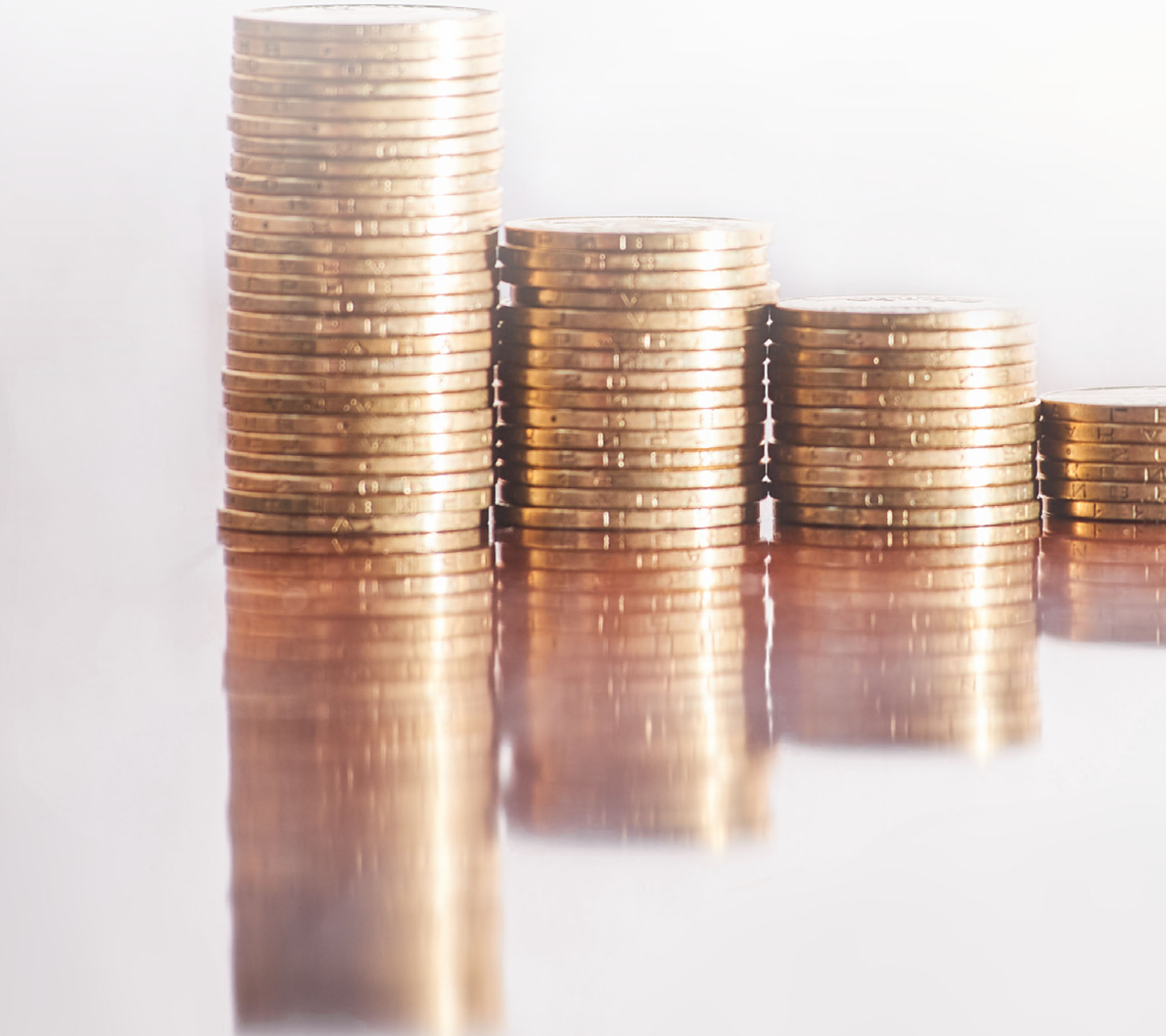
akd benelux lawyers

Alternative Funds Industry

Quarterly Update

April to June 2022



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

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

In this quarterly update covering Q2 2022, you will learn about the latest news and updates on *inter alia* the guidance through SFDR requirements, the new AIFMD, the introduction of ePassporting, the regulation of UCI administrator and tax reporting in the funds industry.

