February 2023.

European Securities and Markets Authority's Notification Statement

On 17 January 2023, the MFSA issued a circular addressed to investment firms and credit institutions when providing investment services activities. By this circular, the MFSA noted that European Securities and Markets Authority ("**ESMA**") is launching a common supervisory action ("**CSA**") with national competent authorities on the application of MiFID II disclosure rules with regards to marketing communications across the European Union. Amongst others, ESMA's CSA will help for the collection of information about possible 'greenwashing practices' observed in marketing communications and advertisements. In its circular, the MFSA noted that it will be contacting the selected firms to conduct a focused inspection to assess the implementation of MiFID II disclosure rules on marketing communication.

Update to the Trusts UBO Register

On 25 January 2023, the MFSA issued a circular to inform the public that it has been working on enhancing the Trusts Ultimate Beneficial Ownership Register ("**TUBOR**") platform to make it more user friendly. The MFSA has launched the following enhancements to the TUBOR platform:

- indication of whether a beneficiary received a benefit on TUBOR;
- deletion of a Trust on TUBOR;
- updates to the Register of Beneficial Owners of Trusts – Frequently Asked Questions;
- uploading of signed declarations on TUBOR;
- second director details displayed automatically on TUBOR Declaration; and
- save as draft feature.

Trustees must make sure that all data reported on TUBOR is accurate and up to date.

Information kindly provided by Mamo TCV Associates in Malta.

North Macedonia

Decision adopted on categorisation of investment funds

The Securities and Exchange Commission of the Republic of North Macedonia ("**Commission**") adopted a Decision on the Adoption of the Guidelines for the Categorisation of Investment Funds

("**Decision**").

The Decision adopts the Guidelines for the Categorisation of Investment Funds adopted by the Commission ("**Guidelines**") and prescribes an obligation for the open and closed investment fund management companies to act in accordance with Chapter VII of the Guidelines.

In Chapter VII, it is stated that open and closed investment fund companies are obliged to harmonise the operation of the open funds they manage. The harmonisation refers to the prospectus and statute of the funds, i.e., the existing open investment funds should harmonise the name of the investment fund, the investment policy, as well as the structure of the investments. The Decision also prescribes that the failure to act on this obligation and non-compliance with the Guidelines is a basis for establishing an irregularity in the operation of open and closed investment fund management companies.

Information kindly provided by Karanovic Partners in North Macedonia.

Norway

EU's Money Market Funds Regulation enters into force in Norway

Regulation (EU) 2017/1131 on Money Market Funds and delegated regulations have been incorporated as Norwegian law by way of amendment to the Norwegian Management of Alternative Investment Funds Act and the Norwegian Securities Funds Act, and entered into force on 1 February 2023.

Information kindly provided by Haavind in Norway.

Serbia

Law on Capital Market aligns financial markets rules with MiFID regulations

On 6 January 2023, the application of the novel Law on Capital Market ("**Law**") commenced, as well as the secondary regulations for the implementation of the Law adopted by the Securities Exchange Commission ("**SEC**"). Belgrade Stock Exchange and the Central Securities Depository and Clearing House also aligned their internal acts with the Law.

The Law brings a completely new comprehensive set of rules in line with the relevant EU regulations governing markets in financial instruments (MiFID I and MiFID II), prospectus, investor-compensation schemes, transparency, securities settlement and market abuse.

In relation to the previous Law on Capital Market, which was adopted in 2011 and was partially aligned with the EU *acqui*, the Law introduces new rules concerning:

- dematerialised securities and operations of entities authorised to perform transactions with financial instruments;
- conditions and forms of organised trading with financial instruments;
- a new institution of data reporting services provider;
- improvement of the quality of the information received by clients regarding investment services;
- greater regulatory requirements especially with regard to new trading platforms and high-frequency and algorithmic trading;
- the obligations of participants in the capital market regarding market abuses; and
- the wider supervisory obligations and sanction powers of the SEC.

Information kindly provided by Karanovic Partners in Serbia.

Slovenia

Slovenian Securities Market Agency issues decisions on AIF unit marketing

On 3 January 2023, two decisions of the Slovenian Securities Market Agency ("**SME**") entered into force, namely the Decision on the definition of individual terms related to the marketing and marketing communication regarding units of alternative investment funds ("**Decision on the definition of terms**"), and the Decision on the method and conditions for marketing units of investment funds ("**Decision on marketing of AIF units**").

