



## Circular CSSF 24/856

Protection of investors in case of an NAV calculation error, an instance of non-compliance with the investment rules and other errors at UCI level

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### **Protection of investors in case of an NAV calculation error, an instance of non-compliance with the investment rules and other errors at UCI level**

To all undertakings for collective investment subject to the CSSF's supervision, to all investment fund managers and to those involved in the functioning and control of these undertakings.

Luxembourg, 28 March 2024

Ladies and Gentlemen,

The purpose of this Circular is to set out the guidelines to be followed by collective management professionals that operate in Luxembourg in case of errors in the administration or management of undertakings for collective investment subject to the CSSF's supervision (the "UCIs").

More specifically, these guidelines cover errors in the calculation of the net asset value ("NAV") of a UCI, instances of non-compliance with the investment rules applicable to UCIs as well as other errors at UCI level, as specified in this Circular.

In accordance with the provisions laid down in Chapter 10, this Circular repeals Circular CSSF 02/77 on the protection of investors in case of NAV calculation error and correction of the consequences resulting from non-compliance with the investment rules applicable to undertakings for collective investment.

Following the regulatory changes since the issue of Circular CSSF 02/77 as well as the developments in the supervision of UCIs by the CSSF and in the industry practices, this Circular seeks to specify its scope of application and to provide more details with regard to the guidelines to be followed in case of NAV calculation errors and instances of non-compliance with the investment rules. Furthermore, this Circular also specifies the guidelines to be followed in case of other errors which may occur at UCI level.

It is the responsibility of the UCI *dirigeants*, investment fund managers and those involved in the functioning and control of UCIs to ensure that any errors covered by this Circular are treated in accordance with the guidelines of this Circular. Compliance with these guidelines is important in order to protect the interests of UCIs and/or aggrieved investors and to maintain the trust of investors in collective management in general and of professionals carrying out their operations in Luxembourg in particular.

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# 1. Definitions and abbreviations

For the purposes of this Circular, the following definitions apply:

"ESMA" means the European Securities and Markets Authority (ESMA).

"UCI administrator" means an entity, as defined in Circular CSSF 22/811, which acts as UCI administrator and may perform one, two or the three main function(s) that (is) are part of the UCI administration activity, i.e. (i) the registrar function, (ii) the NAV calculation and accounting function, and (iii) the client communication function.

"Circular CSSF 21/790" means the circular on the practical rules concerning the self-assessment questionnaire to be submitted annually by Luxembourg undertakings for collective investment and the engagement of the *réviseurs d'entreprises agréés* (approved statutory auditors) of Luxembourg undertakings for collective investment and the practical rules concerning the management letter and the separate report to be drawn up annually.

"Circular CSSF 22/811" means the circular relating to the authorisation and organisation of entities acting as UCI administrator.

"AIFMD" means Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers, transposed into Luxembourg law by the AIFM Law.

"UCI dirigeants" means the *dirigeants* as referred to in Article 129(5) of the UCI Law, Article 42(3) of the SIF Law and Article 12(3) of the SICAR Law, or the *dirigeants* of companies as referred to in the Law on Commercial Companies.

"IFM dirigeants" means the management body within the meaning of Article 1(26a) of the UCI Law or, where appropriate, within the meaning of Article 2(1)(s) of Directive 2009/65/EC, or the governing body within the meaning of Article 1 of Regulation 231/2013, respectively.

"Constitutive documents" means the management regulations, articles of incorporation or other constitutive documents to which the UCI Law, the SIF Law, the SICAR Law, the MMFR, the ELTIF Regulation, the EuVECA Regulation and the EuSEF Regulation refer.

"ELTIF" means a European long-term investment fund within the meaning of the ELTIF Regulation.

"EuSEF" means a European social entrepreneurship fund within the meaning of the EuSEF Regulation.

"EuVECA" means a European venture capital fund within the meaning of the EuVECA Regulation.

"Error/non-compliance" means a significant NAV calculation error within the meaning of Chapter 4 of this Circular, an instance of active non-compliance with the investment rules applicable to UCIs within the meaning of Chapter 5 of this Circular and any other error, within the meaning of Chapter 6 of this Circular, occurring at UCI level.

"FCP" means a *fonds commun de placement* - common fund.

"AIF" means an alternative investment fund in accordance with Article 1(39) of the AIFM Law.

"RAIF" means a reserved alternative investment fund subject to the RAIF Law.

"SIF" means a specialised investment fund subject to the SIF Law.

"Investment fund manager" or "IFM" means

- a management company incorporated under Luxembourg law and subject to Chapter 15 of the UCI Law;

- a management company incorporated under Luxembourg law and subject to Article 125-2 of Chapter 16 of the UCI Law;
- a Luxembourg branch of an IFM subject to Chapter 17 of the UCI Law;
- an investment company which has not designated a management company within the meaning of Article 27 of the UCI Law;
- an alternative investment fund manager authorised under Chapter 2 of the AIFM Law;
- an internally managed alternative investment fund within the meaning of Article 4(1)(b) of the AIFM Law;
- a management company authorised by the competent authorities of another Member State under Directive 2009/65/EC which pursues, in Luxembourg, in accordance with Article 119 of the UCI Law, the activity for which it has been authorised, either by the establishment of a branch or under the freedom to provide services; and
- an alternative investment fund manager authorised by the competent authorities of another Member State in accordance with the AIFMD which manages in accordance with Article 33 of the AIFM Law alternative investment funds established in Luxembourg either directly or by setting up a branch there.

“Registered alternative investment fund manager” or “registered AIFM” means an alternative investment fund manager as referred to in Article 3(2) of the AIFM Law.

“Authorised alternative investment fund manager” or “AIFM” means

- an alternative investment fund manager authorised under Chapter 2 of the AIFM Law;
- an internally managed alternative investment fund within the meaning of Article 4(1)(b) of the AIFM Law;
- an alternative investment fund manager authorised by the competent authorities of another Member State in accordance with the AIFMD which manages in accordance with Article 33 of the AIFM Law alternative investment funds established in Luxembourg either directly or by setting up a branch there.

“Well-informed investor” means an investor as defined by the SIF Law and the SICAR Law.

“Professional investor” means an investor which is considered to be a professional client, or which may, on request, be treated as a professional client in accordance with Annex II to Directive 2014/65/EU on markets in financial instruments.

“Law on Commercial Companies” means the Law of 10 August 1915 on commercial companies, as amended.

“AIFM Law” means the Law of 12 July 2013 on alternative investment fund managers, as amended.

“RAIF Law” means the Law of 23 July 2016 on reserved alternative investment funds, as amended.

“SIF Law” means the Law of 13 February 2007 relating to specialised investment funds, as amended.

“UCI Law” means the Law of 17 December 2010 relating to undertakings for collective investment, as amended.

“OER Law” means the Law of 16 July 2019 on the operationalisation of European regulations (including the MMFR, the ELTIF Regulation, the EuVECA Regulation and the EuSEF Regulation) in the area of financial services, as amended.

“SICAR Law” means the Law of 15 June 2004 relating to the investment company in risk capital (SICAR), as amended.

“MMF” means a money market fund within the meaning of Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds.

“UCIs” means UCIs that fall within the scope of application of this Circular as provided for in Chapter 2 of this Circular and that may be a UCITS, a UCI Part II, a SIF, a SICAR, an MMF, an ELTIF, an EuVECA and an EuSEF;

“Closed-ended UCI” means a UCI that is not an open-ended UCI. An open-ended UCI is a UCI whose units are, at the request of any unit-holder, repurchased or redeemed before the beginning of its liquidation or dissolution phase, directly or indirectly, out of the UCI’s assets and in accordance with the arrangements and frequency defined in the constitutive documents and/or the UCI’s prospectus. UCITS and MMFs cannot be closed-ended UCIs.

“UCI Part II” means an undertaking for collective investment subject to Part II of the UCI Law.

“UCITS” means an undertaking for collective investment in transferable securities subject to Part I of the UCI Law.

“Units of UCIs” means shares, securities or partnership interests issued by a UCI.

“Prospectus” means for a UCITS and a UCI Part II, the prospectus issued in accordance with Article 150 of the UCI Law, for a SIF, the offering document issued in accordance with Article 52 of the SIF Law, for a SICAR, the prospectus issued in accordance with Article 23 of the SICAR Law, for an MMF, the prospectus to which the provisions of the MMFR refer, for an ELTIF, the prospectus as referred to in Article 23 of the ELTIF Regulation.

“REA” means a *réviseur d’entreprises agréé* (approved statutory auditor) to which notably the UCI Law, the SIF Law and the SICAR Law refer.

“Regulation 231/2013” means Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision, as amended.

“ELTIF Regulation” means Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds, as amended.

“EuSEF Regulation” means Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds, as amended.

“EuVECA Regulation” means Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds, as amended.

“MMFR” means Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds, as amended.

“GDR” means the Grand-ducal Regulation of 8 February 2008 relating to certain definitions of the Law of 20 December 2002 relating to undertakings for collective investment, as amended, and transposing Commission Directive 2007/16/EC of 19 March 2007 implementing Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions.

“SICAR” means an investment company in risk capital governed by the SICAR Law.

“SICAV” means an investment company with variable capital.

“NAV” means the net asset value as calculated regularly in accordance with the rules set out in the law, the constitutive documents and/or the prospectus applicable to a UCI.

## 2. Scope of application and legal basis

### 2.1. Scope of application

1. This Circular is applicable, in its entirety, to the following UCIs:

- UCITS;
- UCIs Part II;
- SIFs;
- SICARs.

As a consequence, the scope of application, as laid down in this point, includes:

- UCITS, UCIs Part II or SIFs which are MMFs;
- UCIs Part II, SIFs or SICARs which are ELTIFs, EuVECAs or EuSEFs.

2. This Circular applies in its entirety, except for Chapter 8 “Intervention of the *réviseur d’entreprises agréé* (approved statutory auditor)”, also to Luxembourg ELTIFs which are not UCIs Part II, SIFs or SICARs (i.e. Luxembourg AIFs which have not been authorised by the CSSF, including RAIFs) for which the CSSF is the competent authority pursuant to Article 2(10) of the ELTIF Regulation and Article 6 of the OER Law.

3. This Circular applies in its entirety, except for Chapter 8 “Intervention of the *réviseur d’entreprises agréé* (approved statutory auditor)”, also to MMFs which are not UCITS, UCIs Part II or SIFs for which the CSSF is the competent authority pursuant to Article 2(17) of the MMFR and Article 11 of the OER Law.

4. For Luxembourg EuVECAs and EuSEFs which are not UCIs Part II, SIFs or SICARs (i.e. Luxembourg AIFs which have not been authorised by the CSSF, including RAIFs), this Circular applies as per points (i), (ii) and (iii) below, pursuant to Article 3(1)(m) and Article 18 of the EuVECA Regulation, or Article 3(1)(m) and Article 19 of the EuSEF Regulation, respectively, and to Article 1 of the OER Law:

i) This Circular applies in its entirety, except for Chapter 8 “Intervention of the *réviseur d’entreprises agréé* (approved statutory auditor)”, to Luxembourg EuVECAs and EuSEFs, which are managed by an IFM established in Luxembourg, as referred to in Article 2(2) of the EuVECA and EuSEF Regulations.

ii) This Circular applies to instances of non-compliance with the rules laid down in Article 5 of the EuVECA and EuSEF Regulations as well as to the errors/instances of non-compliance covered by this Circular, which correspond to instances of non-compliance of with obligations set out in the constitutive documents of Luxembourg EuVECAs and EuSEFs managed by an IFM that is not established in Luxembourg, as referred to in Article 2(2) of the EuVECA and EuSEF Regulations. Chapter 8 “Intervention of the *réviseur d’entreprises agréé* (approved statutory auditor)” does not apply.



