

September 2023

## EUROPEAN UNION

### DIGITAL MARKETS ACT (DMA)

- EC designates six gatekeepers under "Digital Markets Act"

### EUROPEAN CROWDFUNDING SERVICE PROVIDERS (ECSP) REGULATION

- EC publishes draft Commission Delegated Regulation (EU) on RTS specifying requirements on credit scoring of crowdfunding projects, pricing of crowdfunding offers, and risk management policies and procedures

### MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE AND REGULATION (MIFID II / MIFIR)

- EP publishes briefing on amendments to MiFID II and MiFIR

### REGULATION ON DIGITAL OPERATIONAL RESILIENCE FOR THE FINANCIAL SECTOR (DORA)

- EC publishes Guidelines on the interplay between NIS2 Directive and DORA

### REGULATION ON MARKETS IN CRYPTO-ASSETS (MICA)

- EP publishes briefing on MiCA

### SUSTAINABLE FINANCE / GREEN FINANCE

- EC publishes consultation on SFDR
- ESAs analyse the extent of voluntary disclosure of principal adverse impacts under the SFDR

### UCITS V / ALTERNATIVE INVESTMENT FUNDS MANAGER DIRECTIVE (AIFMD)

- EP publishes a briefing on the amendments to AIFMD and UCITS

## FRANCE

### INVESTMENT FUNDS / COLLECTIVE INVESTMENT SCHEMES (CIS) / ASSET MANAGEMENT

- AMF publishes report on state of play and vulnerabilities of the private equity sector / L'AMF publie un rapport sur l'état des lieux et les vulnérabilités du secteur du capital-investissement

### MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE AND REGULATION (MIFID II / MIFIR)

- AMF applies revised ESMA guidelines on MiFID II product governance requirements / L'AMF applique les lignes directrices révisées de l'ESMA sur les exigences de gouvernance des produits MiFID II

## GERMANY

### ANTI-MONEY LAUNDERING / COMBATING THE FINANCING OF TERRORISM (AML / CFT)

- Germany publishes Draft law to strengthen the risk-based working methods of the FIU Investigations

### DERIVATIVE FINANCIAL INSTRUMENTS (DERIVATIVES)

- BVI publishes a press release on relocation of derivatives clearing to the EU

## HONG KONG

### CYBERSECURITY

- SFC publishes circular to intermediaries on commencement of cybersecurity review

## IRELAND

### FINANCIAL SUPERVISION

- Ireland publishes Central Bank Act 1942 (Section 32D) Regulations 2023 (S.I. No. 438 of 2023)

## LUXEMBOURG

### ANTI-MONEY LAUNDERING / COMBATING THE FINANCING OF TERRORISM (AML / CFT)

- CSSF informs about Luxembourg's good result in the 4th mutual evaluation report by the FATF / La CSSF informe du bon résultat du Luxembourg dans le 4ème rapport d'évaluation mutuelle du GAFI

### DIGITAL SERVICES ACT

- Luxembourg publishes draft law implementing Digital Services Act / Le Luxembourg publie un projet de loi mettant en œuvre le règlement européen sur les services numériques

#### INVESTMENT FUNDS / COLLECTIVE INVESTMENT SCHEMES (CIS) / ASSET MANAGEMENT

- ALFI publishes position paper on calibration of the depositary duties as regards the monitoring of ESG investments / L'ALFI publie sa position sur le calibrage des devoirs du dépositaire en matière de suivi des investissements ESG
- CSSF informs on the new reporting channel for AIFMs as of November 2 2023 / La CSSF informe sur le nouveau canal de reporting pour les GFIA à compter du 2 novembre 2023
- CSSF publishes a video on liquidity stress test for Luxembourg investment funds / La CSSF publie une vidéo sur les tests de résistance de liquidité pour les fonds d'investissement luxembourgeois

#### MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE AND REGULATION (MIFID II / MIFIR)

- CSSF publishes Circular 23/840 on the ESMA Guidelines on MiFID II product governance requirements / La CSSF publie la Circulaire 23/840 relative aux lignes directrices de l'ESMA sur les exigences de gouvernance des produits MiFID II

#### SUSTAINABLE FINANCE / GREEN FINANCE

- CSSF advises on the ESMA CSA on sustainability risks and disclosures in the investment fund sector / La CSSF conseille sur la CSA de l'ESMA sur les risques et informations en matière de durabilité dans le secteur des fonds d'investissement

### SWITZERLAND

#### REAL ESTATE

- AMAS increases environmental transparency in real estate funds / L'AMAS augmente la transparence environnementale des fonds immobiliers

#### SUSTAINABLE FINANCE / GREEN FINANCE

- Swiss Federal Council adopts internationally recognized outlines on sustainable corporate governance / Le Conseil fédéral suisse adopte des lignes directrices internationalement reconnues en matière de gouvernance d'entreprise durable

### NETHERLANDS

#### INVESTMENT FUNDS / COLLECTIVE INVESTMENT SCHEMES (CIS) / ASSET MANAGEMENT

- AFM advises on LMTs and correct AIFMD reporting
- AFM reminds of comparison map transition period expiration on October 1

### SPAIN

#### ASSET MANAGEMENT ACTIVITIES

- Government publishes Consultations on Four draft Royal Decrees for the development and implementation of certain sections of the Spanish Securities and Investment Services Act

### UNITED KINGDOM

#### CRYPTOASSET / CRYPTOCURRENCY / VIRTUAL CURRENCY

- FCA sets expectations ahead of incoming crypto marketing rules

#### DATA PROTECTION / GENERAL DATA PROTECTION REGULATION (GDPR) / EPRIVACY REGULATION (EPR)

- UK publishes the Data Protection (Adequacy) (United States of America) Regulations 2023

#### FINANCIAL PROMOTION REGIME

- FCA publishes findings on financial promotions for high-risk investments

#### FINANCIAL SUPERVISION

- FCA publishes Handbook Notice No.112
- FCA publishes a letter on supervisory strategy for CFFs

### MONACO

#### ANTI-MONEY LAUNDERING / COMBATING THE FINANCING OF TERRORISM (AML / CFT)

- Monaco publishes Sovereign Ordinance No.10.124 on Law No.1.362 of August 3 2009 on AML/CFT and the proliferation of weapons of mass destruction and corruption

### BRAZIL

#### INVESTMENT FUNDS / COLLECTIVE INVESTMENT SCHEMES (CIS) / ASSET MANAGEMENT

- ANBIMA informs about new rules on self-regulation of funds
- CVM publishes important updates to Resolution no.175 on Investment Funds Framework

### INTERNATIONAL

#### DERIVATIVE FINANCIAL INSTRUMENTS (DERIVATIVES)

- ISDA announces launch of an integration between ISDA Create and S&P Global Market Intelligence's Counterparty Manager service

## CONTACTS

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## EUROPEAN UNION

### DIGITAL MARKETS ACT (DMA)

#### EC designates six gatekeepers under "Digital Markets Act"

On September 6 2023, the European Commission designated, for the first time, six gatekeepers - Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft - under the Digital Markets Act (DMA).

In total, 22 core platform services provided by gatekeepers have been designated. The six gatekeepers will now have six months to ensure full compliance with the DMA obligations for each of their designated core platform services.

Under the DMA, the European Commission can designate digital platforms as 'gatekeepers' if they provide an important gateway between businesses and consumers in relation to core platform services. Today's designation decisions follow a 45-day review process conducted by the Commission after the notification by Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft and Samsung of their potential status as gatekeepers. In particular, the Commission has established gatekeeper status with respect to the specific core platform services. Gmail, Outlook.com and Samsung Internet Browser are not designated as core platform services.

The DMA, in force since November 2022 and applied since May 2023, aims to ensure contestable and fair markets in the digital sector. It regulates gatekeepers, large online platforms that provide an important gateway between business users and consumers, whose position can grant them the power to create a bottleneck in the digital economy.

Improved data availability will create new opportunities for service providers, including financial institutions (e.g. banks could request data on behalf of a large set of SMEs to better calibrate their lending risk management, resulting in providing better loans for those SMEs or financial firms using online ad services provided by Amazon, Google, and Meta will be empowered to ask for data collected in relation to their campaigns, a valuable resource often kept hidden from them).

### EUROPEAN CROWDFUNDING SERVICE PROVIDERS (ECSP) REGULATION

#### EC publishes draft Commission Delegated Regulation (EU) on RTS specifying requirements on credit scoring of crowdfunding projects, pricing of crowdfunding offers, and risk management policies and procedures

On September 29 2023, the European Commission published the Draft Commission Delegated Regulation (EU) supplementing Regulation (EU) 2020/1503 of the European Parliament and of the Council with regard to regulatory technical standards specifying requirements on credit scoring of crowdfunding projects, pricing of crowdfunding offers, and risk management policies and procedures.

The draft technical standards:

- Specify the information that crowdfunding service providers must disclose to investors about the methods used to calculate the credit score for crowdfunding projects and to suggest the price for crowdfunding offers.
- Specify the factors that crowdfunding service providers must consider to ensure fair and appropriate pricing of the loans they facilitate on their platforms.
- Set out the information and factors that crowdfunding service providers must consider when:
  - assessing the credit risk for a crowdfunding project or project owner, to ensure it is based on sufficient information, in accordance with Article 4(4)(a) and 4(4)(b) of the Regulation;
  - conducting a loan valuation at different points in the life cycle of the loan, as specified in Article 4(4)(e) of the Regulation.
- Require that the methods for assessing creditworthiness be proportionate to the size, type and maturity of the loan and to the characteristics of the project owner.
- Specify the governance arrangements that crowdfunding service providers must have in place to support information disclosure to investors, credit risk assessment and loan valuation and the risk management framework referred to in Article 4(4)(f).
- Require that such internal governance arrangements and processes be proportionate to the size and complexity of the crowdfunding service provider

The Regulation contains 23 articles.

### MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE AND REGULATION (MiFID II / MiFIR)

#### EP publishes briefing on amendments to MiFID II and MiFIR

On September 21 2023, the European Parliament published a briefing on amendments to MiFID II and MiFIR.

The second Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR) are the principal texts regulating investment services and financial markets activities in the EU. Following an extensive consultation and in light of the recent developments in the context of the coronavirus pandemic, the European Commission proposed the establishment of an EU-wide consolidated tape for financial markets instruments, as well as making targeted changes to market structure, so as to increase transparency and strengthen the competitiveness of EU financial markets. Consolidated tape is a high-speed electronic system that reports the latest price and volume data on sales of exchange-listed stock. The proposals are currently being discussed by the co-legislators. Within the European Parliament, both have been assigned to the Committee on Economic and Monetary Affairs (ECON), which adopted its reports on March 1 2023 and also decided to enter into trilogue negotiations on that basis. A provisional agreement was reached on June 29 2023.

### REGULATION ON DIGITAL OPERATIONAL RESILIENCE FOR THE FINANCIAL SECTOR (DORA)

#### EC publishes Guidelines on the interplay between NIS2 Directive and DORA

On September 18 2023, the European Union published European Commission guidelines on the application of Article 4 (1) and (2) of Directive (EU) 2022/2555 (NIS 2 Directive).

The guidelines seek to clarify the application of Article 4(1) and (2) of NIS2, which disapply relevant provisions of NIS2 to essential or important entities subject to equivalent requirements under sector-specific EU legal acts, and cover:

- assessing the equivalence of obligations to adopt cybersecurity risk management measures and to notify significant incidents; and
- the consequences of equivalence, such as in relation to supervision and enforcement, and national cybersecurity strategies.

An appendix to the guidelines sets out a non-exhaustive list of EU legal acts that the Commission considers fall within the scope of Article 4, which at present only lists the Digital Operational Resilience Act (DORA). The Commission notes, among other things, that Member States should not apply relevant NIS2 provisions to financial entities covered by DORA.

## REGULATION ON MARKETS IN CRYPTO-ASSETS (MICA)

### EP publishes briefing on MiCA

On September 29 2023, the European Parliament published a briefing on Markets in crypto-assets (MiCA).

The Regulation on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, establishes harmonised rules for crypto-assets at EU level, thereby providing legal certainty for crypto-assets not covered by existing EU legislation. By enhancing the protection of consumers and investors as well as financial stability, the regulation promotes innovation and the use of crypto-assets. The regulation identifies and covers three types of crypto-assets, namely asset-referenced tokens (ART), electronic money tokens (EMT), and other crypto-assets not covered by existing EU law. The legislation regulates issuance and trading of crypto-assets as well as the management of the underlying assets, where applicable, with additional regulatory rules aimed at 'significant' ART and EMT. The agreement resulting from the negotiations aimed at securing liquidity and redemption, and envisaged the inclusion of the environmental impact of crypto-assets in communications to investors. The final act was signed on May 31 2023 and the regulation will apply from December 30 2024. The 'EU Legislation in Progress' briefings are updated at key stages throughout the legislative procedure.