<u>Decision on the definition of terms</u>

The Decision on the definition of terms was issued on the basis of the Alternative Investment Fund Managers Act ("**ZUAIS**"), which provides that the SME shall, by means of its general acts, define terms regarding the marketing of AIF units. Accordingly, the present Decision defines terms referred to in Article 35 of ZUAIS regarding the marketing of the AIF units, the units of AIFs from another Member States, and the units of AIFs from a

third country. Therefore, provisions of Articles 2 to 6 of the Decision provide for the definitions of the following terms:

- investor;
- offer of the AIF units;
- direct or indirect offer of the AIF units;
- unspecified or specified group of investors; and
- initiative of the manager of AIF.

In addition, the SME's Decision also defines the conditions of marketing communications in relation to AIF units, AIFs from other Member States, and the units of AIFs from a third country.

Decision on marketing of AIF units

The SME's Decision on marketing of AIF units was adopted on the basis of Investment Funds and Management Companies Act ("**ZISDU-3**") and provides for detailed conditions of the marketing of investment funds units referred to in ZISDU-3.

Moreover, the Decision on marketing of AIF units sets out rules of conduct of management companies when marketing units, which must act diligently, fairly, with due professional care and due regard for the interests of investors as defined in Regulation EU 2019/1156 on facilitating cross-border distribution of collective investment undertakings.

In addition, the Decision on marketing of AIF units provides for the procedures regarding the conduct of marketing of investment funds units.

Finally, the Decision defines which elements must be contained in the appendix to a prospectus of a UCITS fund of another Member States, whose units are marketed in the Republic of Slovenia.

Information kindly provided by Rojs, Peljhan, Prelesnik & partners in Slovenia.

Sweden

Swedish Financial Supervisory Authority implements e-service for online applications

The Swedish Financial Supervisory Authority's (the "**SFSA**") new e-service for certain online applications was launched on 21 February 2023 and it is now possible to submit applications for management suitability assessments and owner management suitability assessments online. If proven successful, the intention is to extend the e-service to other applications.

The application process consists of:

- registering user(s) and authorisation(s) (for the applicant as well as the person(s) being assessed);
- logging in and completing the application (the e-service will adapt the application to the legal entity it concerns and only request relevant information);
- paying the application fee (the SFSA will not begin processing the application until the fee has been paid); and
- the processing and decision making (the applicant will be able to view the status of the application and will receive a notification if more information is required, and/or once a decision has been made).

More information on the application process and guidance on registration and authorisation is available in both Swedish and English on the SFSA's website.

Reminder of the new system for quarterly reporting for certain funds

The SFSA stresses that the quarterly reporting for Swedish UCITS and special funds must, as of 31 March 2023, be submitted via the SFSA's system 'Fidac' and not the system for periodic reporting as was previously the case.

Information kindly provided by our Eversheds Sutherland office in Sweden.

Switzerland

Upcoming amendments to the Federal Act on Collective Investment Schemes

On 1 August 2023, recent amendments to the Federal Act on Collective Investment Schemes are expected to come into force. Notably, this will introduce a new fund vehicle, the *Limited Qualified Investor Funds* ("**L-QIFs**"). These are funds reserved exclusively for qualified investors which do not require a licence or an approval from the Swiss regulator. L-QIFs are comparable to the Reserved Alternative Investment Fund introduced in Luxembourg in 2016.

The list of qualified investors within the meaning of the law is broad, and includes high net-worth retail clients that opt out of their retail status. The ordinary threshold for high net-worth is set at 2 million Swiss francs (but can be reduced in some cases to 500'000

Swiss francs). However, some restrictions may apply as to the scope of investors and high net worth clients may be excluded, in particular where the funds are invested in real estate.

In terms of choice of a legal form for an L-QIF, three options are available:

- a contractual fund (i.e. based on a collective investment contract);
- an investment company with variable capital ("**SICAV**"); or
- a limited partnership for collective investment ("**LP**").

In terms of regulatory requirements, a distinction should be made between the regulatory status of L-QIFs and the management of L-QIFs, as the L-QIFs are required to be managed by regulated financial institutions.

In particular, L-QIFs in the form of a contractual fund shall be managed by a fund management company, a category of financial institutions governed by the Swiss Federal Act on Financial Institutions. A fund management company is required to have the form of a company limited by shares (*société anonyme / Aktiengesellschaft)* with its registered office and head office in Switzerland. Further delegation of management is possible as well. The authorised investments are specified in the fund contract that also needs to be approved by the custodian bank. Another noteworthy element is the requirement for an L-QIF to achieve net asset value of at least CHF 5 million within one year after its launch (this may be extended for a period of 6 months).

Similarly, L-QIFs in the form of an investment company with variable capital are required to delegate their management and all investment-related decisions to a fund management company (with possibility of sub-delegation). The terms of the investments are set out in the investment regulations of the company. Similar to the contractual fund, the L-QIF is required to have a net asset value of at least CHF 5 million within one year after its launch.