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

Table of Contents

Luxembourg 4

ESG 4

Marketing 10

AIFMD 11

UCI administrator 13

AML/CFT 14

Other developments 16

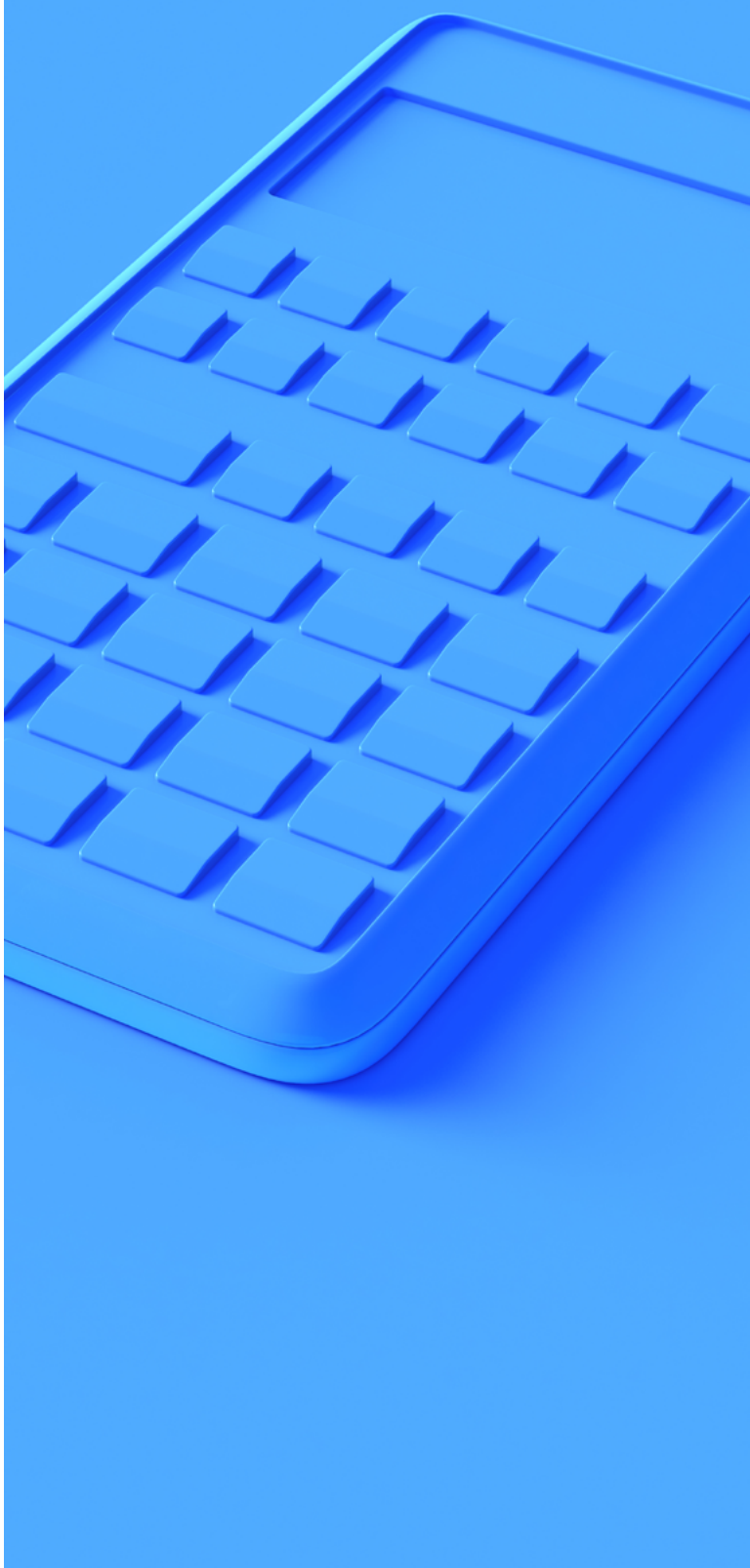
Tax 20

Netherlands 21

Regulatory 21

Glossary 22

Contacts 23



Luxembourg

ESG

SFDR level 2 measures – final draft of the European Commission

On 6 April 2022, the European Commission published the final RTS with the aim to provide guidance on the SFDR by providing detailed guidance on disclosures relating to principal adverse impacts on sustainability factors ("**PAI**") at the level of financial market participants and financial advisers, and by providing pre-contractual templates detailing the content of the disclosures, periodic reporting disclosure templates and new rules on website disclosures of financial products promoting environmental or social characteristics ("**Article 8 SFDR Products**") or having sustainable investment as their objective ("**Article 9 SFDR Products**"). If no objection is made by the EU Council and the EU Parliament, the RTS will enter into force on 1 January 2023.

The ESAS published their guidance on SFDR with separate annexes which contain the standardised disclosure templates that financial market participants must use as annexes to their offering documents as disclosures in compliance with Article 4 SFDR and Article 8 to 11 SFDR.

The main body of the RTS and its annexes contain several changes compared to the previous RTS drafts as addressed below:

- *Integration of PAI*

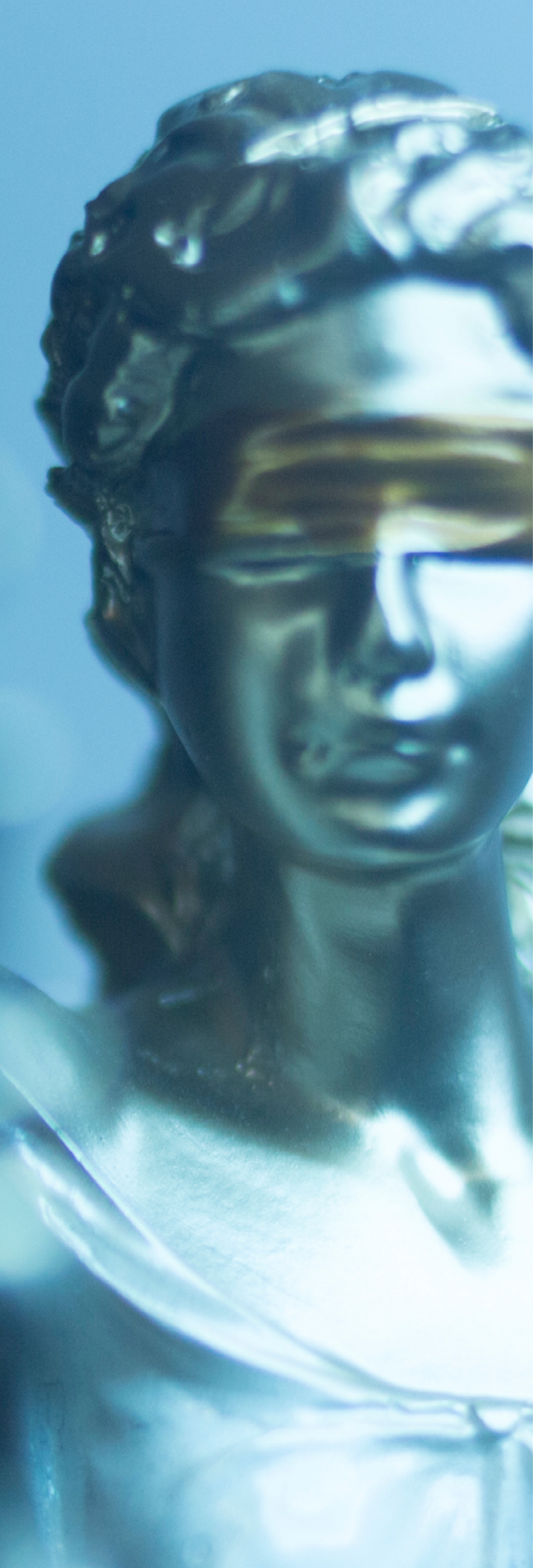
The information on PAIs is therefore an integral part of the pre-contractual/periodic disclosures.
This adds a new requirement for financial advisers. They must explain in their PAI statement that they are required to publish on their website how they select the financial products they choose to present, including the way in which they use information published by financial market participants and the way in which they consider PAI indicators when selecting or advising on financial products.

- *Composition of Article 8 and Article 9 SFDR Products:*

Unfortunately, the RTS does not include a definition of 'sustainable investment', neither of 'Article 9 SFDR products' nor of 'Article 8 SFDR products'. In addition, there is no threshold stated in RTS to qualifying as an Article 8 SFDR Products. As a result, there are no minimum requirements to make sustainable investments within an Article 8 SFDR Product.
The RTS states that Article 9 SFDR Products should only include sustainable investments as defined under the SFDR (other than cash held as ancillary liquidity or hedging instruments). However, a mitigation is made as Article 9 SFDR Products can "*to some extent make other investments where they are required to do so under sector specific rules*".

- *Standardised and comparable quantitative and qualitative indicators.*

The RTS indicates that quantitative and qualitative disclosure of the extent to which a product is aligned with the TR will be required for Article 9 SFDR Products and Article 8 SFDR Products that make one or more environmentally focused sustainable investments.
Such quantitative and qualitative indicators should demonstrate how each financial product meets the environmental or social characteristics that it promotes or the sustainable investment objective that it aims to attain.
This quantitative and qualitative disclosure of the extent to which a product is aligned with TR will not be required for Article 8 SFDR Products that do not make sustainable investments or Article 9 SFDR Products or Article 8 SFDR Products promoting financial products that have a sustainability objective, which focus solely on sustainable social investments. These funds will have to disclose that they are not aligned with TR in the box at the beginning of the pre-contractual and periodic reporting templates.
Thus, the final draft of the RTS in form of delegated regulation provides more detail without diverging significantly from previous versions.
The CSSF has furthermore published a communication regarding the application of SFDR and TR in relation to the interim period until the application date of the RTS.
Although that the full application of the RTS is postponed until 1st January 2023, financial market participants and financial advisers were required to comply with most of the provisions on sustainability related disclosures in the SFDR by 10 March 2021.