- iii) This Circular applies to errors/instances of non-compliance covered by this Circular, which correspond to instances of non-compliance with requirements of the EuVECA and EuSEF Regulations, for Luxembourg EuVECA and EuSEFs managed by a registered AIFM established in Luxembourg, as referred to in Article 2(1) of the EuVECA and EuSEF Regulations. Chapter 8 “Intervention of the *réviseur d’entreprises agréé* (approved statutory auditor)” does not apply.

## **2.2. Legal basis for the guidelines laid down in this Circular**

5. The guidelines to be followed in case of errors/instances of non-compliance, as laid down in this Circular, are based in particular on the legal provisions as set out below.
6. The guidelines which the CSSF requests UCITS and UCIs Part II to follow in case of errors/instances of non-compliance, as specified in Chapters 4, 5, 6 and 7, are based on Article 147(1) and (2) of the UCI Law which entrusts the CSSF with all the supervisory powers necessary for the purposes of application of the UCI Law, including the right to adopt any type of measure to ensure that UCIs continue to comply with the requirements of the UCI Law.
7. The guidelines which the CSSF requests SIFs to follow in case of errors/instances of non-compliance, as specified in Chapters 4, 5, 6 and 7, are based on Article 41(3) of the SIF Law which provides that the CSSF ensures that SIFs comply with the applicable legal and contractual rules as well as Article 45(3) of the SIF Law which entrusts the CSSF with all the supervisory powers necessary for the purposes of application of the SIF Law, including the right to adopt any type of measure to ensure that SIFs continue to comply with the requirements of the SIF Law.
8. The guidelines which the CSSF requests SICARs to follow in case of errors/instances of non-compliance, as specified in Chapters 4, 5, 6 and 7, are based on Article 11(3) of the SICAR Law which provides that the CSSF ensures that SICARs comply with the applicable legal and contractual rules.
9. The guidelines which the CSSF requests MMFs falling within the scope of application of this Circular to follow in case of errors/instances of non-compliance, as specified in Chapters 4, 5, 6 and 7, are based on Articles 11 and 12 of the OER Law which designate the CSSF as the competent authority for the application of the MMFR and entrust the CSSF with all the supervisory powers necessary for the purposes of application of the MMFR, including the power to take appropriate measures to ensure that an MMF or the IFM of an MMF continues to comply with the MMFR.

Article 38 of the MMFR provides that the competent authority of the MMF or, where relevant, the competent authority of the manager of an MMF is responsible for supervising compliance with Chapters II to VII of the MMFR and that the competent authority of an MMF is responsible for supervising compliance with the obligations set out in the rules or in the instruments of incorporation of the MMF, and the obligations set out in the prospectus, which must be consistent with the MMFR.

10. The guidelines which the CSSF requests Luxembourg ELTIFs to follow in case of errors/instances of non-compliance, as specified in Chapters 4, 5, 6 and 7, are based on Article 6 of the OER Law which designates the CSSF as the competent authority for the application of the ELTIF Regulation and Article 7 of that law which entrusts the CSSF with

all the supervisory powers as provided for in Article 50 of the AIFM Law, towards the persons referred to in the ELTIF Regulation for the purposes of the application of that regulation, including the power to adopt any type of measure to ensure that managers continue to comply with the requirements of the AIFM Law.

Article 32 of the ELTIF Regulation provides that the competent authority of the ELTIF is responsible for supervising compliance with the rules laid down in Chapters II, III and IV and that it is responsible for supervising compliance with the obligations set out in the articles of incorporation or constitutive documents of the ELTIF, and the obligations set out in the prospectus, which must comply with the ELTIF Regulation.

11. The guidelines which the CSSF requests Luxembourg EuVECAs and EuSEFs to follow within the scope of application of Section 2.1. above, in case of errors/instances of non-compliance, as specified in Chapters 4, 5, 6 and 7, are based on Article 1 of the OER Law which designates the CSSF as the competent authority for the application of the EuVECA and EuSEF Regulations and Article 2 of that law which entrusts the CSSF with the supervisory powers necessary for the purposes of the application of the EuVECA and EuSEF Regulations, including the power to take appropriate measures to ensure that the AIFM or registered AIFM of EuVECA or EuSEFs continue to comply with the EuVECA and EuSEF Regulations.

Article 18(1) of the EuVECA Regulation and Article 19(1) of the EuSEF Regulation provide that the competent authority of the home Member State, i.e. the Member State where the manager of an EuVECA or EuSEF has its registered office, supervises compliance with the requirements laid down in the EuVECA and EuSEF Regulations. Article 18(1a) and (1b) of the EuVECA Regulation and Article 19(1a) and (1b) of the EuSEF Regulation provide for the supervisory obligations applicable to the competent authorities in the case where the EuVECA or the EuSEF is managed by a manager as referred to in Article 2(2) of the EuVECA and EuSEF Regulations.

12. The specific controls which the CSSF requests the REA to perform at the level of UCITS, UCIs Part II, SIFs and SICARs in case of errors/instances of non-compliance, as specified in Chapter 8, are based on Article 154(3) of the UCI Law, Article 55(3) of the SIF Law and Article 27(3) of the SICAR Law which allow the CSSF to request a REA to perform a control on one or several particular aspects of the activities and operations of these UCIs at the expense of the UCI concerned.
13. The obligation to notify the CSSF of any errors/instances of non-compliance, as specified in Chapter 9, is based on Article 147(2) of the UCI Law, Article 45(3) of the SIF Law, Article 32 of the SICAR Law, Article 2(2), Article 7, Article 12(2) of the OER Law and Article 50(2) of the AIFM Law which allow the CSSF to require information from the UCIs that fall within the scope of application as well as their IFM in the context of the exercise of its supervisory mission.

### **3. Roles of the different stakeholders in the treatment of errors/instances of non-compliance**

#### **3.1. General principles**

14. In general terms, it is up to the UCI *dirigeants* or the IFM *dirigeants* under the supervision of the UCI *dirigeants*, where applicable, to ensure the implementation of a sound organisation in order to prevent, as far as possible, the occurrence of errors/instances of non-compliance at UCI level.

In the case where errors/instances of non-compliance occur nevertheless, the UCI *dirigeants* or the IFM *dirigeants* under the supervision of the UCI *dirigeants*, where applicable, must ensure that the guidelines, as specified in this Circular as regards the treatment of these errors/instances of non-compliance are complied with.

In this respect, the UCI *dirigeants* or the IFM *dirigeants* under the supervision of the UCI *dirigeants*, where applicable, must in particular ensure that the relationships with the different service providers involved in the functioning of UCIs are covered by adequate arrangements (including contractual arrangements) in accordance with the guidelines laid down in this Circular.

15. In respect of the roles and obligations of the different stakeholders, this Circular is based on the guideline under which the party that caused an error/non-compliance entailing a loss, as a result of non-compliance with the obligations applicable to them, must ensure compensation for it.
16. In case of error/non-compliance at the level of a UCI which has designated an IFM, the IFM, under the supervision of the UCI *dirigeants*, is responsible for ensuring correction of the error/non-compliance and remediate any loss suffered by the UCI and/or its investors.

In case of error/non-compliance at the level of a UCI which has not designated an IFM, the UCI *dirigeants* must ensure correction of the error/non-compliance and compensation for any loss suffered by the UCI and/or its investors.

#### **3.2. UCI *dirigeants***

17. Where a UCI has adopted a corporate form, the UCI *dirigeants* have the power to take any action necessary and/or useful to realise the corporate purpose.

UCI *dirigeants* are in charge of the UCI's overall policy, even under a delegation arrangement.

In the case of a UCI in corporate form which has designated an IFM, the UCI *dirigeants* are required to supervise the IFM, which means that they can impose certain rules of conduct on the IFM, notably also where the IFM, in turn, delegates certain functions.

In the case of a UCI incorporated in accordance with contract law (FCP), the *dirigeants* of the IFM<sup>1</sup> are deemed to be UCI *dirigeants* and, in this capacity, they have the power to take any action necessary and/or useful to realise the contractual purpose of the UCI, with the exception of those reserved by the UCI's management regulations, where appropriate, to the general meeting of unit-holders.

In the context of AIFs incorporated in accordance with contract law (FCP), the *dirigeants* of the IFM<sup>2</sup> may designate an AIFM, it being understood that the *dirigeants* of the IFM have a duty of supervision to the designated AIFM similar to the one described above.

In case of designation of an IFM, it should be borne in mind that designating an IFM does not exempt the *dirigeants* of a UCI having adopted a corporate form or the *dirigeants* of the IFM, in case of a UCI incorporated in accordance with contract law (FCP), from their obligation to supervise the IFM and to act in the investors' interests.

18. In the case where the UCI has not designated an IFM, the *dirigeants* of the UCI having adopted a corporate form or the *dirigeants* of the IFM, in case of a UCI incorporated in accordance with contract law (FCP), must ensure that a sound administrative and accounting organisation as well as adequate internal control mechanisms are in place at the level of the UCI and its service providers in order, on the one hand, to prevent, as far as possible, the occurrence of errors/instances of non-compliance and, on the other hand, to ensure compliance with the guidelines, as specified in this Circular as regards the treatment of these errors/instances of non-compliance.

### **3.3. Investment fund manager**

#### **3.3.1. Luxembourg IFM**

19. In accordance with Article 109(1) and Article 122 of the UCI Law and, respectively, Articles 16 and 17 of the AIFM Law, the IFM of a Luxembourg UCI must implement sound administrative and accounting organisation, control and safeguard arrangements for electronic data processing, and adequate internal control mechanisms. These arrangements, which must also cover any delegations made by the IFM, aim, on the one hand, at preventing, as far as possible, the occurrence of errors/instances of non-compliance and, on the other hand, ensuring compliance with the guidelines, as specified in this Circular as regards the treatment of errors/instances of non-compliance.

As regards the valuation of the portfolio and the determination of the NAV of the units of the UCI, it is moreover recalled that this is one of the functions included in the collective portfolio management activity of a UCITS and that the AIFM is, for each AIF that it manages, responsible for the proper valuation of the assets of the AIF as well as the publication of the NAV of the AIF (Article 17 of the AIFM Law).

Moreover, where the IFM decides to delegate one or more of its functions or to involve other stakeholders, the IFM's responsibility is not affected by the fact that it has delegated

<sup>1</sup> In this context, "IFM" also refers to a management company incorporated under Luxembourg law and subject to Article 125-1 of Chapter 16 of the UCI Law.

<sup>2</sup> In this context, "IFM" also refers to a management company incorporated under Luxembourg law and subject to Article 125-1 of Chapter 16 of the UCI Law.

any functions to a third party (Article 110 of the UCI Law, Article 18 of the AIFM Law, Article 75 of Regulation 231/2013, respectively).

20. Based on the above, the IFM must ensure that the delegations and sub-delegations in place shall not prevent the IFM from executing its own obligations.

### **3.3.2. IFM managing Luxembourg UCIs on a cross-border basis**

21. Under Article 122 of the UCI Law and Article 49 of the AIFM Law, IFMs managing Luxembourg UCIs on a cross-border basis must comply with the guidelines, as specified in this Circular as regards the treatment of errors/instances of non-compliance.

### **3.3.3. Registered AIFM of EuVECAs/EuSEFs**

22. In accordance with Article 20(3) of the EuVECA Regulation and Article 21(3) of the EuSEF Regulation, registered AIFMs of Luxembourg EuVECAs/EuSEFs are liable for any losses or damages resulting from infringements of the EuVECA Regulation or the EuSEF Regulation and must comply with the guidelines, as specified in this Circular as regards the treatment of these errors/instances of non-compliance, within the limits of the applicable European rules.

## **3.4. UCI administrator**

23. The UCI administrator(s) acting in this capacity on behalf of a UCI, in charge of the NAV calculation and accounting functions and/or the registrar function, may moreover, by delegation, control, or partly control, compliance with the investment rules in accordance with the applicable laws and regulations, and with the UCI rules as set out in the constitutive documents and/or the prospectus.

