Comments of Articles

relating to

CAA Regulation N° 20/03 of 30July 2020 relating to the fight against money laundering and terrorist financing

*(hereinafter the "**Regulation**")*

The purpose of the Regulation is to replace and repeal the amended CAA Regulation No. 13/01 of 23 December 2013 on the fight against money laundering and terrorist financing (hereinafter the "**Regulation 13/01**") following the legislative changes resulting from the transposition of the 4th and 5th Anti-Money Laundering Directives.

Some changes or additions to the Regulations require certain specifications:

Chapter 1

Article 1:

This article includes definitions taken from Regulation 13/01 as well as new definitions, some of which require to be further detailed:

- **"management**": this definition refers inter alia to the management committee. This term refers to a management committee set up in accordance with the provisions of the law of 10 August 1915 on commercial companies, as amended, and not an internal committee that does not meet the criteria laid down by this law.
- **"domicile**": this definition includes not only the principal place where a natural person has settled, which in principle determines the exercise of the person's civil rights and at which judicial acts concerning are notified, but also, if that place is different, the principal residence, i.e. the place where the person habitually and effectively resides.
- **"law on the implementation of restrictive measures in financial matters**": a bill of law relating to the implementation of restrictive measures in financial matters and repealing the law of 27 October 2010 relating to the implementation of United Nations Security Council resolutions and acts adopted by the European Union containing prohibitions and restrictive measures in financial matters against certain persons, entities and groups in the context of the fight against the financing of terrorism was tabled at the *Chambre des Deputés* on 15 January 2019 (Bill of Law no. 7395). The purpose of the definition is to include the relevant law once it has been passed.
- **"staff**": includes the members of the management of the professional.
  The term "self-employed" is also to include in the definition of staff the sub-brokers and self-employed agents who are authorised respectively on behalf of a broker being a natural or legal person or an insurance undertaking. Conversely, all third parties such as service providers or other external advisors (e.g. lawyers, auditors) are not to be included in the definition of staff.

Article 2:

The purpose of Article 2 is to clarify the scope of the Regulation.

Article 2, paragraph 1, subparagraph 2 of the Regulation specifies that, for insurance undertakings, reinsurance undertakings and intermediaries, obtaining an authorisation to conduct the classes of life insurance referred to in Annex II to the Law on the insurance sector and/or classes 14 (credit) and 15 (surety) of non-life insurance referred to in Annex I to the Law on the insurance sector has as immediate consequence that the concerned

professional falls within the scope of the Regulation. Consequently, the professional to whom an authorisation has been issued is required to appoint a Responsible for Compliance as defined in Article 1, paragraph 1, point(t) of the Regulation, even if he does not pursue the activities for which the authorisation was issued. Similarly, the professional is required to take the necessary measures to put in place the policies, controls and procedures required by the amended Law of 12 November 2004 on the fight against money laundering and terrorist financing (hereinafter the "**Law**") before the beginning of any activity relating to the branches of activity falling within the scope of the Law.

However, it should be noted that the provisions of the Regulation do not apply directly to insurance agents and agencies. It is up to the insurance undertakings for which they are authorised to take the necessary measures to ensure that the provisions of the Regulation are applied.

The purpose of Article 2, paragraph 2 of the Regulation is to specify that all natural and legal persons under the supervision of the CAA are required to implement the restrictive measures in financial matters whether or not they are professionals covered by paragraph 1 of the same Article. It should be clarified that natural and legal persons which are under the supervision of the CAA but which are not professionals referred to in paragraph 1 of Article 2, are not required to identify and take reasonable measures to verify the identity of the beneficial owners in accordance with the provisions of the Law. However, the latter have to take the appropriate measures if doubt exists on whether beneficial owner(s) could be subject to restrictive measures in financial matters.

Chapter 2

Article 3:

This article specifies the scope of the overall risk assessment to be carried out by any professional as defined in the Regulation.

Article 4:

This Article specifies the categories, variables and risk factors which the professional is required to consider when classifying his clients, it being understood that the same client may however be classified as high, normal or low risk depending on the type of contract to which he subscribes.

The European Supervisory Authorities' guidelines on risk-based supervision provide examples of risk factors that may lead respectively to simplified or enhanced due diligence measures. These guidelines are available on the website of the CAA.