Finally, L-QIFs operating as limited partnerships shall delegate management to managers of collective assets, another category of regulated financial institutions under the Financial Institutions Act. Sub-delegation of management is possible but may be restricted depending on the identity of certain partners (e.g. banks, insurance companies, etc). The terms of the investments are set forth in the partnership agreement. The fund should be set up for a minimum duration of 5 years.

Finally, the amended Collective Investment Schemes Act contains specific requirements with regard to the use of related indications or misleading information in company names and documents / publicity materials relating to L-QIFs. A breach of such requirements is punishable by a fine that can go up to 500'000 Swiss francs.

Information kindly provided by our Eversheds Sutherland office in Switzerland.

UK

ESMA confirms changes to notification letters for cross-border UCITS and AIFs

On 15 December 2022, ESMA published their final report on draft regulatory technical standards ("**RTS**") and implementing technical standards ("**ITS**") on notifications for cross-border marketing to host state National Competent Authorities ("**NCAs**") and management of AIFs and UCITS in the EU.

Background

On 17 May 2022, ESMA published a consultation paper regarding draft RTS and ITS specifying the information to be provided by UCITS management companies and AIFMs to home and host state NCAs before undertaking cross border marketing. See our previous briefing, "ESMA proposes changes to notification letters for cross-border UCITS and AIFs".

Annex III of the consultation paper contains draft RTS specifying details of envisaged marketing strategies, activities and targets in a host member state by a management company or AIFM. Annex IV contains draft ITS, including five template notification letters to be provided to NCAs.

In the final report ESMA scaled back the notification letter disclosure requirements, removing obligations that went beyond the existing practices and requirements of the UCITS Directive and AIFMD that could create unintended barriers to the cross-border distribution of funds and higher costs for investors.

Key changes

Although the notification letters will remain largely the same, there are some key changes, including:

- Legal entity identifier ("**LEI**") codes of the management company/AIFM/internally managed AIF are mandatory

- contact details and contact point for the transmission of the invoice or the communication of any applicable regulatory fee or charges can be for a singular person or a department responsible for application within the management company/AIFM/internally managed AIF
- ISIN of share class(es) for UCITS and AIFs are only required if available
- information on the duration of the UCITS/AIFM/internally managed AIF and AIFs are only required if available
- information on the management company/AIFM/internally managed AIF national identification code is only required if available

Overall, these changes should allow management companies and AIFMs to commence managing and marketing AIFs and UCITS at an earlier stage.

Clarifications

Following concerns raised from responses to the draft report that the technical standards go beyond existing practices and requirements, ESMA have made some key clarifications:

- only material modifications require a notification to the relevant NCA
- in respect of information on AIFs to be marketed in host Member States, there is no expectation for AIFs to identify only the share classes that will actually be marketed in the host Member State. However, all share classes of the AIF should be indicated to enable the NCA to identify the AIF structure

Next Steps

The European Commission will decide whether to adopt ESMA's final report by 15 April 2023.

UK's FCA updates timeline of Overseas Funds Regime

On 28 February 2023, the Financial Conduct Authority ("**FCA**") published its Regulatory Initiatives Grid updating the timeline of the Overseas Funds Regime ("**OFR**"), the new equivalence regime for retail investment funds and money market funds established outside the UK, which will allow recognised funds to be marketed to the public in the United Kingdom.

This initiative was introduced in the Financial Services Act 2021 and the majority of provisions were commenced in February 2022. The FCA has confirmed that it is now working on operationalising the OFR and will be consulting on various aspects of the Handbook rules during the second quarter of 2023 to ensure OFR funds are appropriately captured. It also confirmed that formal engagement is planned during the second half of 2023 and first half of 2024.

Information kindly provided by our Eversheds Sutherland office in the UK.

UK overseas territories

Guernsey

Guernsey's government issues consultation on 'six directorship' exemption

In December 2022, Guernsey States' Policy and Resources Committee published a consultation paper seeking views on a proposed change to the requirements which affect some individuals acting as company directors, by way of business, in or from within the Bailiwick.

Acting as a director for any company in the Bailiwick, by way of business, requires directors to hold a personal fiduciary licence granted by the GFSC under the Fiduciaries Law, though there are a number of exemptions to this requirement. One exemption is the 'six directorship' exemption, which means individuals who hold directorships of six or fewer companies, being directorships which are not subject to another exemption under the Fiduciaries Law, are not required to hold a personal fiduciary licence. However, they are still subject to anti-money laundering and counter-terrorism financing obligations. In 2015, a MoneyVal report recommended measures should be introduced to ensure effective compliance with these obligations.

The proposed changes, which would see a registration framework extended to directors who come under the 'six directorship' exemption, are intended to be a practical and proportionate solution to deliver on the recommendation.