In accordance with Circular CSSF 22/811, the UCI administrator must establish, implement and maintain procedures to detect, assess and, where appropriate, notify errors/instances of non-compliance to the UCI or its IFM. These errors/instances of non-compliance must be recorded, monitored and, where appropriate, corrected by the UCI administrator upon approval by the UCI or its IFM, where applicable.

In case of errors/non-compliance, the UCI administrator, in cooperation with the other stakeholders, must draw up a remediation plan to be approved by the UCI or its IFM, where applicable, and implement the related corrective measures as well as ensure that a proper follow-up is being performed.

24. Moreover, where the UCI administrator delegates some of its tasks, this delegation does not exempt the UCI administrator of its responsibilities.

In this context, its responsibilities include, inter alia, ensuring that a sound organisation, including its delegates, is in place (e.g. procedures, contracts, insurance) in order, on the one hand, to prevent, as far as possible, the occurrence of errors/non-compliance and, on the other hand, to ensure compliance with the guidelines, as specified in this Circular as regards the treatment of these errors/instances of non-compliance.

### 3.5. Depositary

25. Where the depositary established in Luxembourg acting in this capacity on behalf of a UCI incorporated under Luxembourg law is charged with oversight and control functions on the basis of the legal and regulatory framework applicable, the latter must implement adequate procedures to ensure compliance with its oversight and control functions, taking account of the outcome of its assessment of the risks associated with the nature, scale and complexity of the UCI's investment strategy and of the IFM's organisation.

The occurrence of errors/non-compliance must be communicated to the depositary that must take this into account when performing these functions.

Where the depositary notices such errors/instances of non-compliance, it must inform the *dirigeants* of the UCI or of the IFM, where applicable, thereof. In the case where the depositary notices that the UCI *dirigeants* or IFM *dirigeants* do not act upon such errors/non-compliance, the depositary must notify it to the CSSF.

## 4. NAV calculation errors at UCI level

26. In general, the CSSF expects that a UCI complies, on an ongoing basis, with the NAV calculation rules provided for by the law, the constitutive documents and/or the prospectus applicable to UCIs.
27. In this respect, the UCI or the IFM, where applicable, must have in place appropriate policies and procedures ensuring, inter alia, that the UCIs' assets and liabilities are valued in a reliable way and that the calculation of the NAV is done in accordance with the law, the constitutive documents and/or the prospectus. The policies and procedures in place for the UCI must allow limiting, as much as possible, the risk of NAV calculation errors and detecting the errors that occur.

Upon discovery of an NAV calculation error, the UCI or the IFM, where applicable, must take the necessary measures, as set out in this Chapter, to correct the situation in which the UCI finds itself as a result of this error, to correct any loss suffered by the UCI and/or investors and to make the necessary compensation.

Closed-ended UCIs do not fall within the scope of application of the guidelines of this Chapter 4 and, consequently, they do not have to notify any NAV calculation errors covered by Chapter 4 to the CSSF, as set out in Chapter 9. The closed-ended UCI or the IFM, where applicable, must however follow the guidelines set forth in point 26 and in the first paragraph of point 27 above. The closed-ended UCI or its IFM, where applicable, must also ensure that corrective measures have been taken to correct, where appropriate, any NAV calculation error. Moreover, the REA of a closed-ended UCI must verify, in accordance with the applicable rules governing the legal audit, that the NAV accurately reflects the value of the UCI's assets and liabilities calculated in line with the constitutive documents and/or the prospectus of the UCI.

#### 4.1. Definition of an NAV calculation error

28. The NAV per unit of a UCI is obtained by dividing the net asset value by the number of units outstanding. The NAV must be calculated in accordance with the rules set out in the law, the constitutive documents and/or the prospectus applicable to the UCI.

In accordance with Articles 9 and 28 of the UCI Law, unless otherwise provided for in the constitutive documents, the valuation of the assets of UCITS and UCIs Part II must be based on the last known stock exchange quotation, or on the probable realisation value, estimated with care and in good faith, respectively.

Pursuant to Articles 9, 28 and 40 of the SIF Law, unless otherwise provided for in the constitutive documents, the valuation of the assets of a SIF must be based on the fair value. Article 5 of the SICAR Law provides that the valuation of assets must be based on the fair value.

Pursuant to Article 29 of the MMFR, the assets of an MMF must be valued by using mark-to-market or mark-to-model. For public debt constant net asset value MMFs, the assets may also be valued by using the amortised cost method. As regards low volatility net asset value MMFs, the amortised cost method may also be used if certain requirements set out in the MMFR are complied with.

Pursuant to Article 23(3)(c) of the ELTIF Regulation which refers to Article 23 of the AIFMD, the information to be disclosed to investors in the prospectus must include a description of the pricing methodology for valuing the assets, including the methods used for hard-to-value assets.

Pursuant to Article 11 of the EuVECA Regulation and Article 12 of the EuSEF Regulation, the rules for the asset valuation must be laid down in the constitutive documents of the EuVECA or the EuSEF and must ensure a sound and transparent valuation process.

The determination of the value of the liabilities of a UCI must be done in accordance with the rules set out in the constitutive documents and/or the prospectus.

29. It is presumed that the NAV of a UCI is correctly calculated where the rules provided for in the law, the UCI's constitutive documents and/or prospectus are applied consistently and in good faith, on the basis of up-to-date and reliable information available at the time of the calculation.

30. An error in the NAV calculation occurs, in principle, as a result of one or more factors or circumstances which cause the NAV calculation to yield an incorrect result.

Generally, these factors or circumstances are to be seen in relation to human errors, inadequate control procedures, shortcomings in the administrative processing of operations, imperfections or deficiencies in the functioning of the IT, accounting or communication systems, or they are related to non-compliance with the valuation rules provided for in the law as well as in the UCI's constitutive documents and/or prospectus. These factors or circumstances may arise at the level of the entity which calculates the NAV (in principle, the UCI administrator) but also at other levels of the UCI organisation (e.g., *dirigents* of UCIs, IFMs, external valuer, etc.).

## 4.2. Tolerance threshold

31. It is generally agreed that the NAV calculation process of a UCI is not an exact science and that the result of the calculation constitutes the closest possible approximation of the real value of a UCI.

The accuracy level of the NAV calculation depends on a series of internal or external factors linked to the nature and complexity of each UCI such as the nature and characteristics of the investments, the liquidity and volatility of the markets on which the UCI's assets are traded, the availability of up-to-date information on asset prices, the reliability of the information sources used and other elements relevant for the calculation of the NAV.

32. On this basis, it is common practice that only those NAV calculation errors whose proportion compared to the NAV reaches or exceeds a certain threshold, referred to as the tolerance threshold (hereinafter "significant NAV calculation errors"), must be notified to the CSSF and corrected in accordance with the provisions of this Circular in order to protect the interests of the UCI and the investors.
33. In all other cases, it is considered that the non-significance of UCI NAV calculation errors does not justify the recourse to relatively long and costly administrative procedures which must be implemented in order to correct inaccurate NAVs and, where appropriate, compensate aggrieved investors. In such circumstances, it is sufficient to correct the source of the error that occurred and to take all necessary measures to prevent such an error from reoccurring in the future.
34. This Circular provides for different approaches to be applied according to the types and investment policies of UCIs, and consequently different tolerance thresholds. This differentiating approach is justified as the implicit level of inaccuracy in each NAV calculation can vary from one type of UCI to the next depending on the factors mentioned in point 30. It is also justified by the need to ensure an increased level of protection for UCIs that raise capital from investors that are not well-informed or professional investors, in contrast to UCIs that reserve their units to one or several well-informed or professional investors.
35. On this basis, the following tolerance thresholds and approaches are applicable to the different types of UCIs covered by this Circular in accordance with the scope of application defined in Chapter 2:

### **(a) MMFs governed by the MMFR**

Table 1

<b>Principal investment policy as defined in the prospectus</b>	<b>Tolerance threshold (in % of NAV)</b>
Money market fund governed by the MMFR	0.20%

All the MMFs falling within the scope of application specified in Chapter 2 must apply the tolerance threshold of Table 1.



**(b) UCITS (except for MMFs)**

Table 2

<b>Principal investment policy as defined in the constitutive documents and/or prospectus</b>	<b>Tolerance threshold (in % of NAV)</b>
UCITS which invest primarily in bonds and/or other debt securities ("bond UCIs")	0.50%
UCITS which pursue a mixed investment policy ("mixed UCIs")	0.50%
UCITS which invest primarily in shares and/or other securities equivalent to shares ("equity UCIs")	1.00%
UCITS which invest primarily in other eligible assets (*) for a UCITS	1.00%

(\*) The "other assets" at the level of a UCITS refer, alongside bonds and/or other debt securities as well as shares and/or other securities equivalent to shares, only to the sole other assets in which a UCITS may invest according to the applicable rules.

UCITS, except for MMFs, must apply the tolerance thresholds of Table 2.

**(c) UCIs Part II (except for MMFs) and ELTIFs whose units can be held by investors that are not well-informed or professional investors**

Table 3

<b>Principal investment policy as defined in the constitutive documents and/or prospectus</b>	<b>Tolerance threshold (in % NAV)</b>
UCIs which invest primarily in bonds and/or other debt securities ("bond UCIs")	0.50%
UCIs which pursue a mixed investment policy ("mixed UCIs")	0.50%
UCIs which invest primarily in shares and/or other securities equivalent to shares ("equity UCIs")	1.00%
UCIs which invest primarily in other assets (*)	1.00%

(\*) "Other assets" refer, for example, to unlisted shares, buildings, loans or eligible investments for ELTIFs.

UCIs Part II (except for MMFs) and ELTIFs as covered by this point (c) must, by default, apply the tolerance thresholds of Table 3.

However, by derogation, these UCIs Part II and ELTIFs, when they invest primarily in other assets, as set out above, may decide to apply a tolerance threshold that is higher than the 1%-threshold, if the characteristics of the UCI, including its risk profile justify it. A specific well-documented analysis must be the basis for determining the higher threshold thus set by the UCI *dirigeants*, together with the IFM, where applicable. Where this derogation is used, the conditions under point (d) below, with notably sub-points (i) and (iii) must be met. Similarly, investors must be informed of the threshold

set via the official and usual investor communication channels provided for in the constitutive documents and/or the prospectus.

**(d) UCIs Part II and ELTIFs reserved to well-informed or professional investors, as well as SIFs, SICARs, EuVECAs and EuSEFs (except for MMFs to which Table 1 applies)**

The tolerance thresholds for these UCIs are to be determined by the UCI *dirigeants*, together with the IFM, where applicable, according to a specific and well-documented analysis meeting the following criteria:

- i) When setting the tolerance thresholds, the following aspects must at least be considered:
  - the characteristics of the UCI (including its "open/closed-ended" type) and its frequency of opening to subscriptions and redemptions of units;
  - the investment policy pursued by the UCI in accordance with the constitutive documents and/or prospectus;
  - the nature of the investments (e.g., listed assets, unlisted assets);
  - the risk profile of the UCI with its exposure to risks such as liquidity risk, market risk or credit risk as well as the UCI's volatility level;
  - the valuation policy in place for the UCI according to the characteristics of the UCI, its investment policy and the planned investments.
- ii) The tolerance thresholds set in Table 3 above must be duly considered as a reference by UCIs Part II and ELTIFs reserved to well-informed or professional investors as well as SIFs, SICARs, EuVECAs and EuSEFs. The CSSF expects, for instance, UCIs Part II and ELTIFs reserved to well-informed/professional investors or SIFs pursuing principal investment policies similar to those presented in Table 3, to use tolerance thresholds similar to those provided for in Table 3.
- iii) The tolerance threshold must not exceed 5% of the NAV. In no case are UCIs permitted to use by default the 5%-threshold, knowing that the tolerance threshold must, in accordance with the above-mentioned conditions, be established subject to a specific analysis which takes account of the aspects indicated above. The UCI must make available to the CSSF the specific analysis mentioned above. The CSSF reserves the possibility to request this analysis as well as further clarification.