## SUSTAINABLE FINANCE / GREEN FINANCE

### EC publishes consultation on SFDR

On September 14 2023, the European Commission (EC) published a consultation on the Sustainable Finance Disclosure Regulation (SFDR).

The SFDR, which has been in application since March 2021, sets out how financial intermediaries, such as asset managers, have to communicate sustainability information to investors. It is designed to bring more transparency to the market and enable investors to make informed choices.

The public consultation is addressed to a broad range of stakeholders and concerns the SFDR as it is today, and the potential issues stakeholders might face in implementing it.

The targeted consultation is aimed at stakeholders who are more familiar with the SFDR and covers the regulation as it is today, exploring how it is working in practice, its interaction with other parts of the European framework for sustainable finance and the potential issues stakeholders might be facing in implementing it. It also looks to the future, assessing possible options to address any potential shortcomings.

The Sustainable Finance Disclosures Regulation (SFDR) started applying in March 2021 and requires financial market participants and financial advisers to disclose at entity and product levels how they integrate sustainability risks and principal adverse impacts in their processes at both entity and product levels. It also introduces additional product disclosures for sustainable financial products making sustainability claims.

This public consultation aims at gathering information from a wide range of stakeholders, including financial practitioners, non-governmental organisations, national competent authorities, as well as professional and retail investors, on their experiences with the implementation of the SFDR. The Commission is interested in understanding how the SFDR has been implemented and any potential shortcomings, including in its interaction with the other parts of the European framework for sustainable finance, and in exploring possible options to improve the framework.

The main topics to be covered in this questionnaire are:

1. current requirements of the SFDR
2. interaction with other sustainable finance legislation

The public consultation covers the SFDR as it is today, exploring how the regulation is working in practice and the potential issues stakeholders might be facing in implementing it.

The Commission is also interested in exploring possible options to improve the framework and address any potential shortcomings. You can therefore find a targeted consultation that in addition to topics 1 and 2 mentioned above, includes questions about potential changes to the disclosure requirements of the SFDR and the potential establishment of a categorisation system for financial products.

Both consultations will run until December 15 2023.

### ESAs analyse the extent of voluntary disclosure of principal adverse impacts under the SFDR

On September 28 2023, the European Supervisory Authorities (ESAs) published an annual report on the extent of voluntary disclosure of principal adverse impacts under the Article 18 of the Sustainable Finance Disclosure Regulation (SFDR).

Similar to the approach adopted for 2022 Report, the ESAs launched a survey of National Competent Authorities to assess the current state of entity-level and product-level voluntary principal adverse impact (PAI) disclosures under the SFDR, and have developed a preliminary, indicative and non-exhaustive overview of good practices and areas that need improvement.

The key highlights are as follows:

- The results show an overall improvement compared to the previous year, although there is still significant variation in the extent of compliance with the requirements and in the quality of the disclosures both across financial market participants and jurisdictions.
- Disclosures appear easier to find on websites compared to the previous year.
- When financial market participants do not consider principal adverse impacts, they should better explain the reasons for not doing so.
- Even though they are encouraged to do so under the SFDR, financial market participants are generally not disclosing to what extent their investments align with the Paris Agreement.
- Voluntary disclosures of PAI consideration by financial products will be further analysed in future reports.

## UCITS V / ALTERNATIVE INVESTMENT FUNDS MANAGER DIRECTIVE (AIFMD)

### EP publishes a briefing on the amendments to AIFMD and UCITSD

On September 14 2023, the European Parliament (EP) published a briefing on the amendments to AIFMD and UCITSD.

The briefing reports on the potential changes to the UCITSD and AIFMD.

Two European Union (EU) directives regulate the EU collective investment funds industry: the Directive relating to undertakings for collective investment in transferable securities (UCITS) and the Alternative Investment Funds Manager Directive (AIFMD). The UCITS Directive, which covers mutual funds, lays down uniform rules, allowing them to be offered cross-border, while the AIFMD, which covers hedge funds and private equity, lays down the rules for authorising, supervising and overseeing the managers of such funds. While reviewing the application of the scope of the AIFMD (as mandated), the European Commission considered that a number of issues highlighted in the AIFMD review were equally relevant for the activities of UCITS. As a result, it proposed to amend both directives, to better align their requirements. The Council agreed on its general approach in June 2022. Within the European Parliament, the file was assigned to the Committee on Economic and Monetary Affairs (ECON). It adopted its report in February 2023, and Parliament confirmed the committee's decision to enter into interinstitutional negotiations in plenary the same month. The co-legislators reached a provisional agreement in July 2023, which now needs to be formally adopted by the two institutions.

# FRANCE

## INVESTMENT FUNDS / COLLECTIVE INVESTMENT SCHEMES (CIS) / ASSET MANAGEMENT

### AMF publishes report on state of play and vulnerabilities of the private equity sector / L'AMF publie un rapport sur l'état des lieux et les vulnérabilités du secteur du capital-investissement

On September 11 2023, the Autorité des marchés financiers (AMF) published a report on the state of play and vulnerabilities of the private equity sector.

The rise of private equity, a segment of fund management dedicated to investing in unlisted equities, makes it a major and structuring player in the financial system. Based on a description of the market and current trends, the study proposes a review of the potential risks it entails and the possible implications for competent authorities.

Private equity plays a relevant role in finance. It is also a vehicle for significant cross-border investment, especially American in Europe. Part of the academic literature highlights the beneficial effects of its development: better management of companies, specific expertise and satisfaction of needs otherwise unsatisfied (e.g. by banks), innovation, growth. The returns posted by funds are higher than those on the stock market (e.g. 15.4% per year from 2015 to 2021 according to Preqin).

This type of financing was chosen by the companies. Some of them emphasise the benefits of the use of private equity, the long-term growth of the target companies. Other works, in contrast, highlight social costs or negative externalities.

In particular, the development of private equity is likely to renew certain questions about the risks within the competence of the market regulator. The macroeconomic context (inflation, rising rates, recessions) accentuates these questions: portfolio managers, with large amounts of capital to invest can play a counter-cyclical role, but private equity can also fuel corporate indebtedness, particularly for some that are particularly exposed in this regard.

At the fund level, the liquidity and leverage effects and the adequacy of transparency fuel certain questions about the risks for the investor. At the macroeconomic level, the choice by companies of this source of financing induced a more limited transparency and regulatory requirements, in particular on governance, sometimes less prescriptive. This questions the proper allocation of capital and the implications for corporate governance.

#### Version française

*Le 11 septembre 2023, l'Autorité des marchés financiers (AMF) a publié un rapport sur l'état des lieux et les vulnérabilités du secteur du capital-investissement.*

*L'essor du capital-investissement, segment de la gestion de fonds dédié à l'investissement en actions non cotées, en fait un acteur majeur et structurant du système financier. Sur la base d'une description du marché et des tendances actuelles, l'étude propose une revue des risques potentiels qu'il comporte et des implications possibles pour les autorités compétentes.*

*Le capital-investissement joue un rôle important dans la finance. C'est aussi un véhicule d'investissements transfrontaliers importants, notamment américains en Europe. Une partie de la littérature académique met en avant les effets bénéfiques de son développement : meilleure gestion des entreprises, expertise spécifique et satisfaction de besoins autrement non satisfaits (par exemple par les banques), innovation, croissance. Les rendements affichés par les fonds sont supérieurs à ceux de la bourse (par exemple 15,4% par an de 2015 à 2021 selon Preqin).*

*Ce type de financement a été choisi par les entreprises. Certains d'entre eux soulignent les bénéfices du recours au capital-investissement, la croissance à long terme des entreprises cibles. D'autres travaux mettent en revanche en avant des coûts sociaux ou des externalités négatives.*

*En particulier, le développement du capital-investissement est susceptible de renouveler certaines questions sur les risques relevant de la compétence du régulateur des marchés. Le contexte macroéconomique (inflation, hausse des taux, récessions) accentue ces questions : les gestionnaires de portefeuille, disposant de capitaux importants à investir peuvent jouer un rôle anticyclique, mais le private equity peut aussi alimenter l'endettement des entreprises, notamment pour certaines qui sont particulièrement exposés à cet égard.*

*Au niveau des fonds, les effets de liquidité et de levier ainsi que l'adéquation de la transparence alimentent certaines questions sur les risques pour l'investisseur. Au niveau macroéconomique, le choix par les entreprises de cette source de financement a induit une transparence plus limitée et des exigences réglementaires, notamment en matière de gouvernance, parfois moins prescriptives. Cela remet en question la bonne allocation du capital et les implications pour la gouvernance d'entreprise.*

## MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE AND REGULATION (MIFID II / MIFIR)

### AMF applies revised ESMA guidelines on MiFID II product governance requirements / L'AMF applique les lignes directrices révisées de l'ESMA sur les exigences de gouvernance des produits MiFID II

On September 28 2023, the Autorité des marchés financiers (AMF) published an update to its position DOC-2018-04 to incorporate the revised guidance of the European Securities and Markets Authority (ESMA) on product governance requirements under Markets in Financial Instruments Directive (MiFID) II. The AMF also updated its position DOC-2006-23 to extend the scope of these revised guidelines to financial investment advisers (FIAs).

At the beginning of 2022, ESMA launched a project to update its guidelines on product governance requirements made necessary by the evolution of regulations requiring the consideration of any "sustainability related objectives" in target markets. These developments come as a reminder from Delegated Directive (EU) 2021/1269 of the European Commission of April 21, 2021 – transposed into French law within the general regulation of the AMF by the decree of July 25, 2022, which entered into force on August 2, 2022. These revised guidelines also take into account implementation issues identified in particular during the 2021 common supervisory action on this topic (target market of complex financial instruments, "clustering" approach, sales outside the positive target market, etc.).

ESMA's final report on this update was published on March 27 2023. The translated versions of the revised guidelines were published on August 3 2023. These revised guidelines, applicable from October 3 2023, aim to clarify the application of those requirements and aim to foster greater convergence in their interpretation and supervision. They will therefore strengthen investor protection.

Position DOC-2018-04 applies to investment firms, including management companies providing investment services. The AMF clarifies that when providing an investment service with an assessment of appropriateness (in particular when providing reception and transmission of orders or execution of orders services), investment service providers are required to verify at least the "type of clients" and "knowledge and experience" criteria of the target market.

As FIAs operate under a French national regime, the ESMA guidelines do not apply directly to them. However, under the AMF General Regulation, they must comply with rules analogous to those that apply to investment services providers with regard to product governance requirements. In view of this, the AMF has decided to extend the scope of these updated guidelines to FIAs. The associated update of Position-Recommendation DOC-2006-23 containing the Questions and Answers relating to the regime applicable to FIAs has been the subject of an update including this point, and which will also apply from October 3 2023.

### [Version française](#)

*Le 28 septembre 2023, l'Autorité des marchés financiers (AMF) a publié une mise à jour de sa position DOC-2018-04 pour intégrer les lignes directrices révisées de l'Autorité européenne des marchés financiers (ESMA) sur les exigences en matière de gouvernance des produits au titre de la directive sur les marchés d'instruments financiers (MiFID) II. L'AMF a également mis à jour sa position DOC-2006-23 afin d'étendre le champ d'application de ces lignes directrices révisées aux conseillers en investissements financiers (CIF).*

*Début 2022, l'ESMA a lancé un projet de mise à jour de ses lignes directrices sur les exigences de gouvernance des produits rendues nécessaires par l'évolution de la réglementation exigeant la prise en compte d'éventuels « objectifs liés au développement durable » sur les marchés cibles. Ces évolutions rappellent la directive déléguée (UE) 2021/1269 de la Commission européenne du 21 avril 2021 – transposée en droit français au sein du règlement général de l'AMF par le décret du 25 juillet 2022, entrée en vigueur le 2 août 2022. Ces orientations révisées tiennent également compte des problèmes de mise en œuvre identifiés notamment lors de l'action prudentielle commune de 2021 sur ce sujet (marché cible d'instruments financiers complexes, approche « clustering », ventes en dehors du marché cible positif, etc.).*

*Le rapport final de l'ESMA sur cette mise à jour a été publié le 27 mars 2023. Les versions traduites des lignes directrices révisées ont été publiées le 3 août 2023. Ces lignes directrices révisées, applicables à compter du 3 octobre 2023, visent à clarifier l'application de ces exigences et visent à favoriser une plus grande convergence dans leur interprétation et leur encadrement. Ils renforceront donc la protection des investisseurs.*

*La position DOC-2018-04 s'applique aux entreprises d'investissement, y compris les sociétés de gestion fournissant des services d'investissement. L'AMF précise que lorsqu'ils fournissent un service d'investissement faisant l'objet d'une évaluation d'opportunité (notamment lorsqu'ils assurent des services de réception et de transmission d'ordres ou d'exécution d'ordres), les prestataires de services d'investissement sont tenus de vérifier au moins le type de clients et sa connaissance et son expérience du marché cible.*

*Les CIF opérant sous un régime national français, les orientations de l'ESMA ne leur sont pas directement applicables. Toutefois, en vertu du règlement général de l'AMF, ils doivent respecter des règles analogues à celles qui s'appliquent aux prestataires de services d'investissement en matière d'exigences de gouvernance des produits. Dans cette optique, l'AMF a décidé d'étendre le champ d'application de ces lignes directrices actualisées aux CIF. L'actualisation associée de la position DOC-2006-23 contenant les Questions et Réponses relatives au régime applicable aux CIF a fait l'objet d'une actualisation incluant ce point, et elle sera également applicable à compter du 3 octobre 2023.*

# GERMANY

## ANTI-MONEY LAUNDERING / COMBATING THE FINANCING OF TERRORISM (AML / CFT)

### Germany publishes Draft law to strengthen the risk-based working methods of the FIU Investigations

On September 11 2023, the Deutscher Bundestag published a Draft law to strengthen the risk-based working methods of the Financial Intelligence Unit (FIU) Investigations.