GFSC increases 2023 licence fees after industry consultation

The GFSC will increase licence fees paid by firms from 1 January 2023 by 8% following a consultation paper on the fee rates and administrative penalties to apply in the new year.

The commission decided to proceed with a lower fee increase of 8%, rather than the 9%

on which it had proposed, and details of its annual fee process can be found on the GFSC's website.

Information kindly provided by Ogier in Guernsey.

Jersey

Proposed access by Obliged Entities to Beneficial Ownership register

The Government of Jersey has issued a response to the consultation, conducted in October 2022, proposing to extend access to the central register of beneficial ownership and control to 'obliged entities' who are required to conduct client due diligence. The proposal to open the registers to certain obliged entities is in line with the Island's ongoing commitment to international standards of accessibility and transparency.

The definition of 'obliged entity' will be aligned to the definitions of Financial Institution and Designated Non-Financial Businesses and Professionals published by the Financial Action Task Force ("**FATF**"), and may be supplemented to better reflect Jersey's business sectors.

It is proposed to make only certain data available to obliged entities via a portal, to monitor access and to ensure only authorised persons have access. The limited data would include individuals' names, date of birth, country of residence, nationality and residential address, and details of the extent and nature of their ownership and control of the relevant legal entity.

The plans have, however, been paused temporarily in light of the landmark judgment of the Court of Justice of the European Union on 22 November 2022. The Court held that the EU's 4th Anti-Money Laundering Directive is invalid where it requires Member States to grant the public access to beneficial ownership information. The delay to the implementation of the 'obliged entity' regime is to enable the Government of Jersey to consider the impact of this judgment and to obtain specialist legal advice. This is expected to be completed in early 2023.

Jersey recognised for tax cooperation

Jersey has received the highest rating of "on track" from the OECD Global Forum on Transparency and Exchange of Tax Information for its practical implementation of the common reporting standard ("**CRS**"). The review considered whether jurisdictions have implemented necessary laws, processes and systems to ensure their financial institutions are complying with the CRS, and whether they are properly collecting and exchanging the information collected.

Feedback and further consultation to amend legislation regarding "arranging" in investment business

In September 2022, a feedback and further consultation paper was issued by the Jersey Financial Services Commission in connection with the ongoing proposals to bring the activity of 'arranging' into the scope of 'investment business' under the Financial Services (Jersey) Law 1998.

No further responses were received. The proposals will now proceed through the legislative process. The timeline for implementation is not yet known.

Information kindly provided by Ogier in Jersey.

Americas

Brazil

New regulatory framework issued for investment funds in Brazil

The Brazilian Securities Commission ("**CVM**") has enacted a new regulatory framework that will potentially reshape the investment funds industry in Brazil. The new regulatory framework brings Brazil closer to the most attractive countries for investment funds.

The long-awaited new regulatory framework for investment funds in Brazil was issued by the CVM on 23 December 2022, under CVM Rule No. 175 ("**RCVM 175**").

The new rule, consistent with the innovations from Law No. 13,874, of 2019 (Economic Freedom Law), introduces a regulatory modernisation to a major industry that became sophisticated over the last decades and further consolidates important rulings from the CVM with respect to the investment funds industry.

The RCVM 175 is comprised of a general part of rules applicable to all investment funds, and of different schedules, each of which regulates different types of funds in detail. The RCVM 175 was released with two different schedules – the first one concerning Financial Investment Funds (formerly by CVM Rule555), and the second one with respect to Receivables Investment Funds ("**FIDC**") (formerly regulated by CVM Rule 356). The schedules for other specific funds, such as real estate funds and private equity, and venture capital funds, are expected to be released by the CVM in early 2023.

The main innovations from RCVM 175 can be summarised as follows:

Limited liability

Now, RCVM 175 brings the possibility of limited liability to all types of investment funds, an innovation brought by the Economic Freedom Law. The limited liability funds will have to add "limited liability" to their corporate names, and quota holders of funds without limited liability will have to bear losses of the fund in case of negative net asset value, in addition to being liable for losses in connection with services rendered by services providers of the funds in bad-faith or fraud.

Multiple classes of quotas, sub-classes, and segregated portfolio

- *Segregated portfolio*

  Following the Economic Freedom Law, the RCVM 175 allows the existence of different classes of quotas and attributes to each class different rights and obligations. The funds with different class quotas must create a segregated portfolio of assets for each class, which is a new concept to the Brazilian funds industry, albeit largely used in other countries. It is expected the use of funds with segregated portfolios comes with reduction in costs and efficiency for both services providers and investors.