In this respect, the CSSF encourages financial market participants and financial advisors to use the draft RTS as a reference for the application of SFDR requirements during the transitional period and until the adoption of the RTS by the European Commission.

It is expected by the supervisory authorities that the market participants will comply with the provision of article 5(1)(b) of the TR during the above-mentioned transitional period, by providing an explicit quantification by numerical disclosure expressed in percentage relating to the extent to which the investments underlying the financial product are aligned with the TR. Prior to the application of the RTS, such numerical disclosure may be accompanied by a qualitative clarification indicating how the percentage of investments of the financial product aligned with the TR is determined. However, this clarification should not disclose more information than those required under Article 5 RTS.

ESMA publishes a second Q&A on SFDR

On 25 May 2022, ESMA published a new Q&A related to SFDR and Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment ("**TR**").

The new Q&A deals with the questions that financial market participants and financial advisers may face when applying SFDR.

1. *Can a financial market participant not consider principal adverse impacts (PAI) at entity level but nevertheless consider PAI under Article 7 for some of the financial products it manages?*

SFDR requires all firms with more than 500 employees to measure and report on PAI, to indicate that they do consider PAI at product level only for a certain subset of financial products, and to publish and maintain on their website clear reasons for why it does not consider such adverse impacts.

Financial market participants are responsible for assessing which financial products must comply with the provisions

of SFDR and must include in the pre-contractual disclosure and in the periodic report information explaining the impact of the financial product PAI on sustainability factors.

2. *Do financial advisers, when providing MiFID II investment advice, have to comply with disclosure obligations in good time before the client is bound by any agreement for the provision of investment advice "as a whole" but also any financial instrument as defined by MiFID II, or for each single recommendation concerning a "financial product"?*

ESMA brings to mind that investment advice as defined in MiFID II refers to the provision of personal recommendations to a client, either at the client's request or at the initiative of the investment firm, in respect of one or more categories of investments, relating to one or more transactions in financial instruments. Consequently, the Article 6 rules on investment advice are not limited to investment advice on financial products as defined in the SFDR.

3. *If a financial adviser recommends financial products or instruments that are not collective or individual portfolios managed by a financial market participant, should it also collect information from non-financial companies for those products and instruments in order to take them into account for the disclosure of the principal adverse impacts?*

The underlying objective of that provision is to encourage financial advisers to provide financial advice that addresses reduction of negative externalities on sustainability caused by investments of end investors. This should, in turn, result in more investments in activities that do not harm environment or social justice, curb greenhouse gas emissions, stimulate investee companies to transition away from unsustainable activities and reduce their negative environmental impacts, or even induce portfolio adjustments and divestment from activities that are harmful to sustainability.

4. *Should a financial adviser who only considers products in its advice process that fall outside the scope of the SFDR nevertheless comply with the obligations under Articles 3, 4, 5, 6 and 13 SFDR?*

The definition of financial advisers provided by Article 2 SFDR includes a credit institution or an investment firm which provides investment advice. This refers to investment advice as defined in MiFID II, being the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments. As a result, investment advice is not restricted to investment advice regarding financial products falling within the scope of Article 2, SFDR. Therefore, obligations laid down in Articles 3, 4, 5, 6, 13 and 14 SFDR are not restricted to financial products.

5. *How are self-employed staff, owner-managers or part-time employees counted under SFDR?*

ESMA specified that the exemption set in Article 17 SFDR applies regardless of the features of the employment relationship, so an employee will count even if he/she is in part-time.

6. *Do Articles 6 and 7 SFDR apply to existing portfolio management financial products?*

ESMA was asked whether Articles 6 SFDR and 7 SFDR apply only to new financial products or also to existing financial products on the date of application, i.e. on 10 March 2021.
The ESMA answered that the SFDR does not provide for any specific transitional legal regime concerning financial products first made available to end investors before 10 March 2021 that continue to be made available to end investors after this date. Indeed, the SFDR applies to those financial products.
For existing investors, where a financial product is no longer available to end investors after 10 March 2021 and a financial market participant prepares a periodic report for that product after that date, the periodic report must comply with the requirements set out in Article 11(1) SFDR. Such financial products must also comply with the rules on transparency of the promotion of environmental or social characteristics and of sustainable investment objectives on websites.

7. *Can an Article 8 SFDR or Article 9 SFDR financial product that does not invest in companies with good governance continue to disclose under Articles 8, 9 and 11 SFDR?*

ESMA has clarified that when a financial product under Article 8 SFDR invests in companies, these companies must comply with good governance practices. Otherwise, the financial product is in breach of Article 8 SFDR. Underlying assets of a financial product referred to in Article 9 SFDR must qualify as sustainable investments within the meaning of the SFDR. It is therefore required that the investee companies adopt good governance practices, including sound management structures, employee relations, remuneration and tax compliance. Otherwise, the financial product is in breach of Article 9 SFDR.

The good governance requirement under Article 8 and Article 9 SFDR applies only to investments in companies. Where a product invests in government bonds, the good governance requirements do not apply.

8. *Can a financial product investing only in government bonds while applying an ESG investment strategy be considered as falling under Article 8 or Article 9 SFDR?*

ESMA recalled that good governance practices relate to investee companies and companies only, therefore they do not apply to government bonds. As a result, a financial product referred to in Article 8 SFDR investing only in government bonds does not have to comply with the requirements concerning good governance practices.

9. *If a financial product under Article 8 SFDR which promotes environmental characteristics does not commit in the pre-contractual disclosures to invest in any economic activities that contribute to an environmental objective, is the financial market participant obliged to disclose the information required by Article 6 SFDR?*

ESMA replied by indicating that financial market participants may only disclose information for the purposes of the disclosures under Articles 5 and 6 of the TR for which they have reliable data, otherwise they would potentially be in breach of the SFDR and the TR, be liable or have the contracts invalidated under national law.
Consequently, where a financial market participant does not collect data on the environmental objectives set out in Article 9 of the SFDR and on the manner and extent to which the underlying investments of the financial product are performed in economic activities considered environmentally sustainable through a given financial product, the pre-contractual and periodic disclosures relating to the product should indicate zero. If financial market participants decide to use narrative explanations about the lack of reliable data, such explanations may contradict the objective of Articles 5 and 6 of the TR. Moreover, the clarifications should not be ambiguous regarding the alignment of the financial product's investments with the TR, nor include negative justifications, such as explaining a failure of alignment by a lack of data.

New ESMA guidance on sustainability risks and disclosures

ESMA supervisory briefing published on 31 May 2022 on sustainability risks and disclosures in the area of investment management (the "**Supervisory Briefing**") intends to further enhance convergence among NCAs by addressing the potential issues arising from the supervision of sustainability-related disclosures as well as the integration of sustainability risks by investment fund managers.

- *Verification of the compliance of the pre-contractual disclosures*

NCAs are invited to create a checklist based on the information to be provided in the pre-contractual templates. This checklist should allow them to verify the provision of information, including but not limited to, a description of the manner in which sustainability risks are integrated in the investment decisions and the results of the assessment of the impact of these risks on the returns of the fund, and a description of the policy to assess the good governance practices of the investee companies.