In Germany, the FIUs receive AML/CFT suspicious activity reports (SARs), analyse and transfer them on to law enforcement authorities. Due to the high volume of reports produced, the draft law tries to ensure investigation efficiency and bring legal certainty on tasks and the risk-based working method of FIUs.

## DERIVATIVE FINANCIAL INSTRUMENTS (DERIVATIVES)

### BVI publishes a press release on relocation of derivatives clearing to the EU

On September 18 2023, the German Investment and Asset Management Association (BVI) published a press release on relocation of derivatives clearing to the EU.

The German fund association BVI is campaigning for a relocation of derivatives clearing to the EU in order to reduce dependence on third countries and thus the risks to financial stability in the EU. With this demand, the BVI supports the position of the European Central Bank, the EU Commission and the EU Securities and Markets Authority (ESMA), which also want to reduce the dependence of EU financial markets on clearing houses in third countries. ESMA, for example, made it clear in a December 2021 report that neither additional crisis management tools nor enhanced cooperation with third-country supervisors alone can sufficiently reduce systemic risks posed by English clearing houses. In a crisis scenario, the UK authority would be obliged to prioritise the UK's financial stability over that of the EU.

The BVI has been advocating a shift of derivatives clearing to the EU since 2017. It thus has a contrary position to the EU fund association EFAMA, which has spoken out against the mandatory introduction of active accounts at EU clearing houses and thus predominantly represents the view of the major market participants on this issue.

# HONG KONG

## CYBERSECURITY

### SFC publishes circular to intermediaries on commencement of cybersecurity review

On September 15 2023, the Securities and Futures Commission (SFC) published a circular to intermediaries on commencement of a cybersecurity review of selected licensed corporations (LCs).

To better assess the industry's preparedness for and resilience to cyber risks, the SFC will commence a cybersecurity review in September 2023. As part of this review:

- the SFC will conduct a survey of selected LCs of different sizes and business types, including securities and futures brokers, leveraged foreign exchange traders, global financial institutions and firms which provide online product distribution platforms. The survey will generally cover:
  - (i) cybersecurity management and incident reporting;
  - (ii) cybersecurity controls to ensure the confidentiality, integrity and availability of systems and data;
  - (iii) cloud security controls and governance;
  - (iv) remote access controls;
  - (v) lifecycle management for information technology assets; and
  - (vi) the management of cybersecurity risks from systems outsourced to third-party technology vendors;
- the SFC will meet with selected LCs to better understand their cybersecurity governance and controls; and
- the SFC will perform on-site inspections of some of the selected LCs for a deep dive review of their information technology and related management controls and an assessment of their compliance with the Cybersecurity Guidelines and other expected standards.

The findings of the cybersecurity review would form the basis for the SFC to issue further guidance to the industry. Where appropriate, the SFC will also share the observations and findings of the cybersecurity review with the industry.

# IRELAND

## FINANCIAL SUPERVISION

### Ireland publishes Central Bank Act 1942 (Section 32D) Regulations 2023 (S.I. No. 438 of 2023)

On September 6 2023, the Houses of the Oireachtas (Ireland's National Parliament) published the Central Bank Act 1942 (Section 32D) Regulations 2023 (S.I. No. 438 of 2023).

If no levy notice is received by a regulated entity for the levy period by October 3 2023 then October 31 2023 shall be the due date for the payment of the levy contributions by such regulated entity.

A levy contribution, supplementary levy contribution and any interest accrued in accordance with Regulation 11 shall be paid by a regulated entity by cheque, direct bank transfer or equivalent electronic transfer of funds to a bank account specified by the Bank, or as is otherwise specified by the Bank.

Irish authorised Credit Institutions (including relevant credit institutions authorised pursuant to section 9A of the Central Bank Act 1971): €178,142.

In addition to the minimum amount, all entities in Category A1 shall pay a variable amount. A supplementary levy contribution is payable as a separate levy by ELG credit institutions in addition to the levy contribution.

Intermediaries (including Investment Product Intermediaries and Mortgage Intermediaries who hold authorisations under the Consumer Credit Act 1995): €950.

Designated Fund Managers, Receipt & Transmission of Orders &/ or Provision of Investment Advice, Portfolio.

Management; Execution of Orders, Stock Exchange Member Firms, Firms authorised under the Investment Intermediaries Act 1995 that are not captured in any other levy category for the purposes of these Regulations: €906,896 (Medium High).

Investment Firms authorised in another EEA state which have established a branch in Ireland: €23,046.

Authorised UCITS, Authorised Unit Trusts, Authorised Investment Companies (Designated and non-Designated), Authorised Investment Limited Partnerships, Authorised Common Contractual Funds, Authorised Irish Collective Asset management Vehicles (ICAV), UCITS Self-Managed Investment Companies (SMICs), UCITS Self-Managed ICAVs, Authorised Designated Investment Companies (Internally Managed Alternative Investment Funds), Authorised Irish Collective Asset management Vehicles (Internally Managed AIF ICAVs): €7,165.

Umbrella funds shall also pay a contribution per sub-fund of €475 up to ten sub-funds and a further levy of €475 on sub-fund numbers greater than ten, to a maximum of twenty sub-funds, resulting in a maximum contribution for umbrella funds of €16,665.

AIF Management Companies, Administrators, UCITS Managers (Non Delegating), Depositaries, Alternative Investment Fund Managers, UCITS Managers (Delegating): €783,228 (Medium High).

UCITS managers and alternative investment fund managers authorised in another EEA state which have established a branch in Ireland: €19,903.

These Regulations came into operation on September 6 2023.

# LUXEMBOURG

## ANTI-MONEY LAUNDERING / COMBATING THE FINANCING OF TERRORISM (AML / CFT)

CSSF informs about Luxembourg's good result in the 4th mutual evaluation report by the FATF / La CSSF informe du bon résultat du Luxembourg dans le 4ème rapport d'évaluation mutuelle du GAFI

### BACKGROUND

Luxembourg has obtained a good overall result. The FATF recognises the quality of the existing framework of Luxembourg regarding the fight against money laundering and the financing of terrorism (AML/CFT) and further issues a certain number of recommendations in order to improve the effectiveness of the overall system. Consequently, Luxembourg has been placed under regular monitoring by the FATF, which corresponds to the best possible result following a mutual evaluation.

### WHAT'S NEW?

On September 27 2023, the Financial Action Task Force (FATF) published the mutual evaluation report of Luxembourg carried out as part of its 4th cycle of mutual evaluations.

More particularly with regard to the financial sector and its supervision by the CSSF, the analyses carried out by the FATF evaluators regarding the effectiveness of the implementation of the Luxembourg system under "immediate outcomes" number 3 and 4 of the report, highlight the good results for the financial sector, particularly in view of the quality of AML/CFT supervision exercised by the CSSF in matters of AML/CFT. Generally speaking, the FATF report underlines that Luxembourg's AML/CFT supervisory regime has matured in recent years, that the controls carried out at the time of granting licenses and registrations of professionals by the supervisors are robust ("market-entry controls"), and that supervisory tools and on-site controls become increasingly targeted.

The CSSF is positively cited by the FATF for its well-developed and risk-based AML/CFT supervisory approach. This is based on a combination of a desk-based supervision carried out both by AML/CFT experts (so-called offsite supervision) and onsite inspections by staff members who visit the supervised professionals to carry out, among other things, detailed tests (so-called onsite supervision). The use of specific monitoring tools, where appropriate automated, was also highlighted.

The report has further underlined that the CSSF has a good understanding of the ML/TF risks (including in particular the risk of money laundering associated with primary tax offenses) that the financial sector faces, which is particularly important given the status of a financial regional and international center of this sector.

With regard to the prevention efforts carried out by the professionals in the financial sector subject to the supervision of the CSSF, the controls, policies and procedures put in place by them are considered solid and sophisticated by the report. Even if the report highlights in particular that more efforts still need to be made regarding ML/TF suspicion reports to be communicated to the Financial Intelligence Unit, it underlines that professionals have made significant investments in compliance and concludes that these professionals generally have a solid understanding of their professional AML/CFT obligations and a good understanding of ML/TF risks.

### WHAT'S NEXT?

A point to improve for the CSSF concerns the form of communications regarding the sanctions taken by it against deficient professionals. These press releases must be further expanded in order to make the information concerning the nature of the deficiencies detected more accessible to the sector as a whole, and therefore the sanctions more effective.

The CSSF must continue its efforts in the fight against the financing of terrorism and the sector must better understand this risk, based on the bases provided for, in particular, by the vertical risk assessment report on financing of terrorism adopted in 2022 by Luxembourg.

### Version française

### BACKGROUND

*Le Luxembourg a obtenu un bon résultat global. Le GAFI reconnaît la qualité du cadre existant au Luxembourg en matière de lutte contre le blanchiment de capitaux et le financement du terrorisme (LBC/FT) et émet en outre un certain nombre de recommandations afin d'améliorer l'efficacité du système dans son ensemble. Par conséquent, le Luxembourg a été placé sous contrôle régulier par le GAFI, ce qui correspond au meilleur résultat possible suite à une évaluation mutuelle.*

### WHAT'S NEW?

*Le 27 septembre 2023, le Groupe d'action financière (GAFI) a publié le rapport d'évaluation mutuelle du Luxembourg réalisé dans le cadre de son 4ème cycle d'évaluations mutuelles.*

*Plus particulièrement en ce qui concerne le secteur financier et sa surveillance par la CSSF, les analyses réalisées par les évaluateurs du GAFI concernant l'efficacité de la mise en œuvre du système luxembourgeois au titre des « résultats immédiats » numéros 3 et 4 du rapport, mettent en évidence les bons résultats pour le secteur financier, compte tenu notamment de la qualité de la surveillance LBC/FT exercée par la CSSF. D'une manière générale, le rapport du GAFI souligne que le régime luxembourgeois de surveillance LBC/FT a mûri ces dernières années, que les contrôles effectués au moment de l'octroi des licences et des enregistrements des professionnels par les superviseurs sont robustes (« contrôles d'entrée sur le marché ») et que les outils de supervision et les contrôles sur site deviennent de plus en plus ciblés. La CSSF est citée positivement par le GAFI pour son approche de surveillance LBC/FT bien développée et basée sur les risques. Celui-ci repose sur une combinaison d'un contrôle documentaire effectué à la fois par des experts en matière de LBC/FT (contrôle hors site) et d'inspections sur place par des membres du personnel qui rendent visite aux professionnels supervisés pour effectuer, entre autres, des tests détaillés (surveillance sur place). L'utilisation d'outils de suivi spécifiques, le cas échéant automatisés, a également été soulignée.*

*Le rapport souligne en outre que la CSSF a une bonne compréhension des risques de BC/FT (y compris notamment le risque associé aux infractions fiscales primaires) auxquels le secteur financier est confronté, ce qui est particulièrement important compte tenu du statut d'institution de place financière centrale au niveau régional et international.*

Au regard des efforts de prévention menés par les professionnels du secteur financier soumis à la surveillance de la CSSF, les contrôles, politiques et procédures mis en place par ces derniers sont jugés solides et sophistiqués par le rapport. Même si le rapport souligne notamment que des efforts supplémentaires doivent encore être déployés concernant les déclarations de soupçons de BC/FT à communiquer à la cellule de renseignement financier, il souligne que les professionnels ont réalisé des investissements importants en matière de conformité et conclut que ces professionnels ont généralement une compréhension solide de leurs obligations professionnelles en matière de LBC/FT et une bonne compréhension de ces risques.