- *Classification*

  Because of the taxation of income and capital gains of investment funds in Brazil varies according to the fund classification pursuant to tax rules, the RCVM 175 provides that the fund may issue multiple classes of quotas, provided that all of such classes are under the same taxation regime. There was a clear concern from the CVM regarding a potential misalignment between RCVM 175 and the current tax regime for investment funds in case of the rule had allowed different classes of quotas under different tax regimes – which is subject to further review of the tax rules applicable to investment funds.

- *Subclasses of quotas*

  The RCVM 175 has introduced the concept of sub-classes of quotas. The characteristics possible to be attributed to the sub-classes of quotas include amortization and redemption, administration and management fees, and distribution of profits. The new rule did not authorise the coexistence of open-ended and closed-ended sub-classes within the same fund.

Services providers

The RCVM 175 has emphasised the relevance of the fund administrator and the fund manager, further defining both as "essential service providers". The rule brings additional responsibilities to fund managers when acting as structuring advisers to the formation of FIDC, and when they carry out due diligence review over the portfolio of receivables to be acquired by the FIDC. The CVM has also ruled on the lack of joint liability between fund administrators and fund managers, except when working on liquidity management activities as detailed below.

Social and environmental funds

The CVM showed special attention to the ESG agenda and added to RCVM 175 minimum criteria that investment funds should meet to be characterised and labeled as ESG funds. Funds that do not seek to effectively bring social and environmental criteria as an outcome of their investments cannot be labeled as ESG funds.

Crypto assets

RCVM 175 brings a definition to crypto assets, which have been added to the list of eligible assets to be purchased and traded by investment funds. However, such crypto assets must be subject to trade in Brazil or abroad in institutions authorised by financial regulators – hence ensuring a regulated trading environment for such assets. Underlying tokens of financial assets and securities are not yet considered as crypto assets under RCVM 175.

Carbon credits

RCVM 175 has also added carbon credits to the list of eligible assets to be purchased and traded by investment funds. For the moment, the CVM has authorised investments exclusively in carbon credits currently existing under Brazilian regulation, such as the Decarbonisation Credits, which must be registered in financial settlement and registration systems accredited with the CVM and the Brazilian Central Bank or traded in organised markets accredited with the CVM.

Governance

RCVM 175 aims at speeding up the decision-making process at the fund level. This gives more flexibility to fund by-laws to regulate new matters, such as payment in kind, issuance of new quotas of closed-end funds, preferred rights on the issuance of quotas, and the creation of a side pocket to the

management of exceptional circumstances of illiquidity.

Liquidity management

Another important point of RCVM 175 is the attribution of joint responsibility between the fund administrator and the fund manager, now characterised as "essential services providers", under the performance of activities related to liquidity management. The joint responsibility arises from the complementarity of such activities between both players, who must ultimately protect the best interest of the quota holders. Nevertheless, for matters other than liquidity management, the fund administrator and the fund manager remain with the power to attribute different responsibilities and duties to each other within the scope of their activities.

Non-disclosure of portfolio

The RCVM 175 has created a rule that allows funds not to disclose their portfolios within a window of 180 days. Many fund managers complained at the CVM that the disclosure of their portfolios under shorter terms had prejudiced their allocation and investment strategies. Such non-disclosure is automatic and does not require prior approval from the CVM, as opposed before RCVM 175. The effects of this rule will be monitored by the CVM and are subject to further amendments pursuant to the CVM's conclusions.

Insolvency

The new rules on insolvency for investment funds are one of the most awaited innovations by the Brazilian funds industry after the creation of such possibility by the Economic Freedom Law. Pursuant to the brand new insolvency rules, in case the net asset value of the fund becomes negative, the quota holders may resolve how to address such a scenario, including declaring insolvency. The insolvency may also be requested by the fund administrator under specific circumstances. If the fund has different classes of quotas – and consequently segregated portfolios, the insolvency will fall exclusively upon the class of quotas of which net asset value became negative.

Foreign Investments

The CVM has made it more flexible for local investment funds to invest abroad. RCVM 175 now authorises local funds to invest abroad up to 100% of their net asset value, as opposed to a limit of 20% prior to the new rule.

Insider Trading

The RCVM 175 created a new set of rules in connection with the use of insider information.

Receivables Funds

Another large change from RCVM 175 is the possibility to market FIDC to retail investors, which until the new rule could only be targeted at qualified investors (e.g., individuals or legal entities with over BRL 1 million invested in financial products and securities). The FIDC targeted at retail investors must comply with a higher standard of features to protect such investors from the risks associated with such type of investment. However, RCVM 175 does not allow the acquisition of receivables abroad.

Effectiveness

Most of the rules of RCVM 175 will become effective on 3 April 2023, however, some other rules will become effective on the following specific dates.

The rules regarding maximum placement fees will become effective on 1 October 2023.

The rules regarding limits of credit exposure for Financial Investment Funds will become effective on 1 October 2023.