- *Verification of the consistency of information in the fund documentation and marketing material*

NCAs should, on a risk-based approach, assess that the

sustainability-related disclosures made are consistent across the fund documentation and the marketing material and should, for that purpose, consider addressing the way the sustainability-related disclosures are presented: the investment fund's name, the investment objective and policy and the investment strategy.

- *Verification of the compliance with the website disclosures' obligations*

Investment fund managers should clearly identify the financial product to which the information in the sustainability-related disclosure section relates and prominently display the environmental or social characteristics or the sustainable investment objective of that investment fund.

- *Verification of the compliance with the periodic disclosures' obligations*

NCAs could create a checklist based on the information to be provided in periodic reports that will help assessing the compliance of disclosures of investment funds under Article 8 or 9 SFDR (and Article 5 or 6 TR). On the basis of this checklist, NCAs should then ensure, at least, that a prominent statement referring to the information to be found in the annex has been included in the main body of the annual report and that the periodic report has been properly completed in all its parts.

- *Additional supervisory actions*

It is noted that NCAs could use and consider on a risk-based approach further available information (for example, media reports, complaints, whistle-blower notifications, etc...) as well as adverse findings reported by internal control functions, external auditors or depositaries.

- *Integration of sustainability risks by AIFMs and UCITS managers*

It is reminded that the Commission Delegated Regulation (EU) 2021/1255 and Delegated Directive (EU) 2021/1270 set out that all authorised investment fund managers are required from 1 August 2022 to integrate sustainability risks in their portfolios and risk management processes and overall governance structure.

Clarifications on the ESAs' draft RTS under SFDR

On 2 June 2022, the ESAs published on 2 June 2022 a statement providing clarifications on ESAs' draft RTS issued under SFDR, which include the financial product disclosures under the Taxonomy Regulation (the "**ESAs' Statement**"). The clarifications relate to the draft RTS (included in a final report) with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a(3), Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of SFDR from 4 February 2021 and the draft RTS (included in a final report) with regard to the content and presentation of disclosures pursuant to Article 8(4), 9(6) and 11(5) of SFDR.

ESAs' Statement provides clarification on key areas of the SFDR disclosures, including but not limited to:

- *Use of sustainability indicators*

ESAs' Statement provides that the reference to sustainability indicators in the disclosures for financial products is to be understood with reference to the "sustainability indicators used to measure the environmental or social characteristics or the overall sustainable impact of the financial product" in Articles 10(1)(b), 11(1)(a) and 11(1)(b) SFDR ("**Sustainability Indicators**").

- *Use of PAI indicators*

The ESAs' Statement further considers that while the Sustainability Indicators and the indicators for principal adverse impact ("**PAI**") referred to in Article 4 SFDR, and Chapter II and Annex I of the draft RTS in the ESAs' final reports refer to different disclosures under the SFDR, it is possible to use the indicators for PAI to measure the environmental or social characteristics or the overall sustainable impact of the financial product.

- *Direct and indirect investments*

The ESAs' Statement provides that the pre-contractual and periodic disclosures could outline what share of the investments of the financial product is held directly and indirectly.

- *Taxonomy-related financial product disclosures*

The "minimum proportion" of Taxonomy-aligned investments in the pre-contractual financial product disclosures are, in the view of the ESAs, intended to be binding commitments to ensure transparency to end investors on the taxonomy ambitions of the financial product. The ESAs' Statement also notes that penalties for failing to respect such commitments are set out in the sectoral legislation referred to in Article 6 (3) SFDR.

- *"Do not significantly harm" (DNSH) disclosures*

The ESAs' Statement provides for a clarification of ESAs' draft RTS regarding DNSH disclosure requirements proposed in the RTS by differentiating between the (i) DNSH disclosures and (ii) PAI consideration disclosures, both of which require the use of the same adverse impact indicators in Annex I.

(i) DNSH disclosures: These disclosures, as referred to in Article 2(17) SFDR, require an explanation of how the sustainable investment does not significantly harm any sustainable investment objective with reference to "how the indicators for adverse impacts in Table 1 of Annex I, and any relevant indicators in Tables 2 and 3 of Annex I, are taken into account".

(ii) PAI consideration: PAI consideration disclosures, as referred to in Articles 4 and 7 SFDR, contain references to how the financial market participant or financial product considers the principal adverse impacts of its investments.

The ESAs' Statement highlights that the two above disclosures apply independently. The ESAs' Statement is part of their on-going efforts to promote a better understanding of the disclosures required under the technical standards of the SFDR ahead of the planned application of the rules on 1 January 2023.

ESMA published answers on call for evidence on ESG ratings

On 27 June 2022, in response to its call for evidence "to gather information on market characteristics for ESG rating providers in the EU" (the "**Call for Evidence**"), ESMA issued the results.

The Call for Evidence aims to develop an understanding

of the market for ESG rating providers active in the EU as well as to gather the views of users and entities covered by ESG ratings, the purpose being to:

- define the legal status, ownership structure, resourcing, revenues and product offerings of the different ESG rating providers which operate in the EU;
- establish the nature of their engagement with ESG rating providers and the characteristics of any contractual arrangements; and
- establish the nature of covered entities' interaction with ESG rating providers and any associated costs.

The Call for Evidence highlights that users of ESG ratings usually contract these products on an investor-pays basis from multiple providers at the same time. Users select different providers in order to increase coverage (asset class, geography, or to receive ESG ratings of a different nature). The Call for Evidence also points out the shortcomings frequently observed by users. These include a lack of coverage of a specific sector or type of entity, insufficient detail in the data and a lack of transparency in the methodologies used by ESG rating providers.

Marketing

Pre-marketing notification on eDesk

On 12 May 2022, the CSSF issued CSSF circular 22/810 on new notification and de-notification procedures applicable to Luxembourg UCIs and AIFMs for pre-marketing and cross-border marketing ("**CSFF Circular 22/810**") applicable as from 12 May 2022.

All notification and withdrawals of notification procedures for pre-marketing and cross-border marketing will gradually and exclusively be made available through the eDesk portal.

Communication regarding the introduction of a new eDesk module – ePassporting

As noted above, on 12 May 2022 the CSSF issued CSSF Circular 22/810 on new notification and de-notification procedures to be observed by Luxembourg UCI and IFM for pre-marketing and cross-border marketing. On 20 June 2022, the CSSF issued a communication (the

"**Communiqué**") to inform the following supervised entities that they must comply with the marketing notification and de-notification procedures, including any updates, these notification and denotification being exclusively available via the eDesk Portal as of 1 July 2022:

- Luxembourg AIFMs (including Luxembourg AIFMs of ELTIFs) wishing to:
  - notify arrangements or de-notify arrangements made for marketing in Luxembourg of units or shares of an EU AIF that they manage in accordance with Article 29 respectively Article 29-1 of the AIFM Law; and
  - notify arrangements or de-notify arrangements made for marketing in another Member State of units or shares of an EU AIF that they manage in accordance with Article 30 respectively Article 30-1 of the AIFM Law.

- Managers of Luxembourg EuVECAs or EuSEFs wishing to market in Luxembourg or another Member State in accordance with Article 16(1) of Regulation (EU) No 345/2013 or Article 17(1) of Regulation (EU) No 346/2013, respectively.