If UCI *dirigeants* falling within this point (d) decide to apply tolerance thresholds that are higher than those indicated in Table 3 above, they must ensure that the investors are informed thereof. This information must be transmitted to investors via the official and usual investor communication channels provided for in the constitutive documents and/or the prospectus.

36. UCIs may apply tolerance thresholds lower than those provided for in Tables 1, 2 and 3 above.

In any case, the UCI must ensure that any lower tolerance thresholds that would be decided are applied on a consistent basis over time.

37. The following guidelines must be observed when determining and applying the tolerance threshold:
- i) For an umbrella UCI, the tolerance threshold must be determined on an individual basis at the level of each sub-fund. Where there are several classes or categories of units within one sub-fund, a single tolerance threshold must be applied to all classes or categories.
  - ii) Upon the incorporation of a UCI or the launch of a new sub-fund and in any case before the publication of the first NAV, the tolerance threshold applicable to the UCI (in the case of a single sub-fund UCI) or to the sub-fund (in the case of an umbrella UCI) must be determined, on a documented basis, in accordance with the policy and procedures in place for the UCI.
  - iii) The investment objective and policy, as laid down in the constitutive documents and/or the prospectus, must be used as a reference for determining the tolerance threshold.
  - iv) For a fund of fund, an index-tracking UCI or a feeder UCI, the applicable tolerance threshold must be determined by reference to the target UCIs' principal investment policy of the target UCIs, or by reference, respectively, to the principal composition of the index, as established at the level of the fund of funds, the index-tracking UCI or feeder UCI. The same applies to UCIs which implement their investment policy mainly through transactions on financial derivative instruments.
  - v) A UCI whose units are admitted to marketing abroad must apply, by default, the tolerance threshold determined in accordance with this Circular. However, this rule does not apply where a country in which UCI units are admitted to marketing requires the application of a more restrictive tolerance threshold. In this case, the UCI must retain this more restrictive tolerance threshold. For the sake of equal treatment of investors, this more restrictive tolerance threshold must apply to the UCI (or UCI sub-fund) as a whole and to all investors of this UCI (or UCI sub-fund) which, regardless of their country of origin, are treated equally in case of NAV calculation errors.

### **4.3. Procedures for the correction and remediation of significant NAV calculation errors**

38. Upon discovery of a significant NAV calculation error, the procedures in place for the UCI must ensure that the IFM, where applicable, the UCI administrator and the depositary are informed thereof without delay. The UCI *dirigeants* and the IFM *dirigeants*, where applicable, must be appropriately informed of such an error so as to be able to perform their role as described in Chapter 3 of this Circular.

Significant NAV calculation errors are to be understood not only as isolated calculation errors which have a significant impact on the NAV but also as simultaneous or successive calculation errors which have not been treated and were each below the tolerance threshold and which, if considered on an aggregate basis, reach or exceed that threshold.

39. The remediation of any loss is only compulsory for the dates on which NAV calculation errors were significant. As far as the other dates are concerned, it is the responsibility of the UCI or the IFM, where applicable, to assess whether it is necessary to determine the financial impact of the error and establish a compensation plan.
40. The UCI or IFM, where applicable, must ensure that all necessary measures are taken, without delay, to correct and remediate the situation in which the UCI finds itself as a result of this error. In case of a significant NAV calculation error, a remedial action plan which notably includes the following steps must be drawn up:
- identify with precision the origin of the error and immediately correct the source of the error so as to ensure that the next NAVs are correctly calculated;
  - determine the corrected NAVs during the error period;
  - apply the corrected NAV to the subscriptions and redemptions made based on an erroneous NAV in order to determine the sums which must be repaid to the UCI and/or the investors that have suffered a loss as a result of the error;
  - upon terminating the operations consisting in the determination of the corrected NAVs and the computation of the loss resulting from the significant NAV calculation error for the UCI and/or its investors, proceed, without delay, in the accounting of the UCI to the necessary accounting entries to reflect the payments to be received and/or the payments to be made by the UCI;
  - inform the investors that must be compensated because of the significant NAV calculation error including on the modalities foreseen for the remediation of the loss suffered;
  - proceed to the compensation of the UCI and/or investors;
  - decide and implement a remedial action plan (where appropriate, adjustment or strengthening of internal controls in place for the UCI) in order to avoid such errors in the future.

#### **4.4. Determination of the financial impact of the significant NAV calculation errors**

41. In the event of a significant NAV calculation error, the correction of the erroneous NAVs during the error period must be carried out, without delay, and the loss for the UCI and/or investors must be calculated based on the corrected NAVs.
42. When determining the financial impact of a significant NAV calculation error, the UCI must distinguish between:
- investors that have redeemed their units during the error period based on an erroneous NAV; and
  - investors that have subscribed units of the UCI during the error period based on an erroneous NAV.

Investors other than those belonging to the above-mentioned categories may be affected, depending on the circumstances, by a significant NAV calculation error.

Table 4 specifies the measures to be taken in respect of investors and the UCI where the significantly erroneous NAV has been undervalued:

Table 4

<b>Investors</b>	<b>UCI</b>
Investors that have redeemed their units during the error period based on an erroneous NAV must be compensated for the difference between the corrected NAV and the undervalued NAV which has been applied to the redeemed units.	The UCI must be compensated for the difference between the corrected NAV and the undervalued NAV which has been applied to the units subscribed to during the error period.

Table 5 specifies the measures to be taken in respect of investors and the UCI where the significantly erroneous NAV has been overvalued:

Table 5

<b>Investors</b>	<b>UCI</b>
Investors that have invested in the UCI during the error period based on an erroneous NAV must be compensated for the difference between the overvalued NAV applied to the units subscribed to and the corrected NAV.	The UCI must be compensated for the difference between the overvalued NAV which was applied to the units redeemed during the error period and the corrected NAV.

43. Investors having suffered a loss as a result of a significant NAV calculation error may be compensated out of the assets of the UCI in case the payments due to the relevant investors correspond to excess amounts in the assets of the UCI and where the payment can therefore not affect the interests of the other investors. Depending on the circumstances, this compensation can also be made through the allocation of additional units (or, where appropriate, fractions of units) to the relevant investors, subject to the provisions of Chapter 7.2.3. However, the IFM, where applicable, the UCI administrator or another party involved in the functioning of the UCI may decide to take over the payments necessary to compensate the aggrieved investors.
44. Where an investor, in the context of subscriptions or redemptions, involuntarily benefited from a significant NAV calculation error, the UCI may request from such an investor the reimbursement of the amounts unduly perceived when it is a well-informed/professional investor. For investors that are not well-informed/professional investors, it is, in principle, not appropriate to request from the latter the reimbursement of the amounts unduly perceived.
45. Similarly, where an investor, in the context of several subscription and/or redemption transactions made during the error period, on the one hand, involuntarily benefited from a significant NAV calculation error on part of these transactions and, on the other hand, suffered a loss on other transactions, in this case the final compensation amount for such an investor may be determined on a net basis, provided that the UCI is able to ensure that the investor having made these transactions is the same final beneficiary in accordance with the provisions of Chapter 7.2.1.

46. In such cases, the UCI must receive compensation equivalent to the amounts unduly perceived by the investors during the error period and which have not been recovered.
47. The financial impact can be determined using either the compound method or the non-compound method.

The compound method is a method where each NAV calculated during the error period is corrected by:

- i) the direct effect of the significant NAV calculation error; and
- ii) by the indirect effect related to the cumulative subscriptions/redemptions made at an erroneous NAV during the period of significant NAV calculation error.

The non-compound method does not take into consideration the cumulative effects of points (i) and (ii) above for each NAV calculated during the period when the significant NAV calculation error occurred.

The calculation method to be used must be set out in the internal policies and procedures applicable to the UCI. Where both methods may be used, the circumstances under which each method can be applied, must be foreseen to ensure a consistent treatment of the instances of significant NAV calculation error over time based on the principle of continuity of the methods and according to the interest of investors.

## **5. Non-compliance with the UCI investment rules**

48. In general, the UCI must comply at all times with the applicable investment rules, by taking into account, in particular, the investment and cash flow management transactions as well as the UCI capital activity (subscriptions/redemptions).

Upon discovery of an instance of non-compliance with the investment rules in the UCI's accounts, the necessary measures, as described in this Chapter, must be taken to correct the situation and to compensate the UCI in case of loss.

### **5.1. Investment rules**

49. The investment rules covered by this Circular concern all the rules regarding asset eligibility, portfolio management techniques and investment restrictions laid down in the regulatory texts applicable to UCIs, including, in particular:

- the European regulations;
- the sector-specific laws;
- the Grand-ducal regulations and CSSF regulations;
- the circulars issued by the CSSF, including the ESMA guidelines implemented in the Luxembourg regulation by means of circulars.

Reference is made, *inter alia*, to:

- the investment rules determining the eligible assets for UCITS specified under Article 41(1) and (2) of the UCI Law, further specified by the GDR and the ESMA guidelines, as well as the investment restrictions under Articles 42 to 52 of the UCI Law;
- the investment restrictions laid down in Circular CSSF 07/309 on risk-spreading in the context of SIFs;

- the eligibility rules of Section 1 and the investment restrictions of Section 2 of Chapter II of the ELTIF Regulation;
  - the eligibility rules of Section I and the investment restrictions of Section II of Chapter II of the MMFR.
50. The investment rules also include the rules defined in the UCI's constitutive documents and/or the prospectus (contractual rules), whether they concern the assets authorised under the UCI investment policy or the investment restrictions, quantitative or qualitative, that apply to a UCI.
51. Pursuant to points 49 and 50 above, all the investment rules that apply to a UCI are to be considered for the purposes of this Chapter.
52. The quantitative investment rules laid down in the regulatory framework governing UCITS shall apply with respect to the NAV of the UCITS. As regards contractual quantitative investment rules, the constitutive documents and/or the prospectus of the UCITS must specify the calculation basis. The general practice is to determine the contractual quantitative investment rules of UCITS in relation to the NAV.

For UCIs that are not UCITS, the regulatory texts provide for different calculation bases with respect to the quantitative investment rules specified in these texts (in particular the NAV and the capital of the UCI). As regards contractual quantitative investment rules, the constitutive documents and/or the prospectus of the UCI must specify the calculation basis. In practice, these contractual investment rules are determined in relation to calculation bases such as, for example, the NAV, capital or gross assets.

53. In general, investment rules must be complied with, on an ongoing basis, during the life of the UCI until the date of dissolution or liquidation.

Exceptions to this rule are those laid down in the regulatory texts (e.g., six-month period provided for in Article 49(1) of the UCI Law for UCITS), and in the constitutive documents and/or prospectus of the UCI (e.g., more extended periods that AIFs use to build up a portfolio (ramp-up period) or divestment periods allowing certain types of AIFs to sell part of the portfolio before the official liquidation/dissolution of the AIF).

## **5.2. Active and passive non-compliance with investment rules**

54. Upon discovery of an instance of non-compliance with the investment rules, the UCI or the IFM, where applicable, must determine whether such non-compliance is "active" or "passive".
55. Instances of non-compliance with the investment rules applicable to UCIs are passive where they occur for reasons beyond the control of the UCI or as a result of the exercise of subscription rights. Instances of active non-compliance are those that cannot be qualified as being beyond the control of the UCI.

The categorisation as "active" or "passive" non-compliance with the investment rule applies to all UCIs.

Instances of passive non-compliance notably result from acts or events that are beyond the control of the UCI, such as for example non-compliance resulting from market price fluctuations of investments held by a UCI decreasing the NAV serving as a reference for the calculation of a given investment restriction.

In the context of passive non-compliance, the general rule requires that the necessary corrective measures are taken within a reasonable period of time, by taking into account the interest of the investors, in order to correct the situation of non-compliance. As long as the instance of passive non-compliance has not been corrected, it must be monitored by the UCI *dirigeants* to ensure that a corrective action is taken within a reasonable period of time by taking into account the interest of the investors.