## WHAT'S NEXT?

Un point à améliorer pour la CSSF concerne la forme des communications concernant les sanctions prises à l'encontre des professionnels défaillants. Ces communiqués doivent être encore enrichis afin de rendre plus accessible à l'ensemble du secteur l'information sur la nature des manquements détectés, et donc les sanctions plus efficaces. La CSSF doit poursuivre ses efforts dans la lutte contre le financement du terrorisme et le secteur doit mieux appréhender ce risque, sur la base des bases prévues notamment par le rapport d'évaluation des risques verticaux sur le financement du terrorisme adopté en 2022 par le Luxembourg.

## DIGITAL SERVICES ACT

### Luxembourg publishes draft law implementing Digital Services Act / Le Luxembourg publie un projet de loi mettant en œuvre le règlement européen sur les services numériques

On September 14 2023, the Chambre des députés du Luxembourg published a Draft law implementing the Regulation (EU) 2022/2065 of the European Parliament and of the Council of October 19 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act (DSA)) and amending the amended law of August 14 2000 on electronic commerce and the amended law of November 30 2022 on competition.

The regulation applies to all online intermediaries who offer their services on the European market whether these are established in Europe or elsewhere in the world. Online platforms allowing third parties (companies or individuals) to sell or offer products and services to end users are in scope. These are actors such as online marketplaces, services hosting or social networks. All intermediaries will now have to respect new obligations, proportionate to the nature of their services, their size, their weight and the risks and societal damage they can cause. This means that very large platforms and very large search engines – defined as those with more than 45 million of users - will be subject to stricter requirements, while very small companies with less than 50 employees and less than 10 million annual turnover will be exempt from certain obligations.

The DSA applies in two stages. First only for very large online platforms and very large search engines from August 25, 2023. 17 very large platforms and 2 very large search engines have been designated - including a very large platform

in Luxembourg (Amazon). For other intermediary services covered by the DSA, the new rules will apply 15 months after the entry into force of the regulation, i.e. February 17, 2024. On this date, States must also have authorized their coordinators for digital services.

This bill aims, firstly, to designate the coordinator for digital services ("DSC") and to set the sanctions that it may impose on the basis of the DSA. The DSA requires member states to establish procedures specific for the exercise of these powers (article 51 §6 DSA). Therefore, the various investigation and execution procedures are defined in the draft law.

The DSC will have to call on sectoral authorities to be provided with assistance during investigations, when these relate to DSA obligations relating to the area of responsibility of these authorities. It will be necessary to create a national coordination group composed of the DSC and sectoral authorities to ensure proper application of the DSA.

### Version française

Le 14 septembre 2023, la Chambre des députés du Luxembourg a publié un projet de loi mettant en œuvre le règlement (UE) 2022/2065 du Parlement européen et du Conseil du 19 octobre 2022 relatif à un marché unique des services numériques et modifiant la directive 2000/31/CE (Digital Services Act (DSA)) et modifiant la loi modifiée du 14 août 2000 relative au commerce électronique et la loi modifiée du 30 novembre 2022 relative à la concurrence.

Le règlement s'applique à tous les intermédiaires en ligne qui proposent leurs services sur le marché européen, qu'ils soient établis en Europe ou ailleurs dans le monde. Sont concernées les plateformes en ligne permettant à des tiers (entreprises ou particuliers) de vendre ou de proposer des produits et des services à des utilisateurs finaux. Il s'agit d'acteurs tels que les places de marché en ligne, les services d'hébergement ou encore les réseaux sociaux. Tous les intermédiaires devront désormais respecter de nouvelles obligations, proportionnées à la nature de leurs prestations, à leur taille, leur poids et aux risques et dommages sociétaux qu'ils peuvent occasionner. Cela signifie que les très grandes plateformes et les très grands moteurs de recherche – définis comme ceux comptant plus de 45 millions d'utilisateurs – seront soumis à des exigences plus strictes, tandis que les très petites entreprises de moins de 50 salariés et réalisant moins de 10 millions de chiffre d'affaires annuel seront exonérées de certaines obligations.

La DSA s'applique en deux étapes. D'abord uniquement pour les très grandes plateformes en ligne et les très grands moteurs de recherche à partir du 25 août 2023. 17 très grandes plateformes et 2 très grands moteurs de recherche ont été désignés - dont une très grande plateforme au Luxembourg (Amazon). Pour les autres services intermédiaires couverts par la DSA, les nouvelles règles s'appliqueront 15 mois après l'entrée en vigueur du règlement, soit le 17 février 2024. A cette date, les États devront également avoir agréé leurs coordinateurs pour les services numériques.

Ce projet de loi vise, dans un premier temps, à désigner le coordinateur des services numériques (« DSC ») et à fixer les sanctions qu'il pourra prononcer sur la base de la DSA. La DSA impose aux États membres d'établir des procédures spécifiques pour l'exercice de ces pouvoirs (article 51 §6 DSA). Ainsi, les différentes procédures d'enquête et d'exécution sont définies dans le projet de loi.

Le DSC devra faire appel aux autorités sectorielles pour être assisté lors des enquêtes, lorsque celles-ci concernent des obligations de la DSA relevantes du domaine de responsabilité de ces autorités. Il sera nécessaire de créer un groupe national de coordination composé du DSC et des autorités sectorielles pour assurer la bonne application de la DSA.

## INVESTMENT FUNDS / COLLECTIVE INVESTMENT SCHEMES (CIS) / ASSET MANAGEMENT

## **BACKGROUND**

The ALFI position paper regarding the calibration of the depositary duties as regards the monitoring of ESG investments has not been validated by any regulator. It does not diminish the responsibility of each stake-holder using it to comply with the applicable rules on investment monitoring.

On 31 May 2022, ESMA published a supervisory briefing. The content of this briefing aims to provide guidance to NCAs regarding the supervision of sustainability-related disclosures and integration of sustainability risks.

§46 states the following: "NCAs should further ensure, through appropriate actions, that all relevant information and data are provided by the UCITS management companies and AIFMs to the appointed depositary to enable it to perform effectively the relevant depositary functions. In particular, depositaries should include all ESG-related investment restrictions in the monitoring of the compliance of the instructions coming from the management company or the investment manager."

## **WHAT'S NEW?**

On September 11 2023, the Association of the Luxembourg Fund Industry (ALFI) published a Position Paper on the calibration of the depositary duties as regards the monitoring of ESG investments.

The ALFI position paper is primarily aimed at reacting at §46 of ESMA May 2022 supervisory briefing on sustainability risks and disclosures in the area of investment management, regarding depositary duties.

The depositary is performing its oversight duties on investment restrictions already in scope, in particular, as regards the carrying out of the AIFM's/Manco's instructions within the meaning of AIFMR and UCITSR. Whether an asset qualifies as an ESG related investment or as a sustainable investment, should not per se be triggering specific duties other than those that already apply. The monitoring of the sustainability risks and factors relating to a given fund is part of the duties of its IFM.

Depositaries are not in scope of SFDR, as they are not "financial market participants". The Depositary should perform the oversight on simple limits, and then if applicable, apply the procedure for complex limits when they are considered as non-simple. Where taxonomy or sustainable investment data are not available to allow quantitative ESG-related limits checks by the Depositary, the Depositary should receive appropriate data or all relevant information from the IFM.

Depositaries should include ESG-related limits monitoring as part of their due diligence on IFMs and are not responsible for challenging classification of funds as Article 6, 8 or 9 under SFDR.

Along the lines of CSSF Circular 18/697 as regards ownership verification, the depositary and the IFM should agree, on a written procedure specifying the type of transactions to be anticipated and the nature of information (and the frequency) to be provided by the IFM to the depositary to fulfil its supervision duties. Due diligence on the IFM could foresee the provision of information to the depositary:

- i. An enhanced due diligence process on the IFM should foresee the provision of ESG inclusion/exclusion criteria. The depositary due diligence will in the first-place leverage on the assessment performed by the IFM, including but not limited to IFM expertise and experience, specific risk associated to the asset class, and risk assessment of the ecosystem in the asset class service.
- ii. Opportunity to have a standard due diligence questionnaire to delineate two cases: provision or no provision of suitable data.

Such information channel would solve the case where the IFM is not able to share its ESG strategy (proprietary and confidential) with its depositary. As regards the potential alternative of public information (when available), a golden source should be privileged, for consistency purposes.

The IFM remains fully responsible for ensuring compliance with fund offering documentation. Similarly to other regulatory streams, the depositary's role is limited to ensuring that the IFM has implemented a dedicated process, e.g. for

- i. Liquidity stress testing, in line with CSSF Circular 20/752,
- ii. Management of collateral, in line with CSSF Circulars 14/592 and 16/644.

It is not part of the depositary duties to check the SFDR classification of a fund at issue (e.g. consistency of the investments with an Article 6, 8, or 9 classification, as part of the SFDR pre-contractual disclosures regime). The depositary must however be notified by the IFM of any breaches identified and the resolution of these.

## **WHAT'S NEXT?**

Generally, this document may be amended without prior notice to incorporate new material and to amend previously published material where the working group considers it appropriate. ALFI strives to update this document to the best of its endeavours but is not legally bound to do so.

## **Version française**

### **BACKGROUND**

*La prise de position d'ALFI relative au calibrage des obligations du dépositaire en matière de suivi des investissements ESG n'a pas été validée par le régulateur. Elle ne diminue en rien la responsabilité de chaque acteur qui l'utilise de respecter les règles applicables en matière de suivi des investissements.*

*Le 31 mai 2022, l'ESMA a publié un briefing prudentiel. Le contenu de cette note d'information vise à fournir des orientations aux ANC concernant la supervision des informations liées à la durabilité et l'intégration des risques en matière de durabilité.*

*L'article 46 stipule ce qui suit : « Les ANC devraient en outre veiller, par des actions appropriées, à ce que toutes les informations et données pertinentes soient fournies par les sociétés de gestion d'OPCVM et les gestionnaires de FIA ??au dépositaire désigné afin de lui permettre d'exercer efficacement les fonctions de dépositaire pertinentes. Les*

dépositaires doivent notamment intégrer toutes les restrictions d'investissement liées à l'ESG dans le contrôle du respect des instructions émanant de la société de gestion ou du gestionnaire d'investissement.

## WHAT'S NEW?

Le 11 septembre 2023, l'Association luxembourgeoise de l'industrie des fonds d'investissement (ALFI) a publié sa position sur le calibrage des devoirs du dépositaire en matière de suivi des investissements ESG.

Le document de position d'ALFI vise principalement à réagir au §46 du briefing prudentiel de l'ESMA de mai 2022 sur les risques en matière de durabilité et les informations à fournir dans le domaine de la gestion d'investissement, concernant les obligations du dépositaire.

Le dépositaire exerce ses fonctions de surveillance des restrictions d'investissement déjà en vigueur, notamment en ce qui concerne l'exécution des instructions du GFIA/Manco au sens de l'AIFMD et de la directive OPCVM. Qu'un actif soit qualifié d'investissement ESG ou d'investissement durable ne devrait pas en soi déclencher d'obligations spécifiques autres que celles qui s'appliquent déjà au dépositaire. Le suivi des risques et facteurs de durabilité relatifs à un fonds donné fait partie des missions de son GFI.

Les dépositaires ne relèvent pas du champ d'application du SFDR, car ils ne sont pas d'« acteurs des marchés financiers ». Le dépositaire doit effectuer la surveillance des limites simples, puis, le cas échéant, appliquer la procédure pour les limites complexes lorsqu'elles sont considérées comme non simples. Lorsque les données de taxonomie ou d'investissement durable ne sont pas disponibles pour permettre au dépositaire de vérifier les limites quantitatives liées aux ESG, le dépositaire doit recevoir les données appropriées ou toutes les informations pertinentes de la part du GFI. Le dépositaire doit inclure la surveillance des limites liées à l'ESG dans le cadre de leur diligence raisonnable sur les GFI et ne sont pas responsables de contester la classification des fonds selon l'article 6, 8 ou 9 du SFDR.

Selon la circulaire CSSF 18/697 en matière de vérification de la propriété, le dépositaire et le GFI doivent convenir, d'une procédure écrite précisant le type de transactions à anticiper et la nature des informations (et la fréquence) à fournir par le GFI au dépositaire pour remplir ses fonctions de surveillance. La due diligence sur le GFI pourrait prévoir la fourniture d'informations au dépositaire :

i. Un processus de due diligence renforcé au sein du GFI devrait prévoir la fourniture de critères d'inclusion/exclusion ESG. La due diligence du dépositaire s'appuiera en premier lieu sur l'évaluation effectuée par le GFI, y compris, mais sans s'y limiter, l'expertise et l'expérience du GFI, les risques spécifiques associés à la classe d'actifs et l'évaluation des risques de l'écosystème dans le service de classe d'actifs.

ii. La possibilité de disposer d'un questionnaire standard de due diligence pour délimiter deux cas : fourniture ou non fourniture de données adaptées.