The rules regarding the creation of different classes and sub-classes of quotas will become effective on 1 April 2024.

Transition Period

Except for the FIDC, existing investment funds, must update their by-laws to conform to RCVM 175 by 31 December 2024. The FIDC must update its by-laws to conform to RCVM 175 by 31 December 2023.

Information kindly provided by Tozzini Freire Avogados in Brazil.

Canada

New self-regulatory organisation of Canada launches

On 3 January 2023, it was announced that the New Self-Regulatory Organisation of Canada and the new Canadian Investor Protection Fund officially launched, marking completion of the Canadian Securities Administrators' plan to create a new, single self-regulatory organisation and an integrated investor protection fund.

Ontario Securities Commission publishes updated service commitment

On 5 January 2023, the Ontario Securities Commission published an updated service commitment for prospectus filings, confirming

that the OSC will return to the prior services standards for prospectus reviews effective 9 January 2023, in advance of the full review of the service commitment for the next fiscal year.

Information kindly provided by McMillan LLP in Canada.

Asia Pacific

Cambodia

Clarification provided n advance tax on dividend distribution

On 14 December 2022, Instruction 30408 "On the Implementation of Advance Tax on Dividend Distribution," was issued by the General Department of Taxation ("**GDT**"). Advance Tax on Dividend Distribution ("**ATDD**") is a mechanism under which Tax on Income ("**TOI**") is calculated at the time when a Cambodian enterprise distributes pre-taxed earnings.

The key difference between ATDD, which was introduced in 2020, and its predecessor, Additional Tax on Dividend Distribution ("**ADDT**"), is that ATDD should only apply to distributions of earnings that have not yet been subject to an annual TOI rate whereas, ADDT could have applied to both interim distributions and to distributions that had been subject to an annual TOI rate that was lower than the standard annual TOI rate of 20%.

This difference is fundamentally illustrated with respect to distributions made by Qualified Investment Projects ("**QIP**"). Prior to 2020, a QIP that distributed earnings, either by way of an interim dividend or on earnings that had already been subject to a annual TOI rate of 0% during the TOI exemption period, would have had to declare and pay 20% TOI via the ADDT mechanism.

Under the post 2020 ATDD mechanism, interim dividends distributed by a QIP during its TOI exemption period are not subject to ATDD and there is no claw-back of ATDD on the distributions of retained earnings that have been subject to a annual TOI rate of 0% during the TOI exemption period.

Instruction 30408 restates the rules contained in the Law on Taxation and Prakas on Tax on Income. To determine the tax base on which ATDD applies, the pre-taxed distribution must first be grossed up and then multiplied by the applicable annual TOI rate at the time of the distribution. The ATDD paid at the time of the distribution can be claimed as a tax credit in the annual tax computation of the enterprise.

Instruction 30408 also takes into account the 6 year progressive rebate on the annual TOI rate for QIPs, following the TOI exemption period, under the 2021 Law on Investment.

Information kindly provided by DFDL in Cambodia.

India

Normal requirements for foreign investment in AIFs

By way of its Circular dated 9 December 2022, the Securities and Exchange Board of India ("**SEBI**") introduced the following requirements relating to foreign investment in Alternative Investment Funds ("**AIFs**"):

- foreign investors being onboarded by an AIF have to be resident of countries whose securities market regulator is a signatory to the International Organisation of Securities Commission's Multilateral Memorandum of Understanding (Appendix A Signatory) or a signatory to the bilateral Memorandum of Understanding with SEBI. AIFs may accept commitment from an investor being a Government or Government related investor, who does not meet the aforesaid condition, if the investor is a resident in the country as may be approved by the Government of India; and

- a foreign investor, or its underlying investors contributing 25% (twenty-five percent) or more in the corpus of the investor or identified on the basis of control, is not a person(s) mentioned in the Sanctions List notified from time to time by the United Nations Security Council and is not a resident in the country identified in the public statement of Financial Action Task Force as:

  - a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or

  - a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies.

If any existing investors currently or subsequently do not meet the above conditions, then the manager of the AIF should not drawdown any further capital contribution from such investor for making an investment, until the investor again meets these conditions.