For UCIs (other than UCITS), including open-ended UCIs as well as closed-ended UCIs that invest in less liquid or illiquid assets (e.g., SIFs, SICARs, UCIs Part II), the consideration of the investors' interest may justify, in specific and duly justified circumstances, that the UCI *dirigeants* decide to keep the position concerned by an instance of passive non-compliance in the portfolio.

Instances of passive non-compliance are not included in the perimeter of the corrective measures described in Sections 5.4, 5.5 and 5.6 of this Circular and, as a consequence, must not be notified to the CSSF in accordance with Chapter 9.

56. Instances of non-compliance qualified as active non-compliance thus refer, by reference to the definition of passive non-compliance, to situations of non-compliance that result from:
- voluntary actions/transactions, notably investment or divestment decisions at the level of a UCI resulting in non-compliance with a given investment rule;
  - absence of actions/transactions or decisions at the level of a UCI where non-compliance with an investment rule was foreseeable or avoidable.

The aforementioned voluntary actions or absence of actions may result from, without being limited to, an intentional decision, inadvertence, human error or from operational or technical/IT failures in relation to a UCI.

Moreover, the actions/transactions concerned may occur at the level of the UCI *dirigeants*, the IFM, where applicable, or of a delegate.

## **5.3. Control arrangements for investment rules**

### **5.3.1. General principles**

57. In order to ensure ongoing compliance with the investment rules governing the functioning of UCIs, adequate control mechanisms must be in place at the UCI or the IFM, where applicable. These arrangements must be supported by robust technical and organisational solutions that are proportionate to the nature, scale, complexity and the risks of non-compliance with the investment rules related to the activities of a UCI.
58. These control arrangements will, first of all, have to include pre-trade controls aiming at verifying, at the moment of the portfolio management decisions (e.g., decisions by the IFM or the delegate), that the envisaged investment transactions comply with the investment rules applicable to the UCI and thereby prevent that non-compliance with the investment rules occurs. These pre-trade controls are all the more important for the UCIs that can, in accordance with the constitutive documents and/or the prospectus, invest in less liquid or illiquid assets.



Moreover, these control arrangements must provide for post-trade controls that must be performed after the conclusion of investment transactions in order to ensure their compliance. The post-trade controls must allow determining whether the instance of non-compliance is active or passive in order to trigger, where applicable, a corrective action and to proceed on that basis to an impact calculation of the loss, possibly followed by the payment of compensation to the UCI and/or the investors in accordance with the guidelines laid down in this Chapter.

This post-trade control must occur at the latest when calculating the next NAV.

59. The control arrangements, also including the frequency of the controls referred to above, must be laid down in the policies and procedures in place for the UCI.

### **5.3.2. Compliance with investment rules between two NAVs**

60. As a general principle, the UCI must comply at all times with the applicable investment rules, i.e. at every NAV and between two NAVs (including on an intra-day basis).
61. On this basis, the CSSF expects that the controls in place on behalf of the UCI allow detecting, correcting and notifying, in accordance with the requirements of this Circular, the transactions carried out between two NAVs that do not comply with the eligibility rules laid down by the regulation and the constitutive documents and/or the prospectus as well as the rules relating to the holding of the securities of the same issuer.
62. As regards the verification of compliance with the diversification restrictions or other restrictions that apply in relation to net assets (or in relation to any other reference in application of the regulation or constitutive documents and/or prospectus, e.g., the value of gross assets), the CSSF considers, in general, that it is sufficient that such a verification is done at each calculation of the NAV.
63. As an exception to point 62 above, the CSSF expects that for UCIs that are materially exposed to risks of non-compliance with diversification restrictions or other restrictions between two NAVs as they engage significantly in transactions between two NAVs (including intra-day transactions), appropriate controls, which take into account the nature, frequency and complexity of the UCI's transactions, are in place to ensure compliance with the rules between two NAVs (including on an intra-day basis).
64. For UCIs that calculate the NAV on a less frequent basis (e.g., monthly, quarterly or more) and carry out transactions between two NAVs, the CSSF expects that verifications are in place to ensure compliance with diversification restrictions or other restrictions between two NAVs by implementing adequate and proportionate controls (e.g., controls at the time of the transaction).

### **5.4. Correction of an instance of active non-compliance with investment rules**

65. Upon discovery of an instance of active non-compliance with investment rules, the policies and procedures in place on behalf of the UCI must ensure that the IFM, where applicable, as well as the UCI administrator and the depositary are informed thereof without delay. The *dirigeants* of the UCI and the *dirigeants* of the IFM, where applicable,

must be appropriately informed of such non-compliance so as to be able to perform their role as described in Chapter 3 of this Circular.

66. The necessary measures must be decided without delay to correct the situation of the UCI resulting from such non-compliance. The time needed to implement the corrective action to bring the UCI back in compliance with the investment rules depends on the types of UCIs, their investment policy and the assets held in the portfolio.

As regards UCITS and UCIs investing in liquid assets, the corrective action must be implemented directly after the detection of an instance of active non-compliance. For UCIs (other than UCITS) investing in less liquid or illiquid assets (e.g., SIFs, SICARs, UCIs Part II), the correction decision must also be taken without delay following the detection of the instance of active non-compliance, while it is admitted that the implementation of this decision could possibly take longer.

67. According to the situations of non-compliance detected, the following corrective actions, provided as examples, can be decided:

- i) sale of the non-eligible investments or the investments that do not comply with the investment policy of a UCI;
- ii) sale of the investment positions that exceed the breached investment restrictions;
- iii) adjustment of the investment portfolio of the UCI that does not comply with the minimum investment rules laid down in the prospectus;
- iv) decrease of the levels of borrowings entered into by a UCI that exceed the maximum level laid down by law or the constitutive documents and/or the prospectus;
- v) provision of eligible financial collateral by the counterparty in relation to securities financing transactions (e.g., securities lending transaction), or complying with the required diversification levels;
- vi) it is also possible that a corrective action is not necessary notably following the development of financial markets or a capital activity at the level of the UCI.

68. Based on the applicable corrective measures, it must be determined in any case whether an impact calculation is necessary in order to establish the existence of a loss for the UCI due to non-compliance.

69. Based on the corrective actions listed above, the following situations may arise in terms of impact calculation:

- under (i) to (iv), the impact resulting from the instances of non-compliance must be determined in compliance with Section 5.5. below in order to establish whether or not the UCI suffered a loss, allowing, on that basis, to remediate any loss suffered by the UCI;
- under (v), there is no need to perform an impact calculation as long as the counterparty to the securities financing transaction has not defaulted during the period of non-compliance;
- under (vi), the UCI must calculate the impact in terms of non-realised result resulting from such non-compliance based on the prices of the irregular investment over the non-compliance period.

70. Where the instances of non-compliance caused a loss for the UCI, the UCI must be compensated to the extent of the loss suffered, pursuant to the methods described in Section 5.5. below.

71. The tolerance thresholds for NAV calculation errors cannot be applied in this case.

## **5.5. Correction methods for instances of non-compliance - impact calculation**

### **5.5.1. General provisions**

72. An internal policy, with related operational procedures, governing the treatment of instances of non-compliance with the investment rules, must be in place as of the incorporation/launch of the UCI. These documents must clearly and precisely define the impact determination methods to be applied in case of an instance of active non-compliance with investment rules.

The policy and its procedures must allow ensuring that instances of non-compliance are treated consistently and objectively over time, by taking into account the investors' interest. Moreover, they must allow avoiding arbitrages in the choice of impact determination methods according, for example, to the calculated compensation amounts.

73. In the case of an umbrella UCI, the impact determination methods can be defined for the UCI as a whole while adequately covering the different sub-funds or for every sub-fund individually. In this context, different impact determination methods can be foreseen depending on the nature of the instance of non-compliance concerned.

74. Changing the impact determination method (e.g., from the accounting method to the economic method) is only possible if such a change is duly justified with respect to the interest of the investors. Such a change must be approved by the *dirigeants* of the UCI or the *dirigeants* of the IFM, where applicable. In principle, changing methods for the treatment of an instance of non-compliance that has already been identified is not allowed.

Thus, for instance, if, in the past, a given instance of non-compliance with investment rules has always been corrected by using the accounting method, it is not possible, in principle, to use the economic method a posteriori for an instance of non-compliance that has already been noted.

75. Where the impact calculation's net result is a profit for the UCI, this profit must remain with the UCI.

### **5.5.2. Modalities in relation to the determination of the start and end of an instance of active non-compliance with investment rules**

76. The following principles must guide the process allowing to determine the financial impact in relation to an instance of non-compliance with an investment rule:

- for non-compliance in relation to the conclusion of transactions in the investment portfolio (except for transactions on cash/deposits) of the UCI (e.g., purchase transaction of securities or transactions in financial derivative instruments), the start date and the end date of the impact period of an instance of non-compliance correspond, in principle, to the trade date of the transaction that caused the active

instance of non-compliance and the trade date of the regularisation transaction, or, where applicable, the date of the return to compliance without intervention;

- for non-compliance with the investment rules related to holdings of cash/deposits, the start date and the end date of the impact period refer, in principle, to the effective dates of cash/deposit inflow and outflow (value date) in the UCI accounts.

### **5.5.3. Correction methods for instances of non-compliance with the investment rules: accounting method and economic method**

77. The financial impact can be determined according to two methods:
- the accounting method;
  - the economic method.

#### **5.5.3.1. Accounting method**

78. The accounting method consists in calculating the gain or loss realised in the accounting of the UCI in relation to an instance of non-compliance with investment rules. More particularly, it consists in determining the result of the transactions (i.e. transaction causing non-compliance and regularisation transaction) based on the accounting entries at the level of the UCI.
79. By default, the accounting method is the method to be used by UCIs. This method notably applies as follows to the illustrative situations below that a UCI may face:
- where non-compliance is the result of non-eligible investments or investments that are non-compliant with the investment policy defined in the constitutive documents and/or the prospectus, the accounting impact refers to the difference between the purchase price and the selling price (including all the costs related to the purchase and the sale) of these investments, while taking into account intermediary distributions or the distribution of dividends;
  - where non-compliance results from exceedances of investment restrictions, the accounting impact is the difference between the purchase price and the selling price of the excess positions by taking into account intermediary distributions or the distribution of dividends;
  - where borrowing restrictions provided for by law or by the constitutive documents and/or the prospectus have been breached, the accounting impact corresponds to the interests paid on the excess part of the borrowing.
80. When using the accounting method, the UCI must, for certain types of instances of non-compliance with investment rules, which notably involve multiple investment transactions and result in non-compliance with restrictions, decide on the approach to be adopted to take into account these transactions for the impact calculation.

In particular, there are the following approaches:

- i) The LIFO (Last In First Out) method, which relies on the principle that the last purchased assets/positions at the level of the UCI's investment portfolio are the first

to exit the portfolio. This method thus consists in selling first the assets/positions purchased last.

- ii) The FIFO (First In First Out) method, which relies on the principle that the assets/positions purchased first at the level of the UCI's investment portfolio are the first to exit the portfolio. This method thus consists in selling first the assets/positions purchased first.
  - iii) The weighted average cost method, which consists in using the weighted average cost (i.e. the total purchase cost of an asset divided by the quantity of this asset in the portfolio) of the assets/positions purchased at the level of the portfolio. Thus, this method consists in comparing the average cost of the asset to the selling price obtained in the context of the regularisation transaction to determine the realised result.
81. The internal policies and procedures in place for the UCI must provide for the method to be applied, by taking into account the accounting principles governing the UCI. The chosen method must be used consistently over time at the level of every sub-fund of the UCI, except where a change of methods is required given the specificities of the case and by taking into account the best interest of investors.