Un tel canal d'information résoudrait le cas où le GFI ne serait pas en mesure de partager sa stratégie ESG (propriétaire et confidentielle) avec son dépositaire. En ce qui concerne l'alternative potentielle de l'information publique (lorsqu'elle est disponible), une source privilégiée devrait être préférée, à des fins de cohérence.

Le GFI reste entièrement responsable du respect de la documentation relative à l'offre de fonds. Selon d'autres volets réglementaires, le rôle du dépositaire se limite à garantir que le GFI a mis en œuvre un processus dédié, par ex. pour

i. Le stress test de liquidité, conformément à la circulaire CSSF 20/752,

ii. La gestion du collatéral, conformément aux circulaires CSSF 14/592 et 16/644.

Il ne fait pas partie des obligations du dépositaire de vérifier la classification SFDR d'un fonds émis (par exemple la cohérence des investissements avec une classification article 6, 8 ou 9, dans le cadre du régime d'information précontractuelle SFDR). Le dépositaire doit toutefois être informé par le GFI des éventuels manquements constatés et de la résolution de ceux-ci.

## WHAT'S NEXT?

De manière générale, ce document peut être modifié sans préavis pour incorporer de nouveaux éléments et pour modifier des éléments précédemment publiés lorsque le groupe de travail le juge approprié. L'ALFI s'efforce de mettre à jour ce document au mieux de ses moyens mais n'est pas légalement tenu de le faire.

## CSSF publishes a video on liquidity stress test for Luxembourg investment funds / La CSSF publie une vidéo sur les tests de résistance de liquidité pour les fonds d'investissement luxembourgeois

On September 18 2023, the Commission de Surveillance du secteur financier (CSSF) published a video explanation of the Working Paper on liquidity stress test for Luxembourg investment funds: the Time to Liquidation Approach.

The CSSF presents in this working paper a liquidity stress testing framework for investment funds, characterised by:

1. a time to liquidation approach, whereby a dynamic dimension is integrated in the assessment of the fund portfolio liquidity,
2. a dual impact shock, by which shocks hit both the liability side (redemption shocks as derived from a macroeconomic model and from the historical distribution of redemptions) and the asset side (application of a haircut to the liquidity of assets) and
3. a macroprudential perspective with both a contagion (via the price impact of first-round sales) and an amplification (via second-round effects of redemptions) channel.

By allowing liquidation speed to depend on the market liquidity of the assets, the time to liquidation approach allows the assessment of, more precisely than standard tiered/static approaches, the liquidity risk of funds with less liquid assets in their portfolio, such as EM and HY bond funds. More particularly, the binary "pass-or-fail" test is replaced in the framework by a view on the liquidation dynamics, enabling the assessment of, by considering the market liquidity of the assets, the time required for funds to meet pre-defined redemptions shocks. The macroprudential perspective is further supported by the contagion and amplification mechanisms embedded in the liquidation process.

Based on this framework, a liquidity stress test is applied to a sample of Luxembourg investment funds with total net assets of EUR 1.1 trillion and diversified investment policies (equity funds, bond funds, high yield (HY) bond funds, emerging market (EM) bond funds, among others). As outcomes, the CSSF shows the time

required for funds to meet the redemption and asset liquidity shocks, but also the proportion of funds, in terms of fund investment strategy and size, that can meet the shocks for a given time horizon as well as the average time to liquidate per fund investment strategy and size.

This framework, based on the time to liquidation approach, is a helpful risk management tool at individual investment fund level, but also a powerful supervisory tool for regulators, critical for those funds with less liquid assets in their portfolio, such as EM or HY bond funds. This paper also aims at contributing to the FSB (2022) goal of promoting the “use of fund-and system-level stress testing” and the “sharing of experiences among authorities on the design and use of such stress tests”.

### Version française

Le 18 septembre 2023, la Commission de Surveillance du secteur financier (CSSF) a publié une vidéo explicative du document de travail sur les tests de résistance de liquidité pour les fonds d'investissement luxembourgeois : l'approche "Time to Liquidation".

La CSSF présente dans ce document de travail un cadre des conditions stressées de liquidité pour les fonds d'investissement, caractérisé par :

1. une approche "time to liquidation", dans laquelle une dimension dynamique est intégrée dans l'évaluation de la liquidité du portefeuille du fonds,
2. un choc à double impact, par lequel les chocs frappent à la fois le côté du passif (chocs de rachat dérivés d'un modèle macroéconomique et de la distribution historique des rachats) et le côté de l'actif (application d'une coupe de liquidité des actifs) et
3. une perspective macroprudentielle avec à la fois un canal de contagion (via l'impact prix des ventes du premier tour) et un canal d'amplification (via les effets de second tour des rachats).

En permettant que la vitesse de liquidation dépende de la liquidité du marché des actifs, l'approche du temps de liquidation permet d'évaluer, plus précisément que les approches statiques/à niveaux standard, le risque de liquidité des fonds ayant des actifs moins liquides dans leur portefeuille, tels que les marchés émergents et Fonds obligataires HY. Plus particulièrement, le test binaire « réussite ou échec » est remplacé dans le cadre par une vision de la dynamique de liquidation, permettant d'évaluer, en considérant la liquidité de marché des actifs, le temps nécessaire aux fonds pour répondre aux exigences de chocs de rachats prédéfinies. La perspective macroprudentielle est en outre étayée par les mécanismes de contagion et d'amplification inhérents au processus de liquidation.

Sur la base de ce cadre, un test de résistance de liquidité est appliqué à un échantillon de fonds d'investissement luxembourgeois avec un actif net total de 1,1 billion d'euros et des politiques d'investissement diversifiées (fonds d'actions, fonds obligataires, fonds obligataires à haut rendement (HY), des fonds obligataire des marchés émergents (EM) entre autres). En guise de résultats, la CSSF indique le temps nécessaire aux fonds pour faire face aux chocs de rachat et de liquidité des actifs, mais également la proportion de fonds, en termes de stratégie d'investissement et de taille du fonds, qui peuvent faire face aux chocs sur un horizon temporel donné ainsi que les délais moyens de liquidation par stratégie et taille d'investissement du fonds.

Ce cadre, basé sur l'approche du délai de liquidation, est un outil de gestion des risques utiles au niveau des fonds d'investissement individuels, mais également un outil de surveillance pour les régulateurs, essentiel pour les fonds ayant des actifs moins liquides dans leur portefeuille, tels que les obligations émergentes ou les fonds HY. Ce document vise également à contribuer à l'objectif du FSB de promouvoir « l'utilisation de tests de résistance au niveau des fonds et des systèmes » et le « partage d'expériences entre autorités sur la conception et l'utilisation de tels tests de résistance ».

### CSSF informs on the new reporting channel for AIFMs as of November 2 2023 / La CSSF informe sur le nouveau canal de reporting pour les GFIA à compter du 2 novembre 2023

On September 22 2023, the Commission de Surveillance du secteur financier (CSSF) published new communication means for AIFM reporting as of November 2 2023.

As announced in the press, the CSSF worked in “codesign mode” with pilot entities from the industry in order to allow managers of alternative investment funds to transmit their AIFM reporting through an API solution (S3 technology).

From November 2 2023, alternative investment fund managers will therefore be able to transmit their AIFM reporting through this new solution.

A dedicated webinar will be held in October in order to present the corresponding details.

Transmission of AIFM reporting through external transmission channels will remain possible until June 30 2024.

### Version française

Le 22 septembre 2023, la Commission de Surveillance du secteur financier (CSSF) a publié de nouveaux moyens de communication pour le reporting des GFIA à compter du 2 novembre 2023.

Comme annoncé dans la presse, la CSSF a travaillé en « mode codesign » avec des entités pilotes du secteur afin de permettre aux gestionnaires de fonds d'investissement alternatifs de transmettre leur reporting AIFM via une solution API (technologie S3).

A partir du 2 novembre 2023, les GFIA pourront donc transmettre leur reporting AIFM via cette nouvelle solution.

Un webinaire dédié aura lieu en octobre afin de présenter les détails correspondants.

La transmission du reporting AIFM par des canaux de transmission externes restera possible jusqu'au 30 juin 2024.

### MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE AND REGULATION (MIFID II / MIFIR)

CSSF publishes Circular 23/840 on the ESMA Guidelines on MiFID II product governance requirements / La CSSF publie la Circulaire 23/840 relative aux lignes directrices de l'ESMA sur les exigences de gouvernance des produits MiFID II

On September 15 2023, the Commission de Surveillance du secteur financier (CSSF) published the Circular 23/840 on the application of the ESMA Guidelines on MiFID II product governance requirements.

The purpose of the Guidelines is to clarify the application of certain aspects of the MiFID II product governance requirements in order to ensure the common, uniform, and consistent application of Articles 9(3), 16(3), 16(6), 24(1) and 24(2) of MiFID II and of Articles 9 and 10 of the MiFID II Delegated Directive.

These Guidelines shall apply to investment firms and credit institutions when providing investment services or performing investment activities, and when selling or advising clients in relation to structured deposits. These Guidelines shall further apply to UCITS management companies when providing the services of portfolio management (in accordance with mandates given by investors on a discretionary, client-by-client basis) or investment advice and external alternative investment fund managers (AIFMs) when providing the services of portfolio management (in accordance with mandates given by investors on a discretionary, client-by-client basis), investment advice or reception and transmission of orders. In accordance with the exemption in Article 16a of MiFID II, the Guidelines shall not apply where financial instruments are marketed or distributed exclusively to eligible counterparties.

In complying with these guidelines, ESMA anticipates a corresponding strengthening of investor protection.

The Guidelines and this circular shall apply from October 3 2023 onwards. The previous ESMA guidelines on this topic will cease to apply on the same date.

### Version française

*Le 15 septembre 2023, la Commission de Surveillance du secteur financier (CSSF) a publié la Circulaire 23/840 relative à l'application des lignes directrices de l'ESMA sur les exigences de gouvernance des produits MiFID II.*

*L'objectif des lignes directrices est de clarifier l'application de certains aspects des exigences de gouvernance des produits sous MiFID II afin de garantir l'application commune, uniforme et cohérente des articles 9(3), 16(3), 16(6), 24(1) et 24(2) de MiFID II et des articles 9 et 10 de la Directive Déléguée MiFID II.*

*Les présentes lignes directrices s'appliquent aux entreprises d'investissement et aux établissements de crédit lorsqu'ils fournissent des services d'investissement ou exercent des activités d'investissement, ainsi que lorsqu'ils vendent ou conseillent des clients en matière de dépôts structurés. Les présentes lignes directrices s'appliquent en outre aux sociétés de gestion d'OPCVM lorsqu'elles fournissent des services de gestion de portefeuille (conformément aux mandats donnés par les investisseurs sur une base discrétionnaire, client par client) ou de conseil en investissement et aux gestionnaires externes de fonds d'investissement alternatifs (GFIA) lorsqu'ils fournissent des services de gestion de portefeuille (conformément à des mandats donnés par les investisseurs de manière discrétionnaire, client par client), de conseil en investissement ou de réception et transmission d'ordres. Conformément à l'exemption prévue à l'article 16a de MiFID II, les lignes directrices ne s'appliquent pas lorsque les instruments financiers sont commercialisés ou distribués exclusivement à des contreparties éligibles.*

*Les lignes directrices et la présente circulaire sont applicables à partir du 3 octobre 2023. Les précédentes orientations de l'ESMA à ce sujet cesseront de s'appliquer la même date.*

## SUSTAINABLE FINANCE / GREEN FINANCE

### CSSF advises on the ESMA CSA on sustainability risks and disclosures in the investment fund sector / La CSSF conseille sur la CSA de l'ESMA sur les risques et informations en matière de durabilité dans le secteur des fonds d'investissement

On September 6 2023, the Commission de Surveillance du secteur financier (CSSF) advised on the launch of the ESMA CSA on sustainability risks and disclosures in the investment fund sector.

The aim of the CSA is to investigate how UCITS Managers and AIFMs comply with the relevant provisions in the Sustainable Finance Disclosure Regulation, the Taxonomy Regulation and relevant implementing measures, including the relevant provisions in the UCITS and AIFMD implementing acts on the integration of sustainability risks. The CSA will also relate to the principles of the ESMA Supervisory Briefing on sustainability risks and disclosures in the area of investment management published in May 2022. The CSA is performed based on a common methodology developed by ESMA.

In this context, on August 29 2023 the CSSF contacted by email the Luxembourg-based UCITS Managers and AIFMs that are in scope of this CSA. The UCITS Managers and AIFMs that did not receive an email from the CSSF on August 29 2023 on this subject matter are not concerned by this exercise.

