

If you cannot see this email, please [click here](#).



Luxembourg Newsflash - 3 March 2024

New CSSF Circular on NAV errors, non-compliance with investment rules and other errors concerning UCIs

On 29 March 2024, the CSSF published circular CSSF 24/856 on the investor protection in case of a nav calculation error, a non-compliance with investment rules and other errors at the level of a UCI circular.

Reading time: 6 minutes, 44 seconds

On 29 March 2024, the *Commission de Surveillance du Secteur Financier* (CSSF) published Circular CSSF 24/856 on the investor protection in case of a NAV calculation error, a non-compliance with investment rules and other errors at the level of a UCI (Circular).

In this long-awaited revamp of its circular guidance from 2002, the CSSF (i) updates the scope of the Circular to take into account the various fund structures put in place since 2002 (for example, SIFs and SICARs), (ii) takes the opportunity to set out the responsibilities of the various parties involved, (iii) specifies the rules applicable in the event of other errors concerning UCIs, and (iv) clarifies the rules concerning NAV errors and non-compliance with investment rules. The Circular reflects general legal and regulatory developments, administrative practice and evolutions in the fund industry, codifying these in a single circular.

1. Scope of the Circular

The major innovation is that the Circular now formally lists both SIFs and SICARs, in addition to UCITS and Part II Funds. Furthermore, the scope of the Circular also encompasses UCITS, Part II Funds and SIFs that qualify as money market funds (MMF) and Part II Funds, SIFs and SICARs that qualify as ELTIFs, EuVECA or EuSEF.

In principle, unregulated alternative investment funds, including RAIFs, do not fall under the scope of the Circular. However, some provisions of the Circular will apply where unregulated alternative investment funds, including RAIFs, qualify as MMF, ELTIFs, EuVECA or EuSEF and the CSSF is the competent supervisory authority according to the relevant regulations.

2. The various stakeholders concerned

The Circular targets the following stakeholders in particular: (i) the governing body of the UCI or IFM, such as the board of directors, (ii) the IFM (whether or not based in Luxembourg), (iii) the UCI administrator, and (iv) the depositary.

3. NAV calculation errors

As already provided for under Circular CSSF 02/77, only NAV errors which have a significant impact on the NAV and where the percentage compared to the NAV reaches or exceeds a certain threshold (tolerance threshold) will have to be reported to the CSSF and corrected in line with the provisions of chapter 4 of the Circular. Where the UCI is a closed-ended UCI, only certain rules of chapter 4 apply.

These thresholds vary according to the type of UCI and its investment policy:

- **UCI qualifying as MMF:** 0.20% of the NAV (formerly 0.25%)
- **UCITS (except MMF), Part II Funds (except MMF) and ELTIFs offering shares to retail investors:**
 - Bond UCIs: 0.50% of the NAV (unchanged)
 - Mixed UCIs: 0.50% of the NAV (unchanged)
 - UCIs in shares and other financial assets: 1.00% of the NAV (unchanged)
 - UCIs investing primarily in other assets: 1.00% of the NAV (new)*

* If the relevant UCI is either a Part II Fund or an ELTIF investing primarily in non-listed shares or in real estate, for example, a higher threshold may be applied provided certain conditions are met.

• **Part II Funds and ELTIFs reserved to qualified or professional investors, as well as SIFs, SICARs, EuVECA and EuSEF (except MMF):** the tolerance threshold is determined by the UCI's governing body, together with the IFM (if applicable), pursuant to an analysis carried out in compliance with specific criteria and which must be properly documented. The above thresholds may serve as a guide, but no tolerance threshold may exceed 5% of the NAV, by default.

UCIs are free to set lower thresholds, provided these are applied on a consistent and continuous basis. Nevertheless, UCIs should continue to verify whether the foreign supervisory authorities of the countries in which they are marketed impose stricter thresholds. If this is the case, UCIs have to comply with the applicable thresholds.