Guidelines introduced for AIFs for Declaration of First Close, Calculation of Tenure and Change/Change in Control of Sponsor/Manager

During November 2022, SEBI published a Circular which introduced certain guidelines with respect to the declaration of first close, calculation of tenure and change of sponsor/manager or change in control of sponsor/manager as specified below:

- the first close of a scheme is now required to be declared within 12 months from the date of SEBI communication for taking the private placement memorandum ("**PPM**") of the scheme on record and the corpus of the scheme at the time of such declaring should not be less than ₹20 crores (approx. US$ 2.4 million);
- existing schemes of AIFs:
  - who have not declared their first close should declare the first close not later than 12 months from the date of the Circular; and
  - whose PPMs were taken on record prior to 12 months from the date of the Circular and have not declared their first close,

  are required to submit updated PPM with SEBI in the specified format, through a SEBI registered merchant banker along with due diligence certificate from the merchant banker and such updated PPM will be circulated to investors before declaration of first close. SEBI has also provided certain directions for first close for large value fund for accredited investors scheme;
- if the above requirements are not met within the above timelines, then AIFs are required to file a fresh application with SEBI for launch of such scheme along with requisite fees;
- SEBI has also, *inter alia*, directed that the tenure of close-ended schemes of AIF will be calculated from the date of declaration of the first close. Existing schemes of AIFs which have already declared their first close may continue to calculate tenure from the date of the final close; and
- SEBI has also provided certain directions with respect to change of sponsor/manager or change in control of sponsor/manager of AIFs, registration fees to be paid in such cases, validity of SEBI approval, etc.

SEBI examines Schemes of AIFs which have adopted priority in distribution among investors

SEBI has by way of its Circular dated 23 November 2022, clarified that it is currently examining the priority distribution model adopted by certain schemes of AIFs wherein a class of investors (other than the sponsor/manager) share losses more than pro rata to their holding in the AIF in comparison to other classes of investors/unit holders since the latter have priority in distribution over the former. Further, SEBI has directed that such schemes should not accept any fresh commitments or make investments in a new investee company till a view is taken by SEBI on the matter.

Information kindly provided by AZB & Partners in India.

Taiwan

Article 138 of the "Operating Rules of the Taiwan Stock Exchange Corporation" amended

On 12 January 2023, the Taiwan Stock Exchange Corporation announced an amendment to Article 138 of the Operating Rules of the Taiwan Stock Exchange Corporation, increasing the amount of the penalty for the violation stipulated in Article 138 from 1 million to 2 million (NTD), and from 2 million to 4 million (NTD) for violating the second time within the most recent half year.

Operating Procedure of the Offering, Issuing, Trading and Subscriptions or Redemptions of the Securities Investment Trust Funds amended

On 30 January 2023, the Securities Investment Trust and Consulting Association announced amendments to the Operating Procedure of the Offering, Issuing, Trading and Subscriptions or Redemptions of the Securities Investment Trust Funds, and amended the template agreement and the template of the sales agent agreement for securities investment trust fund ("**SIT Fund**") accordingly. The main amends are summarised below:

- given that a securities investment trust enterprise ("**SITE**") is now permitted to entrust a centralised securities depository enterprise (i.e., "**TDCC**") to handle the receipt/payments of funds of SIT Funds, where a SITE entrusts the receipt/payments of funds to the TDCC, the SITE and its sales agent(s) shall sign agreements with the TDCC; and

- where the SITE handles the receipt/payments of funds according to the preceding paragraph, the subscription amount may be remitted to the fund account of the SIT Fund designated by the TDCC according to the share class of the SIT Fund. For the amount related to the redemption, distribution of interest/proceeds and the liquidation, the amount may be remitted to the bank accounts designated by each sales agents of the fund and the investors through the bank account designated by the TDCC.

Information kindly provided by Lexcel Partners in Taiwan.

Middle East and Africa

South Africa

Commencement of sections 31 and 56 of the Financial Intelligence Centre Act, 2001

On 20 January 2023, a proclamation was published under which sections 31 and 56 of the Financial Intelligence Centre Act, 2001 ("**FICA**") took effect on 1 February 2023.

Section 31 relates to electronic transfers of money to or from South Africa and section 56 relates to the failure to report such electronic transfers.

Amendments to the Money Laundering and Terrorist Financing Control Regulations, 2002 ("**FICA Regulations**") relating to sections 31 and 56 of FICA were also published and took effect on 1 February 2023.

Section 31 of FICA places an obligation on accountable institutions to report electronic transfers of money, above a prescribed threshold amount, to or from South Africa to the Financial Intelligence Centre ("**FIC**") within a prescribed period, this report being referred to as an 'international fund transfer report' ("**IFTR**"). Section 56 of FICA makes the failure to file an IFTR where there is an obligation to do so an offence, in respect of which an administrative penalty may be imposed.

In terms of the FICA Regulations, the prescribed threshold amount that triggers an obligation to file an IFTR with the FIC is ZAR 19 999.99, and an accountable institution is required to file the relevant IFTR no later than three days after a natural person, employee or officer of the institution becomes aware of the transaction triggering an IFTR filing obligation. The FICA Regulations also set out the information that an IFTR must contain and reiterate that a contravention of section 31 is an offence.