Cross-border marketing and distribution - update of notification letter

On 17 May 2022, ESMA published consultation paper regarding the draft of implementing technical standards ("**ITS**") and RTS on notifications for cross-border marketing and management of AIFs including the following changes:

- information to be transmitted by AIFM to the NCAs of the AIFM's home Member State
- information which could be provided regarding the envisaged marketing strategy of an AIF in the AIFM's home Member State, and
- information on the envisaged marketing targets in the host Member State.

The draft ITS and RTS aim at facilitating the process for notifying cross-border marketing and management activities in relation to AIFs. In this regard ESMA has developed five templates to be used by AIFMs.

Answers shall be submitted online, by 9 September 2022. ESMA will consider the comments received in this consultation and expects to publish a final report in early 2023.

Marketing notification letters for EU AIFs and ELTIFs

On 22 June 2022, the CSSF published two notification letters for marketing. The first concerns the marketing in Luxembourg or in other Member States by Luxembourg-based AIFMs of units or shares of ELTIFs (Articles 31 and 32 of the AIFMD and Article 31 of Regulation (EU) 2015/760 on ELTIFs) and the second relates to marketing in Luxembourg or in other Member States by AIFMs established in Luxembourg of units or shares of EU AIFs (Articles 31 and 32 of the AIFMD).

It should be pointed out that the titles of the documents must be in French even if the publication is only in English (an English title may be added in addition to the French title). The information to be filled in the form is the entity type(s), it is necessary to select the theme(s), content type, the relevant keyword(s) to find the publication, as well as the archive/delete rules applicable. Concerning the EU AIFs notification letter form, the document is split in two parts, the first relating to information on the AIFM or internally managed AIF, which is divided three sections as follows:

- Information on the AIFM or internally managed AIF,
- Information on the AIFs to be marketed in the home Member State of the AIFM,
- Compliance with the national laws and regulations of the Member State where the AIFs are intended to be marketed.

AIFMD

New AIFMD - European Parliament proposal

On 16 May 2022, the European Parliament published a draft report regarding the proposal to amend and update the AIFM and UCITS directives as regards delegation and supporting reporting arrangements, clarification of liquidity management tools, unification of depositary and custody services and loan origination (the "**Draft Report**").

The amendments echoed the Commission's proposal by seeking to complete and contribute to the integration objective of European capital markets.

The main areas of improvement are as follows:

- *Delegation and supervisory reporting:* In order to promote this activity, this Draft Report seeks to meet a balance not to burden this process, but at the same time granting comprehensive reporting powers to competent authorities.

- *Liquidity management tools ("**LMTs**"):* The proposed changes aim at clarifying that the decision of LMTs' primary responsibility is a task for the manager. Consequently, any role of the competent authorities to activate or deactivate LMTs should be limited to extraordinary circumstances, after consultation with the manager.

- *Loan origination funds:* The amendments proposed in this Draft Report aim to do away with unnecessary risk retention and to caution against creating product specific rules.

- *Depository services:* The proposed changes intend to set the path toward a more efficient depository services among Member States. The rapporteur encourages the European Commission to launch a comprehensive study on the cost, benefits and feasibility of a depository passport in the EU.

- *Transparency, data collection and disclosure:* A full transparent regime in which data collection and disclosure to investors is fully guaranteed but without undermining the growth and competitiveness of European capital markets. Cooperation between NCAs and ESMA should be improved and simplified in order to avoid duplications, granting quality of information reported and making a more efficient supervisory convergence regime.

ESMA updates its AIFMD Q&A including further clarifications on performance fees

On 20 May 2022, ESMA updated its Q&As on the application of the AIFMD with two new questions clarifying the ESMA guidelines on performance fees in UCITS and certain types of AIFs (the "**Guidelines**") in particular (i) when an investment fund employs a performance fee model based on a benchmark index and the reference period and (ii) the length of the performance reference period:

1. *Based on the Guidelines, how should the performance reference period for the benchmark model be set?*

Under paragraph 40 of the Guidelines, it is reminded that any underperformance of the investment fund compared to the benchmark index should be clawed back before any performance fee becomes payable. In addition, the length of the performance reference period, if this is shorter than the whole life of the investment fund, should be set equal to at least 5 years.
Thus, any underperformance is brought forward for a minimum of five years before a performance fee is paid, so investment fund managers must look back over the last five years to compensate for underperformance.
In the situation where the investment fund has overperformed the benchmark, the investment fund manager should be able to crystallise the performance fee.
This is in accordance with the principle of the AIFMD that underperformance in a given year should still be compensated for a period that includes the fifth year following such underperformance, but not brought forward to the sixth year.

2. *The guidelines recommend that the length of the performance reference period (if this is shorter than the whole life of the investment fund) should be set equal to at least 5 years. Is this requirement applicable to the hurdle rate model?*

ESMA confirms the application of this requirement for the hurdle rate model since paragraph 42 of the Guidelines provides that the only exception to the application of the 5-year performance reference period is the fulcrum fee

model and other models that provide for a symmetric fee structure.

Council of the European Union provides its position regarding the proposal of amendment of the AIFMD

On 21 June 2022, the EU Council published its position on updating the rules on hedge funds, debt funds and other AIFs in the context of the Capital Markets Union (the "**Position**").

Last year, the European Commission introduced a proposal to amend the AIFMD and UCITS rules (the "**Proposal**"), to improve the integration of AIFs, offer more diversified forms of financing to companies, enhance investor protection, and improve the ability of the IFMs to handle liquidity pressure in situations of market stress. In its Position, the EU Council indicates its approval concerning the revision of the AIFMD and the legislative framework governing managers of hedge funds, private equity funds, debt funds, real estate investment trusts and other so-called AIFs in the EU. This aims to strengthen investor protection, preserve the competitiveness and attractiveness of the European asset management market and facilitate the development of private investment to finance the ecological and digital transitions.

The EU Council also supports the creation of an EU framework for investment funds providing loans, with requirements to mitigate risks to financial stability.

The EU Council has further clarified the rules on outsourcing and delegation of certain functions to third parties by investment fund managers and is reinforcing supervisory cooperation in this area. Moreover, the Position mentioned that clear reporting requirements on outsourcing are expected to reduce the opportunities for the creation of letterbox companies.

The provision of cross-border services by depositaries and new transparency rules to ensure better investor protection were discussed, in particular with regard to the anti-dilution levy, the level of information to be provided to them and the stipulation of redemption in kind in case of retail investors.

However, the result of the tripartite dialogues between the EU institutions will be awaited before a definitive text is released.

UCI Administrator

New CSSF Circular for central administrator

On 16 May 2022, the CSSF issued Circular 22/811 on authorisation and organisation of entities acting as UCI administrator ("**CSSF Circular 22/811**"), repealing Chapter D of Circular IML 91/75 with the aim to standardise the governing rules applying to UCI central administrators, including the following in particular:

- *Documentation* – The Circular requires to create and maintain (i) a manual of written procedures on various topics, to be reviewed annually; (ii) a policy governing the approval of new business relationships and new services (e.g. with the depositary, delegates, clients) and (iii) a conflicts of interest policy.