#### **5.5.3.2. Economic method**

82. The economic method consists in comparing the financial impact of the instance of non-compliance calculated according to the accounting method with the performance that would have been realised in case the irregular investments would have had the same fluctuations as the portfolio invested in compliance with the investment policy and the investment restrictions provided for by the applicable regulation and the constitutive documents and/or the prospectus (the "comparative reference").
83. The selected comparative reference is only acceptable if it allows determining a representative performance of the investment policy (or part of the investment policy) of the UCI, as defined in the constitutive documents and/or prospectus of the UCI and which the investors could expect on that basis.

The choice of the comparative reference must not cause a loss to investors and must not have been carried out with the purpose of reducing to the minimum the compensations to be paid.

Based on the above, the comparative reference may, for instance, be the benchmark of the UCI. However, the comparative reference cannot be an isolated asset considered by the UCI as being representative of the irregular investment (e.g., the performance of a non-eligible asset cannot be compared with that of a corresponding eligible asset with globally the same characteristics).

84. Where the investment policy defined in the constitutive documents and/or the prospectus of the UCI provides for several distinct "investment pockets", it may be decided, in accordance with the internal policy in place for the UCI and based on clearly defined rules avoiding any discretionary element, to define one comparative reference per distinct "investment pocket".
85. The economic method may only be used if it is, with the comparative reference defined in points 82 to 84, formally provided for in the internal policy in place for the UCI.

### **5.5.3.3. Determination of the financial impact in the presence of several instances of non-compliance**

86. In general, the impact of an instance of non-compliance with investment rules must be determined individually for each instance of non-compliance.
87. In the presence of several simultaneous instances of non-compliance with investment rules, the impact may be calculated according to the net result of the regularisation transactions pursuant to the methods set out above covering all the instances of non-compliance.
- “Simultaneous investment instances of non-compliance” refer to instances of non-compliance that are closely linked (e.g., instances of non-compliance of the same origin or nature) and characterised by overlapping error periods.
- Instances of non-compliance that do not fulfil these criteria must be treated according to an individual impact calculation.
88. In any case, the UCI, in so doing, must be able to demonstrate that the aggregated treatment did not cause a loss to investors or the UCI and that globally, the impact thus calculated constitutes a performance that the investors of the UCI could have expected based on the investment policy laid down in the constitutive documents and/or the prospectus.

## **5.6. Non-compliance with an investment rule resulting in a significant NAV calculation error**

89. The purpose of the correction procedures to be put in place, in accordance with Chapter 5.4. above, is to compensate the UCI in case of a loss suffered as a result of such non-compliance.
90. Non-compliance with an investment rule may result in a significant NAV calculation error within the meaning of Chapter 4 of this Circular. More particularly, such a significant NAV calculation error occurs where over the period of non-compliance with an investment rule (i.e. from the start date to the end date) transactions relating to the capital of the UCI (i.e. subscriptions and/or redemptions) have been executed with a significantly erroneous NAV owing to non-compliance with this investment rule.
91. The UCI or the IFM, where applicable, must verify, for every instance of active non-compliance with investment rules, the impact of the non-compliant transactions with investment rules on all the NAVs determined during the period of non-compliance. If the impact was significant with respect to the tolerance threshold applicable to a given NAV during the period of non-compliance, a significant NAV calculation error has occurred following non-compliance with that investment rule.
92. Where non-compliance with an investment rule causes a significant NAV calculation error, the UCI or the IFM, where applicable, must apply the guidelines laid down in Chapter 4 and notably recalculate and correct the NAV for all the NAV calculation days on which the tolerance threshold was exceeded.

## 6. Other errors at UCI level

93. In the context of the activities and operations of a UCI, errors other than those stated in Chapters 4 and 5 may occur and may cause a loss to the UCI and/or its investors.
94. This Chapter specifies the guidelines to be followed by the UCI for four types of errors to which a UCI may, where appropriate, be exposed and which result in the UCI being in a situation of non-compliance with the regulation, the constitutive documents and/or the prospectus applicable to the UCI.
95. Upon discovery of such other error, the procedures in place for the UCI must ensure that the IFM, where applicable, the UCI administrator and the depositary are informed thereof without delay. The UCI *dirigeants* and the IFM *dirigeants*, where applicable, must be appropriately informed of such an error so as to be able to perform their role as described in Chapter 3 of this Circular.
96. Besides these four types of errors, other errors may occur, where appropriate, at the level of a UCI in the context of its activities and operations. Notwithstanding the absence of specific guidelines laid down in this Circular in relation to these errors, the UCI must, at every occurrence, assess whether such errors require corrective actions and compensation for the losses suffered by the UCI and/or the investors.

### 6.1. Incorrect application of Swing Pricing

97. Swing Pricing is an NAV adjustment mechanism which allows protecting existing investors in the UCI from dilution effects due to capital activity (i.e. subscriptions and/or redemptions).
98. Errors in relation to the application of the Swing Pricing mechanism may occur where the application rules and minimum or maximum swing factors do not comply with the provisions laid down in the constitutive documents and/or the prospectus of the UCI or with the internal implementing modalities set down for the UCI.
99. Table 6 hereafter specifies the case of non-application of the swing factor as set for the UCI:

Table 6

<b>Impact on the UCI</b>	The UCI was not protected from the dilution effect and suffered a loss equal to the net variation in capital multiplied by the difference between the applied NAV and the NAV that should have been applied had it been adjusted by the swing factor set for the UCI.
<b>Corrective measure</b>	The UCI must be compensated for the loss suffered.
<b>Impact on investors</b>	Depending on the direction of the swing that has not been applied, part of the investors benefited thereof (i.e. either those that subscribed or those that redeemed) and another part suffered a loss. <ul style="list-style-type: none"> <li>• Where the tolerance threshold was not exceeded (*): no compensation is required for capital activity carried out by investors.</li> <li>• Where the tolerance threshold was exceeded: a correction procedure according to Chapter 4 must be applied.</li> </ul>

*(\*) The exceedance (as a percentage) of the tolerance threshold aiming to determine whether the UCI is facing a significant NAV calculation error must be calculated based on the difference between the NAV per unit/share applied to transactions and the NAV per unit/share that should have been applied based on the swing factor.*

Table 7 relates to the application of a swing factor that exceeds the factor set at the level of the UCI:

Table 7

<b>Impact on the UCI</b>	The UCI has been over-protected (received too much) from the dilution effect (in both the net subscription and the net redemption scenario).
<b>Corrective measure</b>	The UCI has not suffered any loss and thus no compensation is required.
<b>Impact on investors</b>	Depending on the direction of the swing applied, part of the investors benefited thereof (i.e. either those that subscribed or those that redeemed) and another part suffered a loss. <ul style="list-style-type: none"> <li>• Where the tolerance threshold was not exceeded (*): no compensation is required for capital activity carried out by investors.</li> <li>• Where the tolerance threshold was exceeded: a correction procedure, pursuant to Chapter 4, must be applied.</li> </ul>

*(\*) The exceedance (as a percentage) of the tolerance threshold aiming to determine whether the UCI is facing a significant NAV calculation error must be calculated based on the difference between the NAV per unit/share applied to transactions and the NAV per unit/share that should have been applied based on the corrected swing factor.*



Table 8 deals with the situation where the swing factor applied was insufficient compared to the factor set for the UCI:

Table 8

<b>Impact on the UCI</b>	The UCI was not sufficiently protected from the dilution effect and suffered a loss equal to the net variation in capital multiplied by the difference between the applied NAV and the NAV that should have been applied if it had been adjusted by the proper swing factor.
<b>Corrective measure</b>	The UCI must be compensated for the loss suffered.
<b>Impact on investors</b>	Depending on the direction of the swing applied, part of the investors benefited thereof (i.e. either those that subscribed or those that redeemed) and part of the investors suffered a loss. <ul style="list-style-type: none"> <li>• Where the tolerance threshold was not exceeded (*): no compensation is required for capital activities carried out by investors.</li> <li>• Where the tolerance threshold was exceeded: a correction procedure, according to Chapter 4, must be applied.</li> </ul>

*(\*) The exceedance (as a percentage) of the tolerance threshold aiming to determine whether the UCI is facing a significant NAV calculation error must be calculated based on the difference between the NAV per unit/share applied to transactions and the NAV per unit/share that should have been applied based on the corrected swing factor.*

100. The guidelines laid down in this Section must be applied in a similar manner to possible errors resulting from the use of other dilution management tools, by taking into account each time the specific characteristics of these tools.

These other tools are, for example, the following:

- the anti-dilution levy;
- the liquidity fees in order to reflect the cost of providing liquidity by a UCI;
- commissions for the benefit of the UCI that charge investing and/or divesting investors the transaction costs, taxes or other elements, these commissions applying either as lump sum or on an individually calculated basis.

## 6.2. Non-compliant payment of costs/fees at UCI level

101. This Section sets out the guidelines to follow to correct situations where costs/fees have been charged and paid by the UCI without complying with the provisions of the constitutive documents and/or the prospectus of the UCI.
102. The situations where costs/fees have not been correctly provisioned (i.e. without effective payment by the UCI) are not covered by this Section. The correction of a significant provisioning error of costs/fees must be considered as a significant NAV calculation error to which the guidelines of Chapter 4 apply.
103. For payments of costs/fees that do not comply with the provisions of the constitutive documents and/or the prospectus, the following two cases may arise:

- the UCI paid too much in costs/fees;
- the UCI did not pay enough in costs/fees.

104. Where the UCI paid an amount of costs/fees (e.g., to an IFM, service providers) that is too high compared to the amount laid down in the constitutive documents and/or the prospectus, this charging is an error which must be corrected and for which the UCI must be compensated.

The tolerance thresholds provided for in Chapter 4 do not apply in this case.

The UCI must be compensated for the amount of unduly paid costs/fees.

Where the compensation amount causes a significant NAV calculation error, this error must be corrected according to the rules of conduct laid down in Chapter 4 of this Circular.

105. Where a UCI paid an amount of costs/fees (e.g., to an IFM, service providers) which turns out to be insufficient compared to the amount provided for in the constitutive documents and/or the prospectus, the UCI or the IFM, where applicable, must ensure that the potential corrective actions of this error do not cause a loss to investors that were not concerned by these costs/fees.

More particularly, such a correction must not cause a loss to investors owing to an ex-post charging of costs/fees as these investors have not benefited from the services that these costs/fees were supposed to pay.

On that basis, the UCI can proceed in two ways:

- Either the UCI will not retroactively charge the amounts of costs/fees that turned out to be insufficient from the UCI's assets on the basis of the guideline, in accordance with Chapter 3, that the party that caused the error must also ensure its remediation and, as a consequence, pay from its own assets the amount of costs/fees due by the UCI.
- Or the UCI will retroactively withdraw the amounts of insufficiently paid costs/fees from the UCI's assets. In this case, the UCI must fully correct the erroneous NAVs (through insufficiently paid fees) over all the error period without applying the tolerance threshold provided for in Chapter 4 in relation to a significant NAV calculation error. This correction must ensure that the insufficiently paid fees will only be borne by the investors that benefited from the services underlying these costs/fees. The UCI and/or the investors must be compensated by the amounts calculated in accordance with the guidelines laid down in Chapter 4.

### **6.3. Incorrect application of cut-off rules**

106. The constitutive documents and/or the prospectus of the UCI open to subscriptions and/or redemptions define the cut-off governing the capital activity that investors may carry out based on a given NAV.

107. Where the cut-off provisions laid down in the constitutive documents and/or the prospectus are not complied with, subscription and/or redemption orders introduced by investors in due form may be executed based on an NAV that is prior or subsequent to the NAV that the investors would have obtained if the provisions laid down in the constitutive documents and/or the prospectus had been observed.

108. In such a case, the UCI must take the necessary measures to correct the loss suffered by the UCI and/or by the investors as the investors obtained an NAV different from that to which they would have been entitled if the provisions laid down in the constitutive documents and/or the prospectus had been observed.