The CSA is a two-stage process where:

1. In the first stage, NCAs will request UCITS Managers and AIFMs to complete a questionnaire focusing more closely on greenwashing risks;
2. In the second stage, NCAs will request UCITS Managers and AIFMs to complete a questionnaire dedicated to the integration of sustainability risks and factors in the organisational arrangements of UCITS Managers and AIFMs and to the transparency disclosures at IFM and product level.

### Version française

*Le 6 septembre 2023, la Commission de Surveillance du secteur financier (CSSF) a donné son avis sur le lancement de la CSA de l'ESMA sur les risques et informations en matière de durabilité dans le secteur des fonds d'investissement.*

*L'objectif du CSA est d'examiner comment les gestionnaires d'OPCVM et les gestionnaires de FIA se conforment aux dispositions pertinentes du règlement sur la divulgation d'informations en matière de finance durable, du règlement sur la taxonomie et des mesures d'exécution pertinentes, y compris les dispositions pertinentes des actes d'exécution des OPCVM et des AIFM sur l'intégration des risques de durabilité. Le CSA portera également sur les principes du Supervisory Briefing de l'ESMA sur les risques et informations en matière de durabilité dans le domaine de la gestion d'investissement publié en mai 2022. Le CSA est réalisé sur la base d'une méthodologie commune développée par l'ESMA.*

*Dans ce contexte, le 29 août 2023, la CSSF a contacté par courrier électronique les gestionnaires d'OPCVM et les gestionnaires de FIA basés au Luxembourg qui relèvent du champ d'application de la présente CSA. Les gestionnaires d'OPCVM et de FIA n'ayant pas reçu de courrier électronique de la CSSF le 29 août 2023 à ce sujet ne sont pas concernés par cet exercice.*

La CSA est un processus en deux étapes où :

1. Dans un premier temps, les ANC demanderont aux gestionnaires d'OPCVM et aux gestionnaires de FIA de remplir un questionnaire plus axé sur les risques de greenwashing ;
2. Dans un deuxième temps, les ANC demanderont aux gestionnaires d'OPCVM et aux gestionnaires de FIA de remplir un questionnaire dédié à l'intégration des risques et des facteurs de durabilité dans les dispositions organisationnelles des gestionnaires d'OPCVM et de FIA et aux informations de transparence au niveau des GFI et des produits.

# SWITZERLAND

## REAL ESTATE

### AMAS increases environmental transparency in real estate funds / L'AMAS augmente la transparence environnementale des fonds immobiliers

On September 11 2023, the Asset Management Association Switzerland (AMAS) expanded its best practices for environmental transparency in real estate funds.

The environmental key figures are part of the free self-regulation of the AMAS in sustainability, which came into force on September 30 2023 and is mandatory for AMAS member institutions and other institutions that have joined. With the first publication of the environmentally relevant key figures for all Swiss real estate funds on May 31 2022, AMAS aimed to increase transparency for investors and to create comparability across the various products.

In this way, the asset management industry also creates incentives to reduce the carbon footprint of real estate funds and to take measures for better energy efficiency. As part of the AMAS self-regulation on transparency and disclosure for collective assets with sustainability relevance, the environmentally relevant key figures also serve the goal of establishing Switzerland as a leading hub for sustainable finance. To this end, AMAS has expanded the corresponding explanations in the sense of a best practice, thereby creating uniform and stronger standards for environmental transparency as well as better comparability of the corresponding key figures.

AMAS recommends that providers of Swiss real estate funds always follow the current REIDA (Real Estate Investment Data Association) CO2 report "Methodological Principles". REIDA's principles are widely supported in the Swiss real estate industry and are considered a uniform methodology for standardized data collection and comparability.

The implementation of the environmentally relevant key figures as part of the self-regulation has gained momentum in the past twelve months. For the first time, the environmentally relevant key figures of real estate portfolios must be published in all annual reports with a closing date on or after December 31 2023. Some fund management companies have already published the environmentally relevant key figures in the annual reports of their real estate funds. AMAS has taken the feedback received from this as an opportunity to supplement the provisions of May 31 2022 with a best practice. AMAS recommends the immediate application of this best practice on environmentally relevant key figures to real estate funds. From December 31 2024, the application is mandatory in all annual reports.

#### Version française

*Le 11 septembre 2023, l'Asset Management Association Switzerland (AMAS) a élargi ses meilleures pratiques en matière de transparence environnementale dans les fonds immobiliers.*

*Les chiffres clés environnementaux font partie de la libre autorégulation de l'AMAS en matière de durabilité, entrée en vigueur le 30 septembre 2023 et obligatoire pour les institutions membres de l'AMAS et les autres institutions qui l'ont adhéree. Avec la première publication, le 31 mai 2022, des chiffres clés pertinents pour l'environnement pour tous les fonds immobiliers suisses, l'AMAS entend accroître la transparence pour les investisseurs et créer une comparabilité entre les différents produits.*

*Le secteur de la gestion d'actifs incite ainsi également à réduire l'empreinte carbone des fonds immobiliers et à prendre des mesures pour une meilleure efficacité énergétique. Dans le cadre de l'autorégulation AMAS en matière de transparence et de publication des actifs collectifs présentant un intérêt pour le développement durable, les chiffres-clés pertinents pour l'environnement servent également l'objectif de faire de la Suisse une plaque tournante de la finance durable. À cette fin, l'AMAS a élargi les explications correspondantes dans le sens d'une bonne pratique, créant ainsi des normes uniformes et plus strictes en matière de transparence environnementale ainsi qu'une meilleure comparabilité des chiffres clés correspondants.*

*L'AMAS recommande aux fournisseurs de fonds immobiliers suisses de toujours suivre le rapport CO2 actuel de la REIDA (Real Estate Investment Data Association) « Principes méthodologiques ». Les principes de REIDA sont largement soutenus dans le secteur immobilier suisse et sont considérés comme une méthodologie uniforme pour la collecte et la comparabilité des données standardisées.*

*La mise en œuvre de chiffres-clés pertinents pour l'environnement dans le cadre de l'autorégulation s'est accélérée au cours des douze derniers mois. Pour la première fois, les chiffres clés environnementaux des portefeuilles immobiliers doivent être publiés dans tous les rapports annuels dont la date de clôture est le 31 décembre 2023 ou après. Certaines directions de fonds ont déjà publié les chiffres clés environnementaux dans les rapports annuels de leurs fonds immobiliers. L'AMAS a profité des retours reçus pour compléter les dispositions du 31 mai 2022 par une bonne pratique. L'AMAS recommande l'application immédiate de cette bonne pratique sur les chiffres clés pertinents pour l'environnement aux fonds immobiliers. A compter du 31 décembre 2024, l'application est obligatoire dans tous les rapports annuels.*

## SUSTAINABLE FINANCE / GREEN FINANCE

### Swiss Federal Council adopts internationally recognized outlines on sustainable corporate governance / Le Conseil fédéral suisse adopte des lignes directrices internationalement reconnues en matière de gouvernance d'entreprise durable

On September 22 2023, the Swiss Federal Council reaffirmed its previous decision to harmonise Swiss law with internationally applicable rules and outlined a draft to be sent for consultation. Among the planned measures, the threshold at which the disclosure of sustainability information will be mandatory will be reduced from 500 to 250 employees.

The popular initiative "Responsible Business - to protect people and the environment" was rejected at the ballot box on November 29 2020. Parliament's indirect counter-proposal entered into force on January 1 2022. The new provisions on the sustainable management of enterprises, focusing on the protection of people and the environment, are included in the Swiss Code of Obligations.

Large Swiss companies are now required to be transparent about some of their sectors of activity, reporting on environmental, social, personnel, human rights and anti-corruption risks. Their report must also set out the measures they have adopted in these areas (obligation to report on non-financial matters). Companies operating in the sensitive areas of child labor and minerals and metals from conflict areas must also comply with broader reporting obligations and specific due diligence. In adopting these rules, Switzerland has opted for internationally harmonized legislation.

European law on sustainable corporate management has further evolved in recent months. The new EU directive entered into force in early 2023 and is being implemented by member states. Due to their close economic ties with the EU, even small Swiss companies will be affected – directly or indirectly – by the new EU rules. For this reason in particular, the Federal Council is convinced that it is necessary to adapt Swiss law to international developments on sustainability disclosure, while taking into account its specificities.

At a discussion on September 22 2023, the Federal Council set out the outline of the draft to be sent for consultation. As in the EU, companies in Switzerland with at least 250 employees will have to report on the risks of their business activity in relation to environmental, human rights and anti-corruption issues, and the measures they have taken in these areas. This obligation currently only applies to companies with 500 or more employees. The report must also be subject to the control of an external auditor.

Unlike EU companies, companies in Switzerland will have the choice of applying either the European standard or another equivalent standard (e.g. the OECD standard) to comply with the reporting obligation. The Federal Council also foresees a further divergence from EU regulations, in that it is refraining from introducing rules applicable to third countries. In other words, foreign companies operating in Switzerland will not automatically be subject to the reporting obligation established under Swiss law. The Federal Council is expected to adopt the preliminary draft in summer 2024.

Legislative work in the EU on due diligence is well advanced. The Federal Council is currently analysing the implications of the planned directive for Swiss companies. The detailed analysis will be available towards the end of 2023.

### Version française

*Le 22 septembre 2023, le Conseil fédéral suisse a réaffirmé sa décision antérieure d'harmoniser le droit suisse avec les règles applicables au niveau international et a présenté un projet à soumettre en consultation. Parmi les mesures prévues, le seuil à partir duquel la divulgation d'informations en matière de développement durable sera obligatoire sera réduit de 500 à 250 salariés.*

*L'initiative populaire « Entreprise responsable - pour protéger les personnes et l'environnement » a été rejetée lors des urnes du 29 novembre 2020. Le contre-projet indirect du Parlement est entré en vigueur le 1er janvier 2022. Les nouvelles dispositions sur la gestion durable des entreprises, axées sur la protection des personnes et de l'environnement, sont inscrites dans le Code des obligations suisse.*

*Les grandes entreprises suisses sont désormais tenues de faire preuve de transparence sur certains de leurs secteurs d'activité, en rendant compte des risques environnementaux, sociaux, du personnel, des droits de l'homme et de la lutte contre la corruption. Leur rapport doit également détailler les mesures qu'ils ont adoptées dans ces domaines (obligation de reporting sur les matières non financières). Les entreprises opérant dans les domaines sensibles du travail des enfants et des minéraux et métaux provenant de zones de conflit doivent également se conformer à des obligations de reporting plus larges et à une diligence raisonnable spécifique. En adoptant ces règles, la Suisse a opté pour une législation harmonisée au niveau international.*

*Le droit européen sur la gestion durable des entreprises a encore évolué ces derniers mois. La nouvelle directive européenne est entrée en vigueur début 2023 et est actuellement mise en œuvre par les États membres. En raison de leurs liens économiques étroits avec l'UE, même les petites entreprises suisses seront concernées – directement ou indirectement – par les nouvelles règles européennes. C'est notamment pour cette raison que le Conseil fédéral est convaincu qu'il est nécessaire d'adapter le droit suisse aux évolutions internationales en matière d'information en matière de durabilité, tout en tenant compte de ses spécificités.*

*Lors de sa discussion le 22 septembre 2023, le Conseil fédéral a fixé les grandes lignes du projet qui sera soumis en consultation. Comme dans l'UE, les entreprises suisses d'au moins 250 salariés devront rendre compte des risques de leur activité commerciale en matière d'environnement, de droits de l'homme et de lutte contre la corruption, ainsi que des mesures qu'elles ont prises dans ces domaines. Cette obligation ne s'applique actuellement qu'aux entreprises de 500 salariés ou plus. Ce rapport doit également être soumis au contrôle d'un auditeur externe.*

*Contrairement aux entreprises de l'UE, les entreprises en Suisse auront le choix d'appliquer soit la norme européenne, soit une autre norme équivalente (par exemple la norme de l'OCDE) pour se conformer à l'obligation de déclaration. Le Conseil fédéral prévoit également une nouvelle divergence par rapport à la réglementation européenne, dans la mesure où il s'abstient d'introduire des règles applicables aux pays tiers. En d'autres termes, les sociétés étrangères opérant en Suisse ne seront pas automatiquement soumises à l'obligation de déclaration établie par le droit suisse. Le Conseil fédéral devrait adopter l'avant-projet à l'été 2024.*

*Le travail législatif au sein de l'UE sur le devoir de diligence est bien avancé. Le Conseil fédéral analyse actuellement les implications du projet de directive pour les entreprises suisses. L'analyse détaillée sera disponible vers la fin de 2023.*

# NETHERLANDS

## INVESTMENT FUNDS / COLLECTIVE INVESTMENT SCHEMES (CIS) / ASSET MANAGEMENT

### AFM advises on LMTs and correct AIFMD reporting

On September 21 2023, the Autoriteit Financiële Markten (AFM) advised on LMTs and correct AIFMD reporting via a Sector Letter.