The FIC has published *Draft Guidance Note 104A* ("**Draft GN 104A**"), which aims to assist accountable institutions to meet their IFTR filing obligations in terms of FICA and the FICA Regulations. Interested parties are invited to make comments on the content of Draft GN 104A using the prescribed form by no later than 1 February 2023.

South Africa grey-listed by the Financial Action Task Force

On 24 February 2023, the FATF placed South Africa on its 'grey list'. This means that South Africa will be subject to increased monitoring by the FATF and is required to actively work to address identified deficiencies in its national legislation and regulations to counter money laundering, terrorist financing and proliferation financing ("**AML/CTF**").

While the FATF acknowledged that South Africa had made significant progress in addressing the shortcomings identified in the FATF Mutual Evaluation Report published in October 2021, eight areas of strategic deficiency were nevertheless identified in relation to the effective implementation of the country's AML/CTF laws. South Africa is expected to take practical steps to address these areas of deficiency by no later than end-January 2025, by:

- demonstrating a sustained increase in outbound mutual legal assistance requests that help facilitate money laundering/terrorist financing investigations and confiscations of different types of assets in line with its risk profile;
- improving risk-based supervision of designated non-financial businesses and professions (these including casinos, real estate agents, dealers in precious metals and/or precious stones, lawyers, notaries and other independent legal professionals, accountants and trust/company service providers) and demonstrating that all AML/CTF supervisors apply effective and proportionate sanctions for non-compliance;
- ensuring that competent authorities have timely access to accurate and up-to-date beneficial ownership information on legal persons and arrangements (this refers to the natural persons who ultimately own or control a customer and/or the natural persons on whose behalf a transaction is being conducted, and includes persons exercising ultimate effective control over a legal person or arrangement) and that these authorities apply sanctions for breaches by legal persons of their

beneficial ownership obligations;

- demonstrating a sustained increase in law enforcement agencies' requests for financial intelligence from the FIC for AML/CTF investigations;

- demonstrating a sustained increase in investigations and prosecutions of serious and complex money laundering and the full range of terrorism financing activities in line with its risk profile;

- enhancing its identification, seizure and confiscation of the proceeds and instrumentalities of a wider range of predicate crimes, in line with its risk profile;

- updating its terrorist financing risk assessment to inform the implementation of a comprehensive national counter financing of terrorism strategy; and

- ensuring the effective implementation of targeted financial sanctions and demonstrating an effective mechanism to identify individuals and entities that meet the criteria for domestic designation.

Importantly, the eight areas of strategic deficiency identified by the FATF do not contain an item that relates directly to preventive measures in respect of the financial sector, nor do they require enhanced due diligence measures to be applied to South Africa. The FATF also stated that 'the FATF Standards do not envisage de-risking or cutting off entire classes of customers, but call for the application of a risk-based approach'.

The FATF does, however, encourage its members and all jurisdictions to consider the strategic deficiencies identified by the FATF in their risk analyses when engaging in business relations and transactions involving South African parties.

The FSCA in its press release relating to the grey-listing, has said that all accountable institutions that fall within the FSCA's supervisory purview will be expected to review their risk management and compliance programmes, to enhance their understanding of AML/CTF risks and to implement effective controls to mitigate these risks.

The FSCA further expects institutions to increase their reporting of suspicious and/or unusual transactions to the FIC, and to fully comply with all other obligations set out in the FICA.

In a media statement issued by the South African Reserve Bank ("**SARB**") almost immediately following the grey-listing decision, the SARB confirmed that it expects banks and other financial institutions within the SARB's supervisory purview to comply fully with all of their obligations, and stated that the SARB will apply a high standard of supervision to safeguard and protect the integrity of the financial system.

In a strong commitment to deal more effectively with AML/CTF, the SARB intends to enhance its supervisory activities and to dissuade non-compliance through the increased issuance of proportional administrative sanctions.

Information kindly provided by Bowmans Law in South Africa.

Your contacts

Please note that this update on recent legal developments is not designed to provide legal advice and it is advisable to consult with local legal counsel before any actual undertakings.

For more information on these updates or about FundsNet, our specialist solution for global AIFs and UCITS distribution activities, please contact:

Lindi Rudman
Legal Director

Dir: 0207 919 0837
Int: +44 20 7919 0837
lindirudman@
eversheds-sutherland.com

Michaela Walker
Partner

Dir: 0207 919 0541
Int: +44 20 7919 0541
michaelawalker@
eversheds-sutherland.com

Ronald Paterson
Partner

Dir: 0207 919 0578
Int: +44 20 7919 0578
ronaldpaterson@
eversheds-sutherland.com

eversheds-sutherland.com

© Eversheds Sutherland 2023. All rights reserved.
Eversheds Sutherland (International) LLP is part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.