

# New CSSF Circular on NAV Calculation Error and Other Breaches

On 28 March 2024, Luxembourg's financial regulator, the *Commission de Surveillance du Secteur Financier* ("CSSF") published a new circular ([Circular CSSF 24/856](#), the "Circular") for undertakings for collective investment subject to supervision by the CSSF ("UCIs") and investment management professionals operating in Luxembourg. The Circular details the guidelines to be observed in the event of errors in the management of such UCIs.

More specifically, these guidelines relate to errors in the calculation of the net asset value ("NAV") of a UCI, breaches of the investment rules applicable to UCIs as well as other errors at the level of a UCI as stipulated in the Circular.

The Circular repeals CSSF Circular 02/77 on the protection of investors in case of NAV calculation error and correction of the consequences resulting from the breach of the investment rules applicable to UCIs ("CSSF Circular 02/77").

Further to the regulatory changes since the issuance of CSSF Circular 02/77 and the developments in the supervision of UCIs and industry practices, the Circular provides much

more detail in relation to the guidelines to be followed, compared to the existing CSSF Circular 02/77.

## Scope

This Circular applies to all UCIs subject to supervision by the CSSF, i.e. UCITS<sup>1</sup>, Part II UCIs<sup>2</sup>, SIFs<sup>3</sup> and SICARs<sup>4</sup>, and to the following UCIs which have not adopted one of the aforementioned UCI legal regimes:

- ELTIFs<sup>5</sup> (except for Chapter 8 of the Circular relating to the intervention of the statutory auditor);
- EuVECA<sup>6</sup> and EuSEFs<sup>7</sup>;
- which are managed by an investment fund manager ("IFM") established in Luxembourg (except for Chapter 8 of the Circular);
- which are managed by an IFM not established in Luxembourg, in relation to non-compliance with the rules set out in Article 5 of the EuVECA and EuSEF Regulations as well as to errors / breaches of the constitutional documents of Luxembourg EuVECA and EuSEFs (except for Chapter 8 of the Circular); or

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<sup>1</sup> Undertakings for collective investment subject to the law of 17 December 2010 on undertakings for collective investment, as amended (the "2010 Law").

<sup>2</sup> Undertakings for collective investment subject to Part II of the 2010 Law.

<sup>3</sup> Specialised investment funds subject to the law of 13 February 2007 on specialised investment funds, as amended.

<sup>4</sup> Investment companies in risk capital subject to the law of 15 June 2004 relating to the investment company in risk capital (SICAR), as amended.

<sup>5</sup> European Long Term Investment Funds subject to Regulation (EU) 2015/760, as amended.

<sup>6</sup> European venture capital funds subject to Regulation (EU) No 345/2013, as amended.

<sup>7</sup> European social entrepreneurship funds subject to Regulation (EU) No 346/2013.

- which are managed by a registered IFM, in relation to errors / breaches of the requirements of the EuVECA and EuSEF Regulations (except for Chapter 8 of the Circular).

## Responsible Persons

The Circular now clarifies the roles and respective responsibilities of those responsible for the UCI's management and operations. According to the Circular, the directors or managers of the UCIs or the directors or managers of the IFMs under the supervision of the directors or managers of the UCIs (if applicable) are responsible for ensuring compliance with the guidelines of the Circular (hereinafter referred to as the "management of the UCI" or "management of the IFM").

In this respect, the management of the UCIs or the management of the IFMs under the supervision of the management of the UCIs (if applicable) must also ensure that the relationships with the various service providers involved in the operation of the UCIs are covered by adequate contractual arrangements.

IFMs managing Luxembourg UCIs on a cross-border basis will also have to comply with the provisions of the Circular.

## UCI Administrators and Depositaries

### *UCI Administrators*

In accordance with the Circular, the UCI Administrator's role is threefold:

- it must establish, implement and maintain procedures to detect, assess and, where applicable, notify the UCI or its IFM, as the case may be, without delay, of errors / breaches;
- it must record, monitor and, where applicable, correct errors / breaches after

approval by the UCI or its IFM, if applicable; and

- in case of errors / breaches, it must draw up a remediation plan to be approved by the UCI or its IFM, if applicable, and implement the related corrective measures and ensure that appropriate follow up is carried out.