- *Sufficient substance and resources* – meaning that human resources, technical infrastructure and IT means should be proportionate and adapted to the business to ensure the four-eyes principle is always applied when performing critical or important tasks.

- *ICT* – including the requirements in case of delegation – should comply with the principles of CSSF Circular 20/750 on ICT and security risk management. The UCI administrator must have the appropriate technical resources by using specific software to calculate NAVs to maintain the partner's or shareholder's register.

The CSSF Circular 22/811 enters into force with immediate effect except for entries already acting as UCI administrator who are granted an extensive period to comply with said circular until 30 June 2023.

The appointment to act as a UCI administrator is subject to prior CSSF authorisation. It is noted in this respect that CSSF Circular 22/811 implements a new authorisation for obtaining and maintaining such authorisation for AIFMs intending to act as UCI administrator by submitting to the CSSF a prior notification in case of delegation of a critical or important operational task.

CSSF publishes a FAQ in completion of Circular 22/811
On 21 June 2022, the CSSF issued an FAQ in relation to a number of key aspects of CSSF Circular 22/811 on the authorisation and organisation of entities acting as UCI administrator (the "**UCIA FAQ**"). The purpose of UCIA FAQ is to bring further clarity on the supervisory expectations of the CSSF.

Every UCI administrator must establish, implement and maintain an adequate business and service continuity policy ensuring the recovery of its activities and services after a disaster within an adequate timeframe with regard to the NAV calculation frequency and providing for regular testing of those plans. In this context, the UCI administrator must define and implement data and system backup and restoration procedures to ensure that they can be recovered as required.

Type of data backup when using a system that is located outside of Luxembourg

Circular 22/811 also states that the UCI administrator must have a secure backup of all accounting and registrar positions in a readable format at the end of each NAV calculation day, when using a system that is located outside of Luxembourg. Question 1.1 of the UCIA FAQ refers to this data backup and clarifies that it is required to have a secure backup (i.e. a copy/picture, for example via simple extraction from the system) of accounting balances and registrar positions to ensure that the last accounting and registrar positions are known and available to the UCIA in Luxembourg or in the EEA in the event of sudden interruption of services provided by a service provider.

Possibility of maintaining unit-/shareholder register through DLT

As noted earlier and in accordance with Circular 22/811, only one service provider may be designated to perform the registrar function for a UCI. With that respect, Question 1.2 of UCIA FAQ provides that a UCI administrator performing the registrar function may use DLT to maintain the unit-/shareholder register. With reference to the use of DLT and in order not to hinder new opportunities and stay open to innovation, the CSSF mentions that it will, in the context of the digital transformation process, remain technology neutral and maintain a flexible regulatory approach.

Finally, the CSSF refers to its white paper to guide professionals in the conduct of their due diligence processes related to DLT and its use in the provision of services in the Luxembourg financial sector.

AML/ CFT

Ukraine – key dates on EU restrictive measures on AML/CTF
On 8 April 2022, the CSSF published a communication addressed to all financial sector professionals under its supervision to inform them about the timetable for the

application of exceptions to certain prohibitions established in the context of the EU financial restrictive AML/CFT measures in response to the current situation in Ukraine (the "**Communiqué**").

As of 12 April 2022, a series of financial restrictive measures are to be adopted by the professionals, in particular under Regulation (EU) 833/2014 of 31 July 2014 and Regulation (EU) 263/2022 of 23 February 2022 regarding restrictive measures in respect of Russia's destabilising actions in Ukraine. As regulations, are directly applicable in all EV member states without implementation into national law, and hence professionals are required to comply with them while putting in place the necessary controls and measures.

AML/CFT – withdrawal of the authorisation for AIFM for serious breach

On 1 June 2022, the ESAs published a joint report providing a comprehensive analysis on the completeness, adequacy and uniformity of the applicable laws and practices on the withdrawal of licence for serious breaches of the rules on AML/CFT ("**Joint Report**").

The Joint Report recommends the introduction of a specific legal ground to revoke licences for serious breaches of AML/CFT rules in all relevant EU sectoral laws, including under AIFMD and UCITSD.

It is reminded that the notion of "breach" is defined as "*any violation of an AML/CFT rule committed by an obliged entity which has been identified by the competent authority*".

AED's guide of professional obligations on AML/CFT for RAIFs

The Registration Duties, Estates and VAT Authority (*Administration de l'enregistrement, des domaines et de la TVA* – "**AED**") issued a guide with the minimum requirements for the RAIFs to comply with regarding AML/CFT obligations (the "**Guide**").

The Guide clarifies that AML/CFT control is based on the three following key duties: (i) vigilance obligations, (ii) internal organisation obligation, and (iii) cooperation obligation.

(i) The identification and verification of the client and ultimate beneficial owner's identity is based on documents, data or information from reliable and independent sources prior to the establishment of the business relationship and continue throughout its duration.

(ii) A RAIF is required to set up an internal organisation that is adequate and proportionate to the size of its business and the services it provides in the course of its professional activity by appointing an RR (*responsable du respect des obligations*) and an RC (*responsable du contrôle du respect des obligations*)

(iii) If it is suspected that the transaction is linked to an AML/CFT offence, it will need to send, at its own initiative and without delay, a suspected operation statement (*Déclaration d'opération suspecte* **"DOS"**) to the Luxembourg financial intelligence unit (*Cellule de renseignement financier* – "**CRF**").

Other developments

Performance fee models to be declared on eDesk platform

On 4 April 2022, the CSSF issued a communication reminding AIFMs and UCITS managers of their obligation to declare the performance fees applicable to the Luxembourg vehicles they manage through the dedicated eDesk platform, in accordance with CSSF Circular 20/764 incorporating the guidelines on performance fee (the "**Guidelines**") provided by ESMA.

These Guidelines have been established to assure investors that the performance fees models used by IFMs comply with the principles of acting honestly and fairly in the conduct of their business activities. Moreover, investors should be properly informed of the existence of performance fees and their potential impact on investment returns.

Consequently, IFMs should undertake a self-assessment and declare which performance fee models they use without delay.

IFMs of investments funds with a performance fee existing before the application date of the Guidelines (i.e., as of 6 January 2021) must apply the Guidelines in respect of those investments funds no later than the beginning of the financial year that follows the application date of the Guidelines by 6 months. The declaration is being required for investments funds whose financial year ends between January 2022 and June 2022.

In addition, a self-assessment should also be completed through the eDesk platform for (i) any (sub)fund that is not subject to a performance fee, including (sub)funds that fall outside the scope of the Guidelines, (ii) any (sub) fund which has not yet been launched although it has been approved by the CSSF, or (iii) any (sub)fund that has become inactive following a full redemption of its shares or units (and then became inactive pending reactivation within a maximum period of 18 months).

CSSF Circular 22/806 on outsourcing arrangements - new requirements

On 22 April 2022, the CSSF published a new circular on outsourcing arrangements that, among other items, has an impact on CSSF Circular 18/698 (the "**Circular 22/806**"). This Circular 22/806 applies to Luxembourg entities performing information and communication technology (ICT) outsourcing such as the case may be, authorised AIFMs, their branches or UCITS management companies as from **30 June 2022** and to all outsourcing arrangements entered into, reviewed or amended on or after this date. It is noted that the CSSF also issued a FAQ providing guidance to Circular 22/806 ("**CSSF FAQ 22/806**").