Article 5:

This article does not call for comments.

Article 6:

The reference in the first sentence of the first paragraph of Directive (EU) 2015/849 should be understood to include the delegated regulations of the European Commission supplementing Directive (EU) 2015/849 regarding the identification of high-risk third countries with strategic deficiencies.

The "relevant information" as referred to in paragraph 1 includes the country's AML/CFT mutual evaluation report issued by the FATF and the country's national AML/CFT risk assessment.

Chapter 3

Article 7:

This article does not call for comments.

Article 8:

If an anti-money laundering department composed of several persons is set up by the professional for the acceptance and review of the files and that the latter are achieved by means of a contract management tool or any other computer-based tool, the professional shall ensure that this tool is configured in such a way as to be able to trace the names of the persons who validate the files as well as the date and time of these validations. The professional's procedures must reflect, for each type of client (low, normal, high risk), which members of the anti-money laundering department can validate the acceptance or review of a file according to their level of seniority.

The purpose of Article 8 paragraph 2 is to allow professionals to use an automated acceptance process not involving the intervention of a natural person. This process may only be used for clients presenting a low risk of money laundering and terrorist financing and must be authorised in advance by the CAA. In addition to justifying the low risk allocated to the concerned clients and products, professionals must be able to explain to the CAA the mode of operation of the process.

Any process put in place to date that has not been authorized by the CAA must be authorized.

The use of such a process does not exempt the professional from completing the quantitative AML/CFT questionnaires in an exhaustive manner.

Article 9:

This article requires the intervention of the Compliance Officer and a member of the senior management for the acceptance of clients likely to present high levels of risk of money laundering or terrorist financing. The purpose of this article is to provide for a "four-eye control" on this type of client. If the size and nature of the business does not require that the functions of Responsible for Compliance and Compliance Officer are performed by two different persons, the member of the senior management must be another person in order to enable this four-eye control.

Articles 10 and 11:

These articles do not call for comments.

Article 12:

This new article relates to the due diligence to be carried out in the event of a portfolio transfer (whether the transferor is located in Luxembourg, in the European Economic Area or in a third country) and shall enable professionals to verify the quality of the customer due diligence measures that have been implemented and applied by the transferor and internally to take the necessary steps to review the files of the clients included in the transferred portfolio.

Article 33 of the Regulation provides that the review and updating of the documents, data and information of any assigned contract shall be carried out at the latest at the time of the first transaction or at the time of the first change concerning such contract.

However, if the transfer of portfolio concerns contracts relating to risks in the classes credit-surety of non-life insurance and the transferor is located in a country where the legislation does not provide for these activities to fall within the scope of the national AML/CFT law, the professional will have to take steps to verify whether due diligence measures have been carried out and what the nature of these measures were. Based on the outcome of this analysis, the professional will be required, where appropriate, to implement a plan to remedy the deficiencies identified and to comply with the requirements of the Law within a reasonable time limit.

Article 13:

This article does not call for comments.

Article 14:

This article lists the information that the professional must at minimis collect in order to identify a client.

With regard to natural persons, it is thus necessary to collect information on domicile as defined in Article 1, paragraph 1, point (h) of the Regulation and therefore to provide in the relevant form for the possibility that the principal residence does not correspond to the domicile in the strict sense. This requirement to collect information on the client's principal residence if it is different from the domicile does not apply, however, to contracts relating to classes 14 (credit) and 15 (surety) of non-life insurance or to contracts relating to the so-called "pure protection" classes of life insurance for which the insured is the policyholder and which do not contain any savings or investment element (e.g. outstanding balance insurance in favour of a bank covering the borrowed amount).

With regard to legal persons, the professional shall identify the members of the client's management body (board of directors, management board, management committee or other similar body). If other persons representing the client are involved in the business relationship with the professional, the professional shall also identify them.

Article 15:

This article does not call for comments.

Article 16:

This article concerns the verification of the identity of clients who are natural persons.

The first paragraph establishes the principle that identification shall be carried out by means of a copy of the identity card or passport. The reasons for any exceptions to this principle must be clearly reflected in the client's file (e.g. refugee who does not possess these documents).

The second paragraph refers to means of electronic identification.

Articles 17:

This article does not call for comments.