### *Depositaries*

When errors / breaches are detected by the depositary, it is required to inform the UCI or the IFM, if applicable. In the event that the depositary finds that the management of UCI or the IFM do not take appropriate action, the depositary is required to notify the CSSF.

## NAV Calculation Errors

The Circular does not define NAV calculation errors differently from CSSF Circular 02/77, however it specifies that the factors or circumstances that may lead to NAV calculation errors may not only occur at the level of the entity that calculates the NAV, i.e. the UCI administrator, but also at other levels of the UCI's organisation (e.g. management of the UCI, IFM, external valuers, etc.).

While the materiality thresholds in the Circular applicable to money market funds within the meaning of Regulation (EU) 2017/1131 on money market funds ("MMF"), UCITS and Part II UCIs (including ELTIFs) that can be distributed to retail investors remain the same as those previously provided for under CSSF Circular 02/77, the Circular now specifies that the materiality thresholds applicable to Part II UCIs (including ELTIFs) that are reserved to professional investors, SIFs, SICARs, EuVECAs and EuSEFs are to be determined by the management of the UCI in consultation with the IFM (but may not exceed 5% of the relevant UCI's NAV).

Any NAV calculation error which is above an applicable materiality threshold, is a significant NAV calculation error for purposes of the Circular.

In addition to the materiality thresholds and elements on which the assessment of the materiality of a NAV calculation error is to be determined, the Circular also outlines a detailed procedure for the correction and indemnification of significant NAV calculation errors and a methodology for the determination of the financial impact of significant NAV errors.

## Breach of the Investment Rules

The Circular codifies the market practice regarding handling of breaches of investment rules and reiterates that adequate controls must be in place at the UCI or IFM level, if applicable. The Circular further clarifies that for the purpose of preventing and / or identifying breaches to the investment rules, robust technical and organisational solutions which are proportionate to the nature, scale, complexity and risks of breaches of the investment rules related to the activities of a UCI must be put in place.

The Circular further confirms the importance of pre-trade and post-trade controls and specifies that the latter should be used to identify whether a breach was of an "active" or "passive" nature.

Passive breaches do not fall within the scope of the corrective measures described in the Circular and therefore do not require notification to the CSSF.

The Circular specifies in this respect that:

- the failure to comply with the investment rules applicable to UCIs is passive if it occurs beyond the control of the UCI or

following the exercise of subscription rights;

- voluntary acts / transactions, including investment or divestment decisions at the level of a UCI leading to non-compliance with a given investment rule are active; and
- the absence of acts / operations or decisions at the level of a UCI where a breach of an investment rule was foreseeable and avoidable is also active.

The Circular further provides specific examples of a number of corrective measures that may be undertaken when breaches to the investment rules have been identified.

The assessment of the impact that a breach of the investment rules may have on the UCI and its investors and the methodology used for such assessment must be determined in advance at the incorporation / launch of the UCI and reflected in its internal policies, i.e. either the accounting method or the economical method, both as further described in the Circular.

## Other Errors

The Circular also details the following four further types of errors which a UCI may encounter and which result in the UCI being in breach of the applicable regulations, its constitutive documents and / or offering document:

- (i) incorrect application of swing pricing;
- (ii) payment of costs / fees at UCI level not complying with the UCI's constitutive documents and / or prospectus;
- (iii) incorrect application of rules relating to cut offs for subscriptions and redemptions; and
- (iv) investments allocation errors.

The Circular also specifies that this list of additional errors is not exhaustive.

## **New Rules around Indemnification of Investors, Notification to Competent Authorities and Involvement of the Statutory Auditor**

The Circular introduces new rules around investor indemnification and notification to the CSSF and to other authorities of the countries where a relevant Luxembourg UCI is marketed in case of NAV calculation errors.

The Circular also outlines the statutory auditor's involvement and role, namely with regard to the establishment of separate reports on NAV calculation errors and special reports in certain circumstances.

### **Timing**

The Circular will enter into force as from 1 January 2025. UCIs will be required to apply the rules contained in the Circular in relation to any error / breach which has been detected as from 1 January 2025. For errors / breaches detected between the date of publication of the Circular and 1 January 2025, UCIs must continue to apply the guidelines contained in CSSF Circular 02/77.

For further information, please reach out to your usual Maples Group contact or any of the contacts below.

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