Key changes provided by Circular 22/806:

- *Assessment of critical or important functions or material parts*

IFMs must assess whether the functions they are outsourcing are "critical or important" functions (including ICT outsourcing and business process outsourcing)

- *Outsourcing documentation requirements*

IFMs must establish an outsourcing policy, which should be written and regularly reviewed and updated. In

addition, IFMs must record information on all outsourcing arrangements in a register, which may be asked by the CSSF at any time. The register will include various data, including commencement and renewal dates of the contracts, a description of the outsourced functions, identification of the service provider, etc.

- *Notification process*

IFMs which intend to outsource a critical or important function must notify their project to the CSSF at least three months before the outsourcing becomes effective and at least one month in advance if the outsourcing is concluded with a Luxembourg support PSF regulated by the CSSF.

This new notification process applies to (i) planned, new critical or important outsourcing arrangements, (ii) material changes to existing critical or important outsourcing arrangements and (iii) changes to outsourcing arrangements that lead to an outsourced function becoming critical or important.

Call for amendment of PRIIP, KID - "What is this product?"

On 9 May 2022, the ESA issued a supervisory statement on expectations regards the section named "*What is this product?*" of the key information document ("**KID**") for packaged retail and insurance-based investment products ("**PRIIPs**").

The "*What is this product?*" is the first section of the nine sections that contain the PRIIPs KID. The retail investors should understand the main characteristics of the product and compare it with other products.

This section should describe the (i) type, (ii) objective and term, (iii) intended retail investor, and - where applicable - (iv) insurance benefits of the PRIIPs.

(i) ***Type of PRIIPs***

Description of the legal form of the PRIIPs, being accurate and precise. Presentation of the product is to be short, concise and easy to understand. This description should also contain information on the product's performance and the level of risk of loss.

(ii) ***Objectives and term***

- *Autocallability and early termination due to extreme market events*

It is recommended to use a mix of text and tables in clear, easy-to-read language to describe the autocallability or early termination features.

The possibility of early redemption should be clearly indicated, if possible at the beginning of the description of the objectives, and in combination with the information on the conditions in the PRIIPs. In addition, PRIIPs manufacturers should try to include the most relevant concrete data/levels in the text, especially the barrier levels and the frequency of autocall windows.

- *Coupon payments*

The appropriate manners of providing information regarding the timing and frequency of coupon payments are either a purely narrative description or a combination of text and tables, provided that, in any case, clear and easy-to-read language is used. This explanation on the timing and frequency of coupon payments must include details of observation dates and calculation of initial/final values, in a separate table if necessary.

- *Underlying assets*

The PRIIPs KID must clearly and accurately describe the specific nature (share, bond, commodity, index, etc.) and industry of the underlying assets. This is considered to be particularly important for products that have a custom index as its underlying assets.

- *Description of the leverage factor*

The PRIIPs KIDs should provide information regarding the relationship between the product's payoff and the underlying asset and whether the leverage factor is dynamic or constant.

- *Clarification of the duration of the investment period*

The term to specify the intended investment period should be in clear terms, e.g. "very short", "short", "medium" or "long" or the numbers of years.

- *Improve the summary risk indicator*

Generic sentence applicable to all investors should be replaced by a risk scale from 1 to 7.

- *Description of capital protection and potential losses*

The relevant description in the PRIIP's KID must be sufficiently clear, precise and straightforward to indicate that, in given circumstances, the product involves a capital loss. Particularly adverse scenarios that involve a loss should be clearly identified and explicitly state the possibility of such a loss and intended retail investor's loss-bearing capacity takes into account the credit risk or risk of default as well as the market risk. The calculation of payoff must be fair, clear and not misleading.

(iii) ***Intended retail investor***

A description of retail investors should be provided, including the ability of retail investors to bear investment loss and their investment period preferences.

Thus, the ESAs gave the necessary guidance to avoid reproducing the deficiencies they identified in numerous PRIIP KIDs.

MiFID: ESMA publishes final report on best execution reporting obligations by investment firms

On 16 May 2022, the ESMA published a final report on the review of the MiFID II framework on best execution reports by investment firms (the "**Final Report**").

This final report is only intended to provide support to the European Commission in its assessment of the adequacy of the best execution reporting obligation for investment firms, and any further technical work to build a well-functioning reporting regime. In this regard, MiFID II requires execution venues and investment firms to disclose periodic data on the quality of execution and has mandated ESMA to issue technical standards in this area. Relevant technical standards are known as RTS 27 (applicable to execution venues) and RTS 28 (applicable to investment firms).

The Final Report contains a number of proposals, which include improving the quality of information in the RTS 28 reports (Commission Delegated Regulation 2017/576/EU) (by proposing to remove a specific reporting requirement for investment firms on the characteristics of executed orders which has not proved effective under the current reporting framework, among other proposals).

Furthermore, the Final Report proposes to facilitate the use of RTS 28 reports, suggesting that investment firms should be required to publish the quantitative information in the reports in a simple CSV (Comma-Separated Values) format in order to facilitate access and comparison of data for end-users.

The ESMA highlights that a change of the scope of Article 27(6) of MiFID II would be needed to enable improvements to the RTS 28 reporting regime.

New CSSF FAQ on SICARs

On 10 June 2022, the CSSF updated its FAQ on SICAR ("**Updated SICAR-related FAQ**"), more precisely question 7 relating to the prudential reporting requirements that SICARs shall comply with.

The Updated SICAR-related FAQ now provides that the prudential reporting regarding SICARs includes the communication of standardised information not only on a semi-annual basis but also on a monthly basis and financial information provided on a yearly basis. It is to be noted that the monthly financial information relating to SICARs must be drawn up, if applicable, for each sub-fund separately, in accordance with table U 1.1 as defined in Circular CSSF 15/627 relating to new monthly reporting to the CSSF.

With respect to the half-yearly financial information, the reporting obligation starts from the date of the first subscriptions of the SICAR or the sub-fund. In this respect, reporting is not required in the event that only subscription commitments have been received.

Regarding the annual report, the Updated SICAR-related FAQ also mentions that any SICAR must also submit to the CSSF, via the e-file communication platform, a copy of its audited annual report as soon as it is available and in any event within six months from the end of the period to which the report relates. In this context, for the financial years closing on or after 30 June 2022 and for every audit report drawn up by the statury auditors (*réviseur d'entreprises agréé*) that includes a modified audit opinion at the level of one or more sub-funds of the SICAR and/or of the SICAR as a whole, the SICAR's directors must send a letter to the CSSF within one month time following the publication of the anual report (the "**Letter**"), without having been expressly requested to do so by the latter. Such Letter shall explain the underlying reasons for the modified audit opinion, its impact on the SICAR and on its investors as well as the corrective measures, including the timeline for their implementation, taken by the directors.