The correction must concern all the orders that were executed based on an erroneous NAV. Where investors realised a gain due to the error, they will retain the gain and the UCI must be compensated by the difference between the erroneous NAV and the corrected NAV. Where an investor suffered a loss, it must be compensated by the UCI based on the allocation of additional units or based on the payment of the difference between the erroneous NAV and the corrected NAV.

Where the investor that involuntarily benefited from such an incorrect application of the cut-off rules qualifies as well-informed/professional investor, the UCI may request such an investor to reimburse the amounts unduly perceived. For investors that are not well-informed/professional investors it is, in principle, not appropriate to request the latter to reimburse the amounts unduly perceived.

109. In the event of an incorrect application of the cut-off, the tolerance threshold referred to in Chapter 4 must not be applied as the NAV had not been subject to a significant calculation error, but a correctly calculated NAV had been incorrectly applied.
110. In the event of an incorrect application of the cut-off, the UCI must also verify that the corrective actions did not lead to a significant NAV calculation error and that additional corrections in accordance with Chapter 4 of this Circular need not be made.
111. In the context of corrective actions, the UCI must also verify whether the incorrect application of cut-off rules did not entail a non-compliance with the provisions of Circular CSSF 04/146 concerning the protection of undertakings for collective investment and their investors against Late Trading and Market Timing practices. If so, the provisions of this Circular must also be applied.

#### **6.4. Investment allocation errors**

112. In the context of the accounting of UCI investments, allocation errors may occur with respect to orders placed and executed on the market by the portfolio manager.
113. Allocation errors may, for example, concern the following situations:
- a security that should have been allocated to sub-fund A of a UCI was erroneously allocated to sub-fund B of that UCI;
  - a security that should have been allocated to UCI X was erroneously allocated to UCI Y;
  - transactions (e.g., currency hedging transactions) were allocated to the wrong share class.
114. Such allocation errors are errors that may negatively impact a UCI, as illustrated below:
- as from the moment the investment which should not have been allocated to the UCI, is in the accounts books of the UCI (i.e. recording for the benefit of the UCI in the accounts held by the UCI administrator and/or in the accounts of the UCI at the depositary) and the UCI is exposed to the risks linked to this investment;

- owing to the fact that the UCI does not benefit from the performance of the investment that the manager intended for the UCI as the investment was allocated to a third party.
115. In the event of such an allocation error, the UCI must be compensated for the loss suffered in relation to the erroneously allocated investments. Where the erroneously allocated investments generated a profit, the UCI will retain this profit.

Where the securities allocation error caused a significant NAV calculation error, the procedure described in Chapter 4 must also be applied.

## **7. General guidelines in relation to the correction of errors/non-compliance**

### **7.1. Payment of compensation**

116. The corrective actions implemented following errors/non-compliance must be carried out with necessary diligence and care in order to protect the UCI and/or its investors.
117. In general, this Circular is built on the guideline that the party having caused an error/non-compliance entailing a loss as a result of non-compliance with the obligations applicable to them, must ensure remediation.

The UCI or the IFM, where applicable, must ensure that the remediation of the loss is done without delay and that the compensation due to the UCI and/or the investors be paid out upon quantification thereof in compliance with the guidelines laid down in Chapters 4, 5 and 6 above.

118. The compensation amounts to which the UCI is entitled must be transferred to the UCI so that it can benefit from it as soon as possible after their determination. It is not acceptable to make the payment of the compensation over time by instalments, nor to deduct the compensation amounts from any future remuneration to which the party responsible for the error/non-compliance could be entitled.
119. Where compensation cannot be paid out without delay, the *dirigeants* of the UCI or of the IFM, where applicable, must ensure that the CSSF is informed of the underlying reasons via the annexes of the notification form provided for in Chapter 9.

### **7.2. Compensation to be made to investors and to the UCI**

#### **7.2.1. Specificities linked to financial intermediaries**

120. End-investors of a UCI (i.e., the final beneficiaries) often refer to the services of financial intermediaries to subscribe to units of a UCI. Consequently, as a general rule, these investors are not included in the register of investors held by the UCI administrator, since the financial intermediary is included on behalf of one or more final beneficiaries in the register as the party that subscribed to the units of a UCI.

Subscribing (and redeeming) to units of a UCI through one or more financial intermediaries may imply that the capital activity is aggregated for several investors at the level of the intermediation chain and that the net subscription/redemption amounts get *in fine* to the UCI administrator in charge of the registrar function.

121. Where an error/non-compliance occurs at the level of a UCI, and where compensation must be paid out to investors as a result of the corrective actions, the UCI must ensure that the final beneficiaries having subscribed/redeemed through financial intermediaries receive the compensation which is due to them following the error/non-compliance. According to this compensation scheme, the UCI (together with the distributors/financial intermediaries) must have in place the necessary arrangements to trace back the intermediation chain in order to ensure that compensation is paid out taking into account the individual situation of each final beneficiary and thus the loss suffered during the error/non-compliance period.
122. Where the UCI is not in a position to pay out compensation in compliance with the criteria set out in point 121, it must nevertheless ensure that all necessary information related to the error/non-compliance (for instance, the error period with the start date and end date, the erroneous NAV and the corrected NAV per day during the error period, the list of subscription and redemption per day during the error period, the impact per day during the error period) is provided to the financial intermediaries acting on behalf of other investors, in order for these financial intermediaries to take on their responsibility and proceed to the necessary compensation towards these other investors.

In that case, the UCI must ensure that investors are clearly informed that the rights of the final beneficiaries may be affected when compensation is paid out in case of errors/non-compliance at the level of the UCI where investors subscribed to units of a UCI through a financial intermediary. For UCIs which must issue a prospectus within the meaning of the definition set out in Chapter 1 of this Circular, this information must be disclosed in the prospectus.

### **7.2.2. Use of the *de minimis* rule**

123. Where investors suffered a loss caused by errors/non-compliance, the UCI may apply the *de minimis* rule for the payment of compensation to which the investors are entitled.
124. Thus, UCIs may not pay out compensation to investors where the compensation amounts do not exceed a certain threshold, referred to as the *de minimis* amount, which is generally fixed as a lump sum. The *de minimis* amount aims to avoid that investors that are entitled to very low compensation amounts end up with no benefit because of the bank charges and other fees they have to bear for the payments by bank transfer.
125. The *de minimis* amount must be determined for each UCI, or even for each UCI sub-fund when necessary, taking into account the level of bank charges and other fees which are charged to investors due to a payment by bank transfer.
126. The application of the *de minimis* rule, the *de minimis* amount(s) provided for as well as the elements justifying this(these) amount(s) must be included in the internal policy and procedures that are in place for the UCI.

127. For compensation to be paid out to the UCI, the *de minimis* rule is not applicable. As a consequence, all compensation amounts due to an UCI following an error/non-compliance must be paid out, unless that amount is lower than one monetary unit.

### **7.2.3. Investor compensation through allocation of additional units**

128. For the compensation of investors that still hold units at the time compensation due to them is paid out, UCIs may decide to allocate additional units to them (or, as the case may be, fractions of units) instead of a payment by bank transfer. This compensation must be made in compliance with the guidelines laid down under point 7.2.1. above.
129. Compensation through allocation of additional units allows avoiding bank charges to be borne by investors. Moreover, this permits full compensation as it is carried out without applying the *de minimis* rule.

### **7.3. Treatment of non-compensated amounts and transfer to the *Caisse de Consignation***

130. As part of the correction of errors/instances of non-compliance, the UCI or the IFM, where applicable, must be diligent in the execution of the compensation payments to investors.
131. In this context, the UCI or the IFM, where applicable, must ensure that the investors, which are no longer invested in the UCI following the full redemption of their units while still being entitled to compensation, must be correctly compensated.
132. In this respect, where the UCI or the IFM, where applicable, does not manage, despite all necessary efforts (including, where appropriate, the performance of additional research), to pay out the compensation due to former investors, the UCI or the IFM, where applicable, files a consignment request with the State Treasury, Consignment Office (*Trésorerie de l'État, Caisse de consignation*) pursuant to Article 1(2) of the Law of 29 April 1999 on consignments to the State.

### **7.4. Bearing the fees resulting from the corrective actions**

133. The fees resulting from the corrective actions of an error/non-compliance must not be borne by the UCI and must thus not be withdrawn from its assets.
134. The fees resulting from the corrective actions include any direct and/or indirect fees linked to the corrective actions (e.g., staff costs at the IFM/UCI, legal consultancy fees, fees related to the drawing up of a special report by the *réviseur d'entreprises agréé* (approved statutory auditor)).
135. The fees linked to the corrective actions must also not be indirectly recharged to the UCI through the increase of costs/fees to be borne by the UCI.

## 8. Intervention of the *réviseur d'entreprises agréé* (approved statutory auditor)

### 8.1. Scope of intervention of the *réviseur d'entreprises agréé*

136. The provisions of Article 154(3) of the UCI Law, of Article 55(3) of the SIF Law and of Article 27(3) of the SICAR Law provide that the CSSF may request a *réviseur d'entreprises agréé* ("REA") of a UCI to carry out a control on one or several particular aspects of the activities and operations of a UCI.

137. In this context, the CSSF requests the REA to carry out specific controls where a UCI is facing errors/instances of non-compliance as covered by this Circular.

The REA must carry out these controls when drawing up the separate report laid down in Circular CSSF 21/790 following the procedures detailed in Section 8.2. below.

138. By way of derogation from the foregoing, the CSSF requests the REA to carry out an additional control, as specified in Section 8.3. below, where the following conditions are met:

- the error/non-compliance relates to a UCITS or a UCI Part II; and
- the total compensation amount exceeds EUR 50,000 or the compensation to be paid out to one single investor exceeds EUR 5,000.

In order to determine the "total compensation amount" for the purposes of applying the EUR 50,000 threshold, both the compensation paid out to the UCI and the compensation paid out to all investors should be taken into account.

The additional control must be performed immediately after the detection of the error/non-compliance at the level of the UCI and it must result in the issuance of a special report by the REA, to the attention of the UCI *dirigeants* and the CSSF.

For the REA to perform this additional control, the UCI or the IFM, where applicable, must ensure that the REA is informed of such cases without delay and that all necessary information is provided to the REA.

139. For the errors/instances of non-compliance that do not meet the two conditions set out under point 138 above, the UCI must ensure that the REA is provided with the necessary information at the latest when the REA starts its year-end work related to the separate report provided for in Circular CSSF 21/790.

140. Where the error/non-compliance is detected by the REA, the latter must inform, without delay, the *dirigeants* of the UCI and the IFM, where applicable, and request that the error/non-compliance be treated and notified in compliance with the requirements of this Circular.

Where the REA observes that the *dirigeants* of the UCI or of the IFM, where applicable, do not follow up on its request, the REA must notify the CSSF thereof at the latest when issuing its management letter and the separate report as set out in Circular CSSF 21/790. Where the absence of reaction of the *dirigeants* of the UCI or of the IFM, where applicable, to the error/non-compliance detected may adversely affect the rights of the UCI and/or its investors, the REA must immediately notify this situation to the CSSF.

As a general rule, the work of the UCI's REA, as set out in this Chapter, must be carried out with all the necessary diligence. The outcome of the control work, which must be clear and concise, must be documented either in the separate report or in the special report.

## **8.2. Controls to be carried out by the REA in respect of the separate report**

141. As part of the separate report provided for in Circular CSSF 21/790, the REA must control the errors/instances of non-compliance which have been reported to it by the UCI in compliance with the requirements of this Circular.

More specifically, the REA must carry out, pursuant to the procedures that the CSSF requests the REA to implement in accordance with a risk-based approach and which are directly indicated in the separate report, sample-based controls on the errors/instances of non-compliance that occurred during the financial year or the period subject to the statutory audit.

The purpose of this control is to verify, for the selected cases, that the conditions and measures required under this Circular are complied with.