The Netherlands Authority for the Financial Markets (AFM) calls on Dutch fund managers to have sufficient and appropriate liquidity instruments at their disposal, regardless of the type of investor. The AFM also stresses the importance of correct reporting to the AFM when using liquidity management instruments (LMTs) by alternative investment funds (AIFs). The reason for this is a study by the AFM in 2022 into the number and composition of LMTs per investment fund among all Dutch fund managers.

Fund managers have a responsibility to manage liquidity risks within the investment fund. Although most funds have 3 or more LMTs at their disposal, there are also funds that do not have a single LMT. As a result, they cannot be temporarily closed in case of acute market stress, for example. This can result in brand sales of assets, which in turn increases the stress in the market. In addition, the research shows that not all AIF funds correctly report the use of LMTs to the AFM.

The AFM and DNB reiterate their previous recommendations. More specifically, the research results require the following actions from fund managers:

- The AFM and DNB call on fund managers to regularly review their liquidity management practice and, where necessary, to make appropriate LMTs available by amending the prospectus.
- Changes to the prospectus must be notified to the AFM and to investors. The sector letter contains guidelines on how fund managers must inform the AFM about the availability and use of LMTs.
- The AFM expects fund managers of AIFs to report the activated LMTs in the AIFMD report and correct any discrepancies.

### AFM reminds of comparison map transition period expiration on October 1

On September 14 2023, the Autoriteit Financiële Markten (AFM) reminded of the expiration of the transition period for the comparison map on October 1, 2023.

The transitional period in which financial service providers must replace the service document (DVD) with the comparison card expires on October 1 2023. From this date, service providers must make the new information document available to consumers.

A page has been set up on [www.afm.nl/nl-nl/sector/themas/dienstverlening-aan-consumenten/klantrelatie/vergelijkingskaart](http://www.afm.nl/nl-nl/sector/themas/dienstverlening-aan-consumenten/klantrelatie/vergelijkingskaart) with all information about the comparison card, including examples of completed comparison cards and explanation videos. Dutch asset managers can create a comparison map in the AFM Portal; by entering all the necessary information the comparison map is created. It can be downloaded as a PDF. Then it must be published in an easily findable place on the website and/or other digital channels and be provided to (potential) clients.

# SPAIN

## ASSET MANAGEMENT ACTIVITIES

### Government publishes Consultations on Four draft Royal Decrees for the development and implementation of certain sections of the Spanish Securities and Investment Services Act

In September 2023, the Ministry of Economic Affairs and Digital Transformation published a public consultation on four draft Royal Decrees for the development and implementation of certain sections of the Spanish Securities and Investment Services Act.

#### 1) Draft Royal Decree on Financial Instruments, Admission to Negotiation, Registration of Negotiable Securities and Market Infrastructures

The Law 6/2023, of March 17, on Securities Markets and Investment Services, which repeals the revised text of the Securities Market Law, approved by Royal Legislative Decree 4/2015, of October 23, aims to technically improve, modernize and adapt the legal regime of the Spanish securities markets, to face the challenges of digitalization and seize its opportunities, improving its competitiveness.

This law systematizes and reorganizes the current regulations in order to guarantee the clarity and simplicity of the regulation of capital markets. The law is configured, therefore, as a framework norm regulating the basic elements with regard to the securities markets, the obligations and rights of the agents that participate in them and the supervision and sanction regime of the National Securities Market Commission. In line with the financial policy objectives of the law, its regulatory development has been summarized by means of royal decrees of a general nature that bring together, on the one hand, the current regulatory development and, on the other, the specific provisions that, until now, were contained in the body of the norm with the rank of law.

This Royal Decree responds to the principles of necessity, effectiveness, proportionality, legal certainty, transparency, and efficiency. With regard to the principles of necessity and effectiveness, it is one of the optimal instruments to carry out the transposition of the amendments to the MIFID II Directive, and thus comply with the obligations of the Kingdom of Spain in relation to the incorporation of rules of European law into the legal system. With regard to the principle of proportionality, the transposition of the MIFID II regulatory package certainly bears the necessary balance between providing an adequate, agile regulatory framework that favours the development and competitiveness of the financial sector, on the one hand; and guarantee investor protection, which will result in greater confidence in the financial sector and a better performance of the functions it must perform in the Spanish economy as a whole, on the other. The principle of legal certainty is reinforced, to the extent that the Royal Decree develops by regulation those issues that, due to their level of detail or their eminently technical nature, must be regulated in regulatory standards.

#### 2) Draft Royal Decree amending Royal Decree 1082/2012, of July 13, approving the Regulations for the development of Law 35/2003, of November 4, on collective investment institutions

The Royal Decree, of an amending nature, is in turn, a consequence of the modifications introduced through Law 18/2022, of September 28, on the Creation and Growth of Companies and through Law 6/2023, of March 17, on Securities Markets and Investment Services in Law 35/2003, of November 4, on Collective Investment Institutions and Law 22/2014, of November 12, regulating venture capital entities, other closed-end collective investment entities and management companies of closed-end collective investment entities, and amending Law 35/2003, of November 4, on Collective Investment Schemes. These amendments aim to introduce improvements in the legal regime of Spanish collective investments to boost their competitiveness and improve operation and adapt Spanish regulations to European Union law.

In addition, the Royal Decree transposes the regulatory changes established in Commission Delegated Directive (EU) 2021/1270 as regards to sustainability risks and sustainability factors to be taken into account in relation to undertakings for collective investment in transferable securities (UCITS). The recitals in the preamble to that directive clearly reflect its background and objectives. In March 2018, the Commission published its Action Plan 'Financing Sustainable Growth', setting out an ambitious and comprehensive strategy on sustainable finance. One of the objectives set out in the Action Plan is to reorient capital flows towards sustainable investments, in order to achieve sustainable and inclusive growth. To this end, it is necessary to clarify that management companies must take into account, within their obligations towards investors, sustainability factors. Management companies should therefore assess not only all relevant financial risks on an ongoing basis, but also all relevant sustainability risks referred to in Regulation (EU) 2019/2088 which, if materialised, are likely to have an actual or potential negative effect on the value of an investment. To ensure that internal procedures and organisational arrangements are properly implemented and observed, it is necessary to clarify that the processes, systems and internal controls of management companies should reflect sustainability risks, and to require capacity and expertise to analyse those risks.

#### 3) Draft Royal Decree developing the powers and administrative powers of the National Securities Market Commission (CNMV)

The content of this Royal Decree corresponds fundamentally to the development of powers and administrative powers of supervision that the Law attributes to the CNMV for the fulfillment of its purposes. In the first place, this royal decree includes the details of the official registers that the CNMV must establish and maintain, and that constitute an essential piece of the transparency that must guide the functioning of the securities markets. Secondly, the regulation regulates in detail the inter-administrative cooperation relationships that must guide the action of the CNMV when it exercises powers that may affect the competences of other national, European or third-country supervisory authorities. Thus, specific provisions are dedicated to cooperation relations with the Banco d'España, the supervisory authorities of other EU Member States, the European Securities and Markets Authority and the supervisory authorities of third States. An important aspect regulated in this Royal Decree is that relating to the specific provisions on supervision of investment firms. Investment firms are one of the most relevant categories of securities market financial intermediaries in terms of number and importance. Therefore, the decree provides for the exercise of powers and supervisory powers over them. To a large extent, these powers originate in European Union law, and in particular in Directive (EU) 2019/2034 on the prudential supervision of investment firms.

#### 4) Draft Royal Decree on the legal status of investment firms and other entities providing investment services

The recent Law 6/2023, of March 17, on Securities Markets and Investment Services partially incorporates into Spanish law the Directive 2019/2034/EC on the prudential supervision of investment firms. Directive 2019/2034/EC, together with the Regulation (EU) 2019/2033, establish a new prudential supervisory framework for investment firms that are not systemically important due to their size and degree of interconnectedness with other financial and economic actors.

Systemically important institutions, which meet the requirements of point (1)(b) of Article 4(1) of Regulation (EU) No 575/2013, should be authorised as a credit institution. In general, they are entities whose total value of their consolidated assets or the group of which they are part is equal to or greater than 30 billion euros. They shall be credit institutions for all purposes, supervised by the European Central Bank and shall be subject to the prudential supervision established in Regulation (EU) No 575/2013, Law 10/2014, as well as their regulatory development. Currently, the prudential regimes provided for in Regulation (EU) No 575/2013 and Directive 2013/36/EU with their respective reforms, are designed to regulate large banking groups and reflect the recommendations established for them by the Basel Committee on Banking Supervision. They therefore seek to address the common risks faced by credit institutions so as to preserve the lending capacity of these credit institutions against economic fluctuations while also protecting depositors and taxpayers from their possible failure. The new framework now transposed into national law sets requirements that are more appropriate to the economic nature and specific risks that smaller investment firms may entail. At the same time, a fairer competition framework is achieved at European Union level with effective prudential supervision and risk-adjusted costs.

The law has collected the main aspects of Directive 2019/2034/EU, but it is necessary to complete its transposition. Therefore, the fundamental objective of this Royal Decree is to finalize the said transposition and complete the regulatory development of the regime applicable to entities that provide investment services after the changes introduced in Law 6/2023 on Securities Markets and Investment Services, deepening the principles that already inspired the modification of said law. One of the novelties of the new prudential regime is the modification of the initial capital requirements. In this way, Directive 2019/2034/EC establishes harmonised requirements between service companies in order to avoid fragmentation at European Union level and regulatory arbitrage between jurisdictions. Financial advisory companies now have an initial capital of 75,000 euros. Until now the initial capital requirement is 50,000 euros or they have a civil liability insurance that allows them to face the activity of providing financial advice. However, Directive 2019/2034/EC does not allow investment firms to take out insurance as an alternative to paying up initial capital.

# UNITED KINGDOM

## CRYPTOASSET / CRYPTOCURRENCY / VIRTUAL CURRENCY

### FCA sets expectations ahead of incoming crypto marketing rules

On September 7 2023, the Financial Conduct Authority (FCA) published a press release related to the new upcoming rules regarding marketing of cryptoasset products.

The FCA has signalled that in response to industry readiness it will consider giving cryptoasset firms more time to implement certain changes, for instance a 24-hour cooling off period. Firms could be given until January 8 2024 to introduce features that require greater technical development, with the core rules still coming into effect from October 8 2023.

Firms must first apply for the flexibility which would then allow them time to make the required back-office changes successfully. The rules and the approach to implementation are aligned with the approach taken last year when the FCA introduced rules for marketing other high-risk investments.

From October 8, UK consumers will have much greater protection as cryptoasset firms' marketing must be 'clear, fair and not misleading', labelled with prominent risk warnings and must not inappropriately incentivise people to invest. These rules apply to firms wherever they are based globally and help strengthen how people are protected from the high risks associated with cryptoassets.

Anyone who continues promoting cryptoassets to UK customers past the October deadline without complying with the rules, may be committing a criminal offence punishable by an unlimited fine and/or up to 2 years imprisonment.

To further support firms make necessary improvements to their marketing, the FCA has published examples of good and poor practice on firms' preparations for the new marketing rules.

## DATA PROTECTION / GENERAL DATA PROTECTION REGULATION (GDPR) / EPRIVACY REGULATION (EPR)

### UK publishes the Data Protection (Adequacy) (United States of America) Regulations 2023

On September 21 2023, the UK published the Data Protection (Adequacy) (United States of America) Regulations 2023.

These Regulations specify the United States of America as a country which provides an adequate level of protection of personal data for certain transfers for the purposes of Part 2 of the Data Protection Act 2018 ("the 2018 Act") and the UK GDPR (defined in section 3 of the 2018 Act).

This means that personal data which will be in the scope of the EU-US Data Privacy Framework Principles can be transferred to persons in the United States of America who participate in the UK Extension to the EU-US Data Privacy Framework without the need for any specific authorisation.

"Personal data" is defined in Article 4(1) of the UK GDPR and has the same meaning in Part 2 of the 2018 Act by virtue of section 5 of that Act.

## FINANCIAL PROMOTION REGIME

### FCA publishes findings on financial promotions for high-risk investments

On September 27 2023, the Financial Conduct Authority (FCA) published findings on financial promotions for high-risk investments.

FCA outlines the findings of its review of how firms offering restricted mass market investments (RMMIs) have complied with new rules on the customer journey. FCA identifies examples of good and poor practice for the wider sector to consider and makes any necessary changes to their own practices.

These examples will be of interest to:

- firms promoting restricted mass market investments to retail consumers
- firms promoting non mass market investments to retail consumers
- firms intending to promote relevant cryptoassets to UK retail consumers when the financial promotion rules for cryptoassets come into force.

