

Performance fees: ESMA clarifications and mandatory CSSF declaration for UCITS and regulated AIFs

1. ESMA clarifications

On 28 May 2021 and 16 July 2021, new questions on performance fees were added to the ESMA Q&As on [UCITS](#) and on [AIFMs](#), to complete the [Guidelines on performance fees in UCITS and certain types of AIFs](#) ("Guidelines") which ESMA had published on 5 December 2020 and in respect of which the CSSF confirmed, by way of its [Circular 20/764](#), the integration of those Guidelines into its administrative and regulatory practices.

The clarifications provided by ESMA through its Q&A in May and July 2021 notably concern:

- the set-up of the reference period for performance fee models based on a benchmark index;
- the set-up of the reference period in case of a merger where the receiving UCITS/AIF is a newly established fund with no performance history and is in effect a continuation of the merging UCITS/AIF;
- the application of the Guidelines in the case of delegation of the portfolio management function to different delegated portfolio managers within the same sub-fund of a UCITS; and
- the crystallisation of performance fees in case of creation of a new sub-fund/share class in an existing umbrella UCITS or AIF in the course of its financial year or in case of creation of a new UCITS/AIF.

2. Mandatory CSSF declaration for UCITS and regulated AIFs

By means of a [press release](#) dated 22 September 2021, the CSSF announces a new requirement for a performance fee declaration to be made as from 30 September 2021 on eDesk by IFMs for the Luxembourg regulated UCITS and AIFs they manage.

The declaration is to be made by Investment Fund Managers (“IFM”) with respect to UCITS and AIFs, including their sub-funds (“Funds”) by means of completing a predefined form on eDesk. For the avoidance of any doubt, the form also needs to be completed for AIFs which are out of scope of the ESMA Guidelines on performance fees applicable to UCITS and certain types of AIFs in order to declare that they are out of scope.

The form will be available as from 30 September 2021 for all Funds whose financial year is ending between July 2021 and December 2021. As from January 2022, the form will be requested for Funds whose financial year is ending between January 2022 and June 2022. The deadline for submission of the initial declaration will be at the latest before the corresponding closing date of each fund as further specified in the IFM’s performance fee eDesk dashboard.

The form must also be completed in respect of Funds and sub-funds that are not subject to a performance fee. Funds that have not yet been launched since having been approved by the CSSF, or that became inactive following the full redemption of their shares or units (and then await reactivation) shall also make the declaration.

After the initial declaration and in case of changes (such as for example introduction of a performance fee for the first time after that date or changes in performance fee models), the IFM will also be responsible to ensure that performance fee declarations shall be kept up to date. According to the press release, a specific update function will be made available under the new eDesk module to send electronically any such changes in parallel to the transmission of the modified prospectus.

The Performance Fee declaration as well as subsequent updates must be completed and submitted by an eDesk user linked to the IFM. Delegations will in principle be possible.

For any further information please contact us or visit our website at www.elvingerhoss.lu.

The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations.

We undertake no responsibility to notify any change in law or practice after the date of this newsletter.