142. The controls to be implemented by the REA, in the event of a significant NAV calculation error, must address the following elements:

- identification of the investors affected by the error, as listed in the register of investors;
- correction of the NAVs applied to the subscription and/or redemption requests received during the error period;
- determination, based on the corrected NAVs, of the amounts to be paid out to the UCI and/or the investors as compensation for the loss resulting from the error;
- verification of the effective payment of the compensation to the UCI and/or the investors in accordance with Section 7.2.

143. The controls to be implemented by the REA, in the event of an instance of active non-compliance with the investment rules of the UCI, must address the following elements:

- calculation of the gains or losses incurred by the UCI as a result of the correction of the instance of active non-compliance with investment rules;
- determination, based on the impacts identified, of the amounts to be paid out to the UCI as compensation for the loss suffered;
- verification of the consistency of the impact calculation method with the guidelines set out in this Circular and the internal guidelines applicable to the UCI;
- verification of the effective payment of compensation to the UCI;
- verification whether the non-compliance with the investment rules resulted in a significant NAV calculation error.

The procedures set out by the CSSF relating to the separate report provide that the REA must also carry out sample-based controls on the adequate classification of instances of "passive" non-compliance.

144. The controls to be implemented by the REA, in the event of any other error, must address the following elements:



- determination, based on the impacts identified, of the amounts to be paid out to the UCI and/or the investors as compensation for the loss suffered;
  - verification of the adequacy of the calculation method of the gains and/or losses for the UCI and/or the investors depending on the type of error;
  - verification of the effective payment of the compensation to the UCI and/or investors in accordance with Section 7.2.
145. The outcome of these procedures that the CSSF requests from the REA are reported in the separate report in the form of answers to a set of mainly closed-ended questions and they do not result in an opinion in accordance with auditing, insurance or any related services standards.

### **8.3. Additional control to be carried out by the REA in respect of the issuance of a special report**

146. Where the occurrence of an error/non-compliance requires, pursuant to Section 8.1. above, the issuance of a special report, the procedures to be implemented by the REA must include the items detailed in Section 8.2.
147. The REA must review, in addition to the items of Section 8.2., the following elements:
- as regards compensation to be paid out for the loss suffered by the investors, as listed in the register of UCI's investors, the REA reviews compliance with the guidelines laid down in Chapter 7 on financial intermediaries;
  - verification that the fees and costs arising from the correction of the error/non-compliance have not been charged or recharged to the UCI;
  - assessment of the adequate application of the *de minimis* rule set out in Chapter 7;
  - verification of the adequacy of the notification (including the exhaustiveness of the content) provided to the CSSF in accordance with Chapter 9;
  - verification that an analysis on the underlying causes of the error/non-compliance has been performed and that corrective measures have been taken.

The modalities for the submission of the special report to the CSSF are detailed in Chapter 9 of this Circular.

### **8.4. Summary tables on the intervention of the REA**

148. The tables below summarise the control work that the CSSF requests the REA to carry out, on an annual basis, as part of the separate report or on an ad hoc basis via the issuance of a special report.

149. Table 9 deals with the significant NAV calculation errors under Chapter 4 of this Circular:

Table 9

	<b>Separate report</b>	<b>Special report</b>
<b>UCITS/UCI Part II</b>		
Significant NAV calculation error entailing compensation exceeding one of the thresholds of EUR 50,000/EUR 5,000, or both thresholds		Review of all the errors
Significant NAV calculation error entailing compensation that did neither exceed the EUR 50,000 threshold, nor the EUR 5,000 threshold	Sample-based review of the errors	
Significant NAV calculation error in a closed-ended UCI (UCI Part II)	No intervention (*)	
<b>SIF/SICAR</b>		
Significant NAV calculation error entailing compensation exceeding one of the thresholds of EUR 50,000/EUR 5,000 or both thresholds	Sample-based review of the errors	
Significant NAV calculation error entailing compensation that did neither exceed the EUR 50,000 threshold, nor the EUR 5,000 threshold	Sample-based review of the errors	
Significant NAV calculation error in a closed-ended UCI	No intervention (*)	

(\*) The REA verifies, as part of its statutory audit, that the NAV accurately reflects the value of the UCI's assets and liabilities calculated in line with the constitutive documents and/or the prospectus of the UCI.

150. Table 10 deals with the instances of non-compliance with the investment rules under Chapter 5 of this Circular:

Table 10

	<b>Separate report</b>	<b>Special report</b>
<b>UCITS/UCI Part II</b>		
Active non-compliance with the investment rules entailing compensation exceeding one of the thresholds of EUR 50,000/EUR 5,000 (*), or both thresholds		Review of all the instances of non-compliance
Active non-compliance with the investment rules entailing compensation that did neither exceed	Sample-based review of the instances of non-compliance	

the EUR 50,000 threshold, nor the EUR 5,000 threshold (*)		
Passive non-compliance with the investment rules	Sample-based review of the instances of non-compliance	
<b>SIF/SICAR</b>		
Active non-compliance with the investment rules	Sample-based review of the instances of non-compliance	
Passive non-compliance with the investment rules	Sample-based review of the instances of non-compliance	

(\*) The EUR 5,000 threshold for compensation of one single investor applies where the instance of non-compliance with the investment rule exceeds the tolerance threshold applicable to the NAV errors entailing a significant calculation error within the meaning of Chapter 4 of this Circular.

151. Table 11 deals with the other errors under Chapter 6 of this Circular:

Table 11

	<b>Separate report</b>	<b>Special report</b>
<b>UCITS/UCI Part II</b>		
Other error entailing compensation exceeding one of the thresholds of EUR 50,000/EUR 5,000, or both thresholds		Review of all the other errors
Other error entailing compensation that did neither exceed the EUR 50,000 threshold, nor the EUR 5,000 threshold	Sample-based review of the other errors	
<b>SIF/SICAR</b>		
Other error entailing compensation exceeding one of the thresholds of EUR 50,000/EUR 5,000, or both thresholds	Sample-based review of the other errors	
Other error entailing compensation that did neither exceed the EUR 50,000 threshold, nor the EUR 5,000 threshold	Sample-based review of the other errors	

## **9. Notification of errors/instances of non-compliance to the CSSF and to other competent authorities**

### **9.1. Notification to the CSSF**

152. Any error/non-compliance, within the meaning of the definition under Chapter 1 of this Circular, must be notified to the CSSF via the specific notification form provided for and made available on the CSSF website.

The organisational arrangements in place at the UCI and at the IFM, where applicable, must include the modalities for the notification of errors/instances of non-compliance to the CSSF.

The notifications must comply with the explanations provided by the CSSF in relation to the notification form and published on the CSSF's website.

#### **9.1.1. Notification form**

153. All the data fields of the notification form relating to a given error/non-compliance must be filled in. To this end, the frame of the form must be strictly followed, and no modification or addition must be made to the form.

The information provided in the "text" fields, as required in the notification form (e.g., origin of the error, remediation plan), must be clear and precise in order to allow the CSSF to obtain a proper understanding of the error/non-compliance as well as of the corrective actions and remediation measures implemented.

154. A quantitative impact calculation allowing the CSSF to trace how the impact of the errors/instances of non-compliance and of the corrective actions was determined must be attached to the notification.

155. The CSSF refuses incomplete notifications, as they do not allow the CSSF to have a sufficient understanding of the error/non-compliance. Thus, where the CSSF considers that a notification is incomplete, a new and duly completed notification must be submitted to the CSSF, without delay.

156. Where the notification form does not allow the entity to provide to the CSSF all the information necessary to the proper understanding of the error/non-compliance and of its correction, additional explanations or clarifications must be provided to the CSSF via a separate document, to be sent jointly with the notification form.

157. Where an error/non-compliance gives rise to the issuance of a special report by the REA in compliance with Chapter 8.1., this report must be transmitted to the CSSF, in principle, within 3 months as from the date of submission of the complete notification form to the CSSF.

#### **9.1.2. Notification deadlines**

158. The CSSF expects the corrective actions relating to any error/non-compliance within the scope of this Circular (including the payments necessary to correct the loss suffered) to

be carried out as soon as possible with a view to ensuring the interests of UCIs/investors are safeguarded.

Based on the above, for an error/non-compliance which does not entail the payment of compensation to investors, the deadline for notification is 4 to 8 weeks at the latest after the date on which the error/non-compliance has been detected. More complex errors/instances of non-compliance which imply compensation to a great number of investors in different jurisdictions must be reported to the CSSF within the above deadlines, without mandatorily including the date the investors are compensated.

This date may be provided to the CSSF at a later stage via the complete form.

The entity submitting the notification must keep the CSSF informed of the progress of the compensation payments on a monthly basis.

Likewise, if the REA's special report cannot be submitted to the CSSF within the 3-months deadline mentioned in point 157 above, the CSSF must be informed of the progress of the work linked to the special report on a monthly basis.

### **9.1.3. CSSF intervention**

159. As regards the notification of an error/non-compliance falling within the scope of this Circular, the corrective actions indicated in the notification form by the UCI are not subject to the CSSF's approval.

Therefore, the CSSF will not provide specific feedback to the entity which submitted a notification. These notifications are integrated in the supervisory work of the CSSF in accordance with a risk-based approach.

160. However, the CSSF may perform, at any time, on an ex post basis, specific supervisory actions on the notifications received, as for example:
- request additional information on the cases reported;
  - request entities to apply other remedial actions where the actions proposed are not in line with the guidelines set out in this Circular;
  - require improvements to the organisational arrangements in place at the level of the UCI and the IFM, where applicable, where the notifications point to organisational deficiencies.

## **9.2. Notification to other competent supervisory authorities**

161. The UCI or the IFM, where applicable, must ensure that the competent authorities of the countries in which the units of a UCI are admitted to marketing are duly informed in the event of errors/instances of non-compliance, in accordance with the rules applicable in these countries as specified by the competent authorities.

## 10. Provisions on the entry into force and repealing provisions

162. This Circular enters into force with effect from 1 January 2025.

UCIs must apply the guidelines of this Circular to any error/non-compliance detected as from 1 January 2025.

To this end, the CSSF will provide the industry with an adapted notification form, sufficiently in advance of the above date of entry into force.

163. As regards the errors/instances of non-compliance detected between the publication date of this Circular and 1 January 2025, UCIs will continue to apply the guidelines of Circular CSSF 02/77.

164. Pursuant to Section 7.2.1., this Circular requires from UCIs that are not in a position, in the event of an error/non-compliance, to pay out compensation that take into account the individual situation of each final beneficiary, to clearly inform the investors of the fact that the rights of the final beneficiaries that subscribed to units of UCIs through a financial intermediary may be affected when compensation linked to errors/instances of non-compliance are paid out.

For UCIs which have to issue a prospectus within the meaning of the definition laid down in Chapter 1 of this Circular, this information must be disclosed in the prospectus. Thus, UCITS, UCIs Part II, MMFs and ELTIFs concerned by this requirement are expected to include the required information in their prospectus in the next update. This also applies to SIFs and SICARs in case they still issue additional units to new investors.

The UCIs that do not have to update their prospectus in consideration of the above, or that are not subject to the regulatory obligation to issue a prospectus, or those that have not yet updated their prospectus prior to the entry into force of this Circular, must transmit the required information to the investors, via the official and usual communication channels referred to in the constitutive documents and/or the prospectus.

165. The annual review of the errors/instances of non-compliance by the REA, as set out under Chapter 8, will have to be carried out based on the current procedures relating to the separate report of Circular CSSF 21/790 and on the provisions of Circular CSSF 02/77 for all financial year-ends up to 31 December 2024 inclusive.

For the subsequent financial year-ends (i.e., year-ends as from 1 January 2025), the intervention of the REA will be made in compliance with Chapter 8. The procedures relating to the separate report of Circular CSSF 21/790 will be updated for the year-ends after 1 January 2025 in order to take into account the provisions of this Circular.

166. Lastly, Circular CSSF 02/77 is repealed upon the entry into force of this Circular.

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