4. Non-compliance with investment rules

Investment rules, such as rules on eligible assets, portfolio management techniques and investment restrictions set out by various laws, rules, circulars and regulations applicable to UCIs, including the EU regulations, are now listed in the Circular. Failure to comply with any of these will be considered by the CSSF to be an active breach that needs to be reported/indemnified, as relevant. Specific rules will apply for passive breaches in the case of funds, such as SIFs, Part II Funds or SICARs, investing in less liquid or illiquid assets and irrespective whether such funds are open- or closed-ended. As a general rule, passive breaches do not need to be reported to the CSSF. The Circular reiterates the exceptions to this rule, for example, ramp-up periods during which portfolios are constructed, but also that compliance with these rules is mandatory until the UCI has been dissolved or put into liquidation.

It is important to keep in mind that no materiality threshold applies to this type of non-compliance.

5. Other errors concerning the UCI

While NAV calculation errors and/or non-compliance with investment rules often trigger the application of the rules outlined in the Circular, other errors may occur which also have a negative impact on the UCI

and/or its investors. This could be the case in the following circumstances: (i) incorrect application of the swing pricing mechanism, (ii) error in the payment of fees and costs, (iii) incorrect application of cut-offs, and (iv) erroneous allocation of investments.

6. Indemnification – Reimbursement

The Circular provides clarification if investors have subscribed using financial intermediaries. In this case, the UCI should ensure that, in principle, the final investors are paid the relevant indemnities. However, where this is not feasible, the UCI must clearly disclose in its prospectus that the rights of the final investors, having subscribed through financial intermediaries, may be impacted. The *de minimis* rule and the option to allocate additional shares to the shareholders have been retained in the Circular.

7. Role of the auditor

In the context of preparing the separate report in accordance with Circular CSSF 21/790, the auditor will carry out spot checks among the errors/non-compliance issues that have been presented to it, to ensure that the provisions of the Circular have been observed. However, an additional control will be required by the CSSF where (i) the error or non-compliance relates to a UCITS or Part II Fund and (ii) the total amount of indemnification exceeds EUR 50,000 or the amount to be paid to one single investor exceeds EUR 5,000. In this case, the auditor will also verify, for example, whether the indemnification rules have been complied with in cases where there have been financial intermediaries and whether the *de minimis* rule has been correctly applied.

8. Notifications

The CSSF must be notified of any error/non-compliance as soon as possible using a standardised notification form available on the CSSF's website. Notification must take place within 4 to 8 weeks after the error was detected. Where the UCI is marketed in other countries, the relevant competent authorities must be informed of the error/non-compliance in accordance with local rules.

9. Repeal OF circular cssf 02/77

Circular CSSF 24/856 repeals Circular CSSF 02/77 on the date it enters into force.

10. Entry into force and transitional provisions

- The Circular will enter into force on **1 January 2025**.
- The rules of Circular CSSF 02/77 continue to apply to any errors and non-compliance that occur between the date of release of the Circular and 1 January 2025.
- Where relevant, UCITS, Part II Funds, MMFs and ELTIFs should amend their prospectuses **at their next update** to add, if necessary, a disclosure that the rights of the final investors, having subscribed through financial intermediaries, may be impacted in cases of indemnification. This also applies to SIFs and SICARs that **offer shares to new investors**.
- Funds that are neither required to update nor to issue a prospectus, as well as those that have not yet updated their prospectus prior to the entry into force of the Circular, need to inform their investors through their official communication channels referred to in the constitutive documents and/or prospectus.
- The new rules of Chapter 8 of Circular CSSF 24/856 apply for fiscal years closing from 1 January 2025. For earlier closures, the rules of Circular CSSF 21/790 and Circular CSSF 02/77 continue to apply.

How we can help

Arendt's Fund Formation Team is available should you require more detailed information and/or to help you prepare for the entry into force of the requirements under the Circular CSSF 24/856.

To access Circular CSSF 24/856 (currently only available in French), [click here_](#)



Arendt & Medernach SA
Registered with the Luxembourg Bar
RCS Luxembourg B 186371

[arendt.com](https://www.arendt.com)

41A avenue JF Kennedy
L-2082 Luxembourg
T +352 40 78 78 1

This publication is intended to provide information on recent developments and does not cover every aspect of the topics with which it deals. It was not designed to provide legal or other advice and it does not substitute for the consultation with legal counsel before any actual undertakings.



I am informed that I can object to the processing of my personal data for marketing purposes at any time either by e-mail addressed to unsubscribe@arendt.com or by clicking [here](#).

[Update e-mails preferences](#) | [Forward this e-mail](#)