FCA expects all firms promoting RMMIs and NMMIs to consider the findings of the review for their businesses. FCA also expects firms promoting relevant cryptoassets to UK based consumers to consider these findings due to the requirements set out in PS23/6 - Financial promotion rules for cryptoassets. PS23/6 sets out how the rules for RMMIs applies to qualifying cryptoassets from October 8 2023.

FCA's strengthened financial promotion rules set a minimum baseline for firms that promote HRIs and give clear guidance on what is expected. The aim is to raise the overall standard of high risk investment promotions. The strengthened rules also support the approach of the Consumer Duty, by encouraging firms to consider for themselves whether they should go beyond this minimum standard, considering the needs of their customers, to deliver good outcomes.

## FINANCIAL SUPERVISION

### FCA publishes Handbook Notice No.112

On September 29 2023, the Financial Conduct Authority (FCA) published the Handbook Notice No.112.

On September 28 2023, the FCA Board made changes to the FCA Handbook, as set out in the instruments listed below:

- CP23/8: Multi-Occupancy Building Insurance Disclosure and other Non-Investment Insurance Contracts Related Amendments Instruments 2023 – Changes effective December 31 2023.

In summary, this instrument makes changes to the FCA Handbook to require firms to disclose product information, remuneration and the number of

alternative quotes obtained. The instrument also includes leaseholders within the definition of 'customer' used in the rules on product governance, customers' best interests and remuneration. The changes aim to increase transparency and provide greater protections to leaseholders.

- CP23/14: Investment Firms Prudential Regime (Amendment) Instrument 2023 – Changes effective September 29 2023.

In summary, this instrument makes changes to the FCA Handbook to clarify how to calculate the own funds threshold requirement and the liquid asset threshold requirement. The instrument also clarifies when a consolidated internal capital adequacy and risk assessment (ICARA) process may be required for an investment firm group and updates the ICARA questionnaire and the numbering of the MIF007 form. The changes are intended to strengthen firms' understanding of the requirements and simplify the reporting process.

- CP23/14: Technical Standards (Markets in Financial Instruments Transparency) (No2) Instrument 2023 – Changes effective April 29 2024.

In summary, this instrument makes changes to the FCA Handbook to clarify how to calculate the own funds threshold requirement and the liquid asset threshold requirement. The instrument also clarifies when a consolidated internal capital adequacy and risk assessment (ICARA) process may be required for an investment firm group and updates the ICARA questionnaire and the numbering of the MIF007 form. The changes are intended to strengthen firms' understanding of the requirements and simplify the reporting process.

- Handbook Administration (No 67) Instruments 2023 – Changes effective September 29 2023.

This instrument makes minor changes to the Glossary of definitions and SYSC 18.1 and 18.3.

### FCA publishes a letter on supervisory strategy for CFFs

On September 28 2023, the Financial Conduct Authority (FCA) published a letter on the supervisory strategy for CFFs.

Corporate finance firms (CFFs) are usually associated with transactions where capital is raised to create, develop, grow or acquire businesses, or in mergers and takeover transactions. CFFs are also likely to provide a range of ancillary services associated with the role of corporate broker.

This letter outlines the harms to consumers and markets the FCA thinks are most likely to arise from the business models of CFFs. It also sets out the FCA strategy to address these harms and its expectations of them. The CFFs portfolio consists of around 500 firms. It includes firms that predominantly advise corporate clients seeking to raise funds or execute strategic transactions. It also includes firms that offer ancillary services such as corporate broking and investment research. CFFs typically raise funds from institutional investors and treat the corporate issuer as a client and investors as a corporate finance contact.

The FCA explained that its supervisory priorities are:

- Client categorisation
- The consumer duty
- Dealing with problem firms
- and market abuse

The FCA expects firms to notify it immediately if they consider that they do not meet the requirements.

By the end of November 2023, the FCA expects firms to have discussed with their directors and Board the content of the letter and to have agreed on appropriate measures to implement.

# MONACO

## ANTI-MONEY LAUNDERING / COMBATING THE FINANCING OF TERRORISM (AML / CFT)

### Monaco publishes Sovereign Ordinance No.10.124 on Law No.1.362 of August 3 2009 on AML/CFT and the proliferation of weapons of mass destruction and corruption

On September 29 2023, Monaco published the Sovereign Ordinance No. 10.124 of September 21 2023 amending Sovereign Ordinance No. 2.318 of August 3 2009 setting the conditions for the application of Law No. 1.362 of August 3 2009 on the fight against money laundering, the financing of terrorism and the proliferation of weapons of mass destruction and corruption, amended, in the Journal de Monaco – Bulletin Officiel de la Principauté.

The changes primarily focuses on regulations for financial activities.

It introduces definitions for terms like "payment service provider", "digital assets" and alterations to terminology like replacing "payment account" with "account".

Changes address client identification for associations and foundations, as well as beneficial ownership criteria. It also covers anti-money laundering measures, including reporting mechanisms and enhanced vigilance. The role and responsibilities of the Monegasque Financial Security Authority are clarified. Additionally, conditions of good repute are outlined for individuals in financial activities.

Furthermore, adjustments are made to numerical references and terminology in several articles, along with modifications related to beneficial ownership, control, and reporting mechanisms. Overall, the amendments signify a comprehensive update to the legal framework governing financial operations.

# BRAZIL

## INVESTMENT FUNDS / COLLECTIVE INVESTMENT SCHEMES (CIS) / ASSET MANAGEMENT

### ANBIMA informs about new rules on self-regulation of funds

On September 11 2023, the Brazilian Financial and Capital Markets Association (ANBIMA) informed about new rules on self-regulation of funds.

ANBIMA published a new version of the Third Party Resources Management Code that includes rules for funds that invest abroad, expansion of sustainability rules for real estate funds and FIPs (Private Equity Investment Funds), new classification structure for real estate funds, as well as adaptation of the text to CVM Resolution 175.

The new version, which was approved at a public hearing in August this year, will be called the Code of Administration and Management of Third Party Resources.

With the new rule, the fund manager must send ANBIMA information about the foreign assets that are part of the portfolio to test influence on the investment. The submission must be made through the ANBIMA Input tool, which will still be released for testing, and should contain information such as the type of asset and issuer.

Investment Now, FIPs and real estate funds must follow the rules for sustainable identification in force for other types of funds since 2022. The standard differentiates funds that have a sustainable objective and can carry in their name the suffix IS (sustainable investment) from funds that integrate ESG (environmental, social and governance) issues into their management process.

The deadline was updated to adapt the stock to the rules for identifying risks linked to crypto assets in funds or managed portfolios that invest in the segment. The new deadline is the first amendment of the regulation from the validity of the standard, being limited until December 2024.

The public hearing raised some points of attention about the percentage of crypto assets needed for the fund to be included in the rules that regulate the sector. Given the relevance of the topic, the subject is being discussed in ANBIMA bodies.

After the consultation, ANBIMA also revised the classification of real estate funds, updating some of the nomenclatures previously used in order to better reflect the current structure of the industry.

In addition to adapting all rules to incorporate the concepts of class and subclass, which were one of the novelties of the regulator, the new text also brought the possibility of some themes gaining self-regulation. The first of these, the liquidity tools, was in public hearing until September 22 for the establishment of rules that detail the use of two mechanisms: the split of illiquid portion (side pocket) and the barriers to redemptions.

The new version of the code enters into force on October 2, along with Resolution 175. The new classification for real estate funds will take effect on April 1, 2024, and existing funds to this date will have until December 2024 to adjust.

### CVM publishes important updates to Resolution no.175 on Investment Funds Framework

On September 27 2023, the Comissão de Valores Mobiliários (CVM) published important updates to its Resolution no.175 on the investment funds framework.

The Superintendencies of Supervision of Institutional Investors (SIN) and Securitization and Agribusiness (SSE) of the Brazilian Securities and Exchange Commission (CVM) published a series of important updates in the Investment fund regulatory framework, namely:

#### 1. the Joint Circular Letter CVM/SIN/SSE 2/2023

The objective is to disclose additional interpretations of the technical areas on provisions of the general part of CVM Resolution 175, the new Regulatory Framework for Investment Funds that entered into force on 10/2/2023.

The document complements the Joint Circular Letter CVM/SIN/SSE 1/2023, released in April this year.

The document presents 20 answers to the questions received from the market, divided into the themes compensation and distribution by account and order, which has the following subtopics:

- Failure to forecast the maximum distribution rate for funds without selling effort
- Unique classes
- Limited Liability
- Hiring the Custodian/Bookkeeper Abroad
- Collection of the Performance Fee in the Class/Subclass
- Liquidity Management Tools
- Operational process of adaptation of funds to CVM Resolution 175
- Regulatory Framework for Investment Funds

#### 2. Circular Letter CVM/SSE 8/2023

The objective is to clarify the understanding of the technical area about the provisions of Normative Annex II of CVM Resolution 175, which entered into force on 10/02/2023 and deal with the registration of credit rights and the role of the administrator, manager and custodian.

The document points out that the registration of credit rights is mandatory for those in which the registrars are authorized by the Central Bank of Brazil for the registration of financial assets, which is addressed in the Resolution of the National Monetary Council 4,593. The Circular Letter also highlights that article 37 exempts the hiring of the custodian for the credit rights subject to registration.

In the context of contracting the registration entity, the technical area reinforces that the administrator must establish minimum governance standards for the relationship between the parties. In this way, it will be possible to obtain periodic reports of monitoring of credit rights, whether for the purpose of reconciliation of positions, problems with the flow of payments or profitability.

Another point presented in the document is about the absence of a minimum verification mechanism among registrars that are authorized to register the same type of credit right. According to the Circular Letter, this disqualifies the credit right as registrable, maintaining, therefore, the requirement of hiring a custodian.

The manager is responsible for verifying the backing of the rights and securities representing credit for the purpose of ascertaining the existence, integrity and ownership of the same.

In addition, with the entry into force of CVM Resolution 175, the administrator becomes responsible for the activities of article 38 of Annex II of the standard, if the credit rights are subject to registration.

The administrator may subcontract other service providers to assist in its activities. However, the hiring of third parties does not transfer the responsibility provided for in the norm to such service providers. The administrator and the manager remain responsible to the CVM.

### **3. CVM Resolution 187**

This Resolution makes specific changes to CVM Resolution 175, the regulatory framework for investment funds

The adjustments reflect requests made to the CVM by market representatives in relation to general provisions of the standard and its Normative Annexes I (FIF), II (FIDC), III (FII), IV (FIP) and XI (social security funds).

In the general part of the standard, changes have been made to the assignment and transfer of open class quotas (art. 16, VI). Deadline for assessment of the financial statements (article 71), which becomes up to 60 days after the availability of the financial statements to the quota holders. possibility for the custodian to request the administrator to convene a shareholders' meeting (article 73, paragraph 1).

Also, the Annexes were changed with specific amendments.

### **4. Circular Letter CVM/SIN 6/2023**

The document discloses the interpretations of the technical area on the provisions of Normative Annexes I, IV, V and XI of CVM Resolution 175. The document complements the Joint Circular Letters CVM/SIN/SSE 1 and 2/2023, released in April this year and this Wednesday, 27/9, respectively.

In all, the Circular Letter presents 10 answers to the questions received from the market about the annexes of Financial Investment Funds (FIF), Social Security Funds, Equity Investment Funds (FIP), Index Funds and Privatization Mutual Funds (FMP-FGTS) and Other Annexes.

The new Regulatory Framework for Investment Funds entered into force on 10/2/2023.

# INTERNATIONAL

## DERIVATIVE FINANCIAL INSTRUMENTS (DERIVATIVES)

### ISDA announces launch of an integration between ISDA Create and S&P Global Market Intelligence's Counterparty Manager service

On September 25 2023, the International Swaps and Derivative Association (ISDA) announced the launch of an integration between ISDA Create and S&P Global Market Intelligence's Counterparty Manager service, aimed at simplifying client onboarding and contract lifecycle management by allowing the end-to-end negotiation of key derivatives contracts on one platform.

Counterparty Manager allows users to exchange information when opening a trading relationship and includes ISDA Amend, an online tool that enables market participants to modify multiple ISDA Master Agreements and share regulatory representations with counterparties. The integration means firms can now leverage ISDA Create's functionality to draft, negotiate and execute ISDA Master Agreements and other key derivatives documents directly within Counterparty Manager – allowing institutions to access the details of all their contractual relationships in a digital form from a single location.

The launch follows a successful trial phase involving select banks and asset managers that leveraged ISDA Create via Counterparty Manager to amend ISDA documentation. ISDA Create is a module of CreateiQ, a contract negotiation platform developed by Linklaters. The integration with Counterparty Manager covers all modules on the CreateiQ platform, incorporating other capital markets contracts.

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