Within 6 months after the end of the financial year, SICARs must also submit to the CSSF the management letter from the *réviseur d'entreprises agréé* relating to the statutory audit of the SICAR's accounts (the "**Management Letter**"). Failing the submission of such Management Letter, a written declaration by the statutory auditor must be provided stating that no such Management Letter was issued. The Updated SICAR-related FAQ also highlights that for the financial years closing on or after 30 June 2022, the Management Letter is made available to the *réviseur d'entreprises agréé* on the eDesk portal. The SICAR's dirigeants mustsubmit the Management Letter, once finalised by the *réviseur d'entreprises agréé*, to the CSSF via the eDesk portal.

Lastly, the Updated SICAR-related FAQ mentions that Circular CSSF 21/790 requires that:

- SICARs submit to the CSSF a self-assessment questionnaire ("**SAQ**") for each year or period in respect of which a statutory audit was carried out, and this as from the financial years closing on or after 30 June 2022. The SAQ must be transmitted by the SICAR to the CSSF via the eDesk portal within 4 months after the end of the financial year; and
- réviseur d'entreprises agréé of a SICAR complete a separate report for each year or period in respect of which a statutory audit was carried out ("SR") This requirement applies to SICARs as from the financial years closing on or after 30 June 2023. The SICAR must, once the SR is completed and validated by the réviseur d'entreprises agréé, submit it to the CSSF within 6 months after the end of the financial year.

Postponing the application dates of the PRIIPs-related disclosures

On 24 June 2022, the European Commission published in the Official Journal of the EU the Commission Delegated Regulation (EU) 2022/975 which it adopted on 17 March 2022, and which then was approved by the co-legislators following a review procedure which ended on 17 June 2022 (the "**Delegated Regulation**").

This Delegated Regulation amends the regulatory technical standards laid down in Delegated Regulation (EU) 2017/653 (the "**Regulation 2017/653**"), as regards the extension of the transitional arrangement laid down in Article 14(2) of the latter. The Delegated Regulation also modifies the regulatory technical standards laid down in Delegated Regulation (EU) 2021/2268 (the **"Regulation 2021/2268**") concerning the ability to use Key Investor Information to provide specific information for the purposes of disclosures relating to PRIIPs offering a range of options for investment.

As consequence, article 14(2) of the Delegated Regulation continues to apply until 31 December 2022, and postpones the date of application of the new rules included in Regulation 2021/2268 to 1 January 2023.

Tax

Entitlement of CIVs to UK-Luxembourg tax treaty benefits

The UK and Luxembourg signed a new tax treaty on 7 June 2022 (the "**New Treaty**"). Amongst other changes, the New Treaty will apply to certain collective investment vehicles ("**CIVs**") as detailed in the Protocol to the New Treaty.

A Luxembourg CIV established as a company will be in a position to claim treaty benefits with respect to UK-sourced income if it meets the two following conditions:

- The CIV qualifies as (i) a UCITS, (ii) UCI Part II, (iii) a SIF, or (iv) a RAIF not having opted for risk capital tax treatment subject to the Law of 23 July 2016 on RAIFs, and
- At least 75% of the beneficial interests of the CIV are owned by so-called "equivalent beneficiaries", i.e. (i) residents of Luxembourg or (ii) residents of another jurisdiction that applies similar exchange of information standards as the UK and has a tax treaty with the UK that provides for a similar or lower withholding tax rate.

For example, if a Luxembourg SCA SICAV-SIF were to derive interest income paid by a UK borrower, the Luxembourg vehicle should be able to apply for a Double Taxation Treaty Passport (DTTP) to benefit from an exemption of UK withholding tax, if it meets the above equivalent beneficiary test .

The New Treaty will apply, with respect to UK tax withheld at source, to income derived on or after 1 January of the calendar year following the year the New Treaty enters into force (i.e. not before 1 January 2023).

Netherlands

Regulatory

Decree Implementing UBO register for trusts and similar legal arrangements

On 2 May 2022, the Implementation decree concerning the registration of beneficial owners of trusts and similar legal arrangements (*Implementatiebesluit registratie uiteindelijk belanghebbenden van trusts en soortgelijke juridische constructies*, the **"Implementation Decree"**) was published in the Dutch Government Gazette (*Staatsblad*).

Based on the consultation version of the Implementation Decree, funds for joint account (*fondsen voor gemene rekening*, "**FGR**") were required to register all participants with an economic interest of 3% or more as their UBOs (in addition to the manager and legal titleholder). The final version of the Implementation Decree now contains an exception for FGRs that are 'offered' to more than 150 persons and that are managed by a manager with a relevant licence under the Act on the Financial Supervision. FGRs that are able to benefit from this exception will only need to register the group of individuals in whose interests the FGR is primarily established/operated (rather than the individual participants).

Glossary

AFM	Netherlands authority for the financial markets
AIF	Alternative investment fund
AIFM	Alternative investment fund manager
AIFMD	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on alternative investment fund managers
AIFM Law	Luxembourg law of 12 July 2013 on alternative investment fund managers, as may be amended from time to time
AML/CFT	Anti-money laundering and counter terrorism financing
CSSF	Luxembourg supervisory authority for financial services (*Commission de Surveillance du Secteur Financier*)
DLT	Distributed ledger technology
eDesk	The CSSF dedicated Internet portal allowing the fund industry to submit their requests
ELTIF	European long term investment funds
ESA	European supervisory authorities
ESG	Environmental, social, and governance
ESMA	European securities and markets authority
EU	European Union
EUSEF	European social entrepreneurship funds
EUVECA	European venture capital funds
IFM	Investment fund managers of AIMF and or UCITS
FAQ	Frequently asked question
KIID/KID	Key investor information document
MMF	Money market funds
NCA	National competent authorities
PRIIP	Packaged retail and insurance-based investment products
PSF	Professional of the financial sector
Q&A	Questions and answers
RAIF	Reserved alternative investment fund
RTS	Regulatory technical standards
SICAR	Investment company in risk capital
SIF	Specialised investment fund
TR	Taxonomy Regulation
UCI	Undertaking for collective investment
UCITS	Undertaking for collective investment in transferable securities
UCITSD	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to Undertaking for collective investment in transferable securities

Contacts

Luxembourg

Jevgeniy Nesch
Funds Partner
jnesch@akd.lu

Virginie Leroy
Funds Partner
vleroy@akd.lu

Ayzo Van Eysinga
Tax Partner
avaneysinga@akd.lu

Stéphanie Viot
Tax Counsel
sviot@akd.lu

Lissie Goldbach
Senior Associate
lgoldbach@akd.lu

Astrid Vaillant
Lawyer
availlant@akd.lu

The Netherlands

Anton Akimov
Tax Advisor
aakimov@akd.eu

Huub Laauwen
Tax Partner
hlaauwen@akd.eu

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

About AKD

Law firm since **1917**

over 100 years history

High-end
client solutions

500+ *Lawyers*
Civil-law notaries
Tax advisers

6 *Offices in the Benelux*

International
Network

AKD
covers all important areas of law

Full service
Benelux law firm

Pragmatic
approach

akd benelux lawyers

T: +31 88 253 5000
E: info@akd.eu
akd.eu