Article 18:

Paragraph 3 of this article aims to consider as "clients" policyholders who have active powers over group life insurance contracts. "Active powers" is to be understood, for example, as the right to pay supplementary premiums without the intervention of the policyholder.

Articles 19 to 21:

These articles do not call for comments.

Article 22:

The purpose of this article is to remind the professional that the 25 per cent direct or indirect ownership threshold reflected in the definition of beneficial owner is only a sign of direct or indirect ownership. The professional is therefore required to adjust it according to the level of risk of money laundering and terrorist financing without however being able to increase this threshold.

The understanding of the ownership and control structure referred to in paragraph 2 of this Article may be achieved in particular through the following documents: organisation chart dated and signed by the client and/or the beneficial owner, copy of the share registers of the direct and indirect shareholders (or equivalent documents), description of the ownership and control structure by an external counsel.

Articles 23 to 25:

These articles do not call for comments.

Article 26:

This article gives examples of simplified due diligence measures, i.e. measures which allow for derogations from certain measures for identifying and verifying the identity of clients, proxies and beneficial owners. The latter can only be applied if the low risk is justified. This presupposes that the professional is able to demonstrate that all the risk factors related to the client and the concerned product justify the allocation of a low risk to the business relationship. This Article aims more specifically the situation of insurance undertakings, reinsurance undertakings and intermediaries carrying on non-life insurance classes 14 (credit) and 15 (surety) referred to in Annex I of the Law on the insurance sector.

Article 26a:

This article provides examples of enhanced due diligence measures, i.e. measures that are to be applied in addition to the identification and verification measures of clients, proxies and beneficial owners.

One of the examples given in this article relates more specifically to bearer capitalisation contracts. If the life insurance undertaking issues such contracts, it shall put measures in place to ensure that it knows the identity of the beneficial owner(s) when exercising the related rights. One of the envisaged means is to deposit these contracts with the company that issued them.

Article 27:

A business relationship entered into at distance shall not be considered high risk if the professional has put in place the means of identification provided for by the Law. If the above-mentioned means are not in place, the remote entry into a business relationship shall be considered high risk if other specific measures have not been taken to compensate for this risk. The measures to be taken by the professional to compensate for this risk shall be clearly defined in the professional's procedures.

Article 28:

Reference is made to the commentary to Article 9 concerning the intervention of the Compliance Officer and a member of the senior management.

Article 29:

Reference is made to the commentary to Article 9 concerning the intervention of the Compliance Officer and a member of the senior management.

Paragraph 2 of this Article sets out the enhanced due diligence measures that must be followed when the business relationship or operations involve a high-risk country. The frequency of updating client and beneficial owner identification data is to be determined by the professional in his procedures and shall in any event be higher than the frequency determined in accordance with Article 33, paragraph 1 of the Regulation regarding ongoing due diligence.

Article 30:

This article provides examples of operations or transactions referred to in the annexes to CAA Circular 18/9 specifying the procedure for the introduction of new harmonised risk assessment questionnaires on exposure to money laundering and terrorist financing for life insurance undertakings. These examples are also to be taken into consideration by intermediaries distributing insurance products relating to life insurance classes.

This list of examples is not exhaustive and must be adapted according to the nature of the client base and the type of insurance contract.

Article 31:

This Article has been adapted to take account of the abovementioned Bill of Law no. 7395, which henceforth specifies the powers of control and sanction that may be exercised by the CAA.

Paragraph 2 provides some clarification on the use of screening tools. As specified in Article 37(2) of the Regulation, screening shall in principle be automated. However, if the volume and nature of the clients or transactions do not so require, the professional may carry out the checks taking into account in particular the consolidated lists issued by the United Nations, the European Union and the competent authorities of Luxembourg. In this respect, reference is made to the practical guides published by the Ministry of Finance, which are available on the latter's website under the tab "International Financial Sanctions". As specified in the CAA Circular 20/12 relating to the application of prohibitions and restrictive measures in financial matters (international financial sanctions), the CAA recommends that all natural and legal persons under its supervision subscribe to the Newsletter issued by the Ministry of Finance in order to keep abreast of the latest developments in this field and to be able to fulfil their obligations in this respect.

Article 32:

This article includes a non-exhaustive list of activities requiring special attention.

The second example covers situations where the life insurance undertaking becomes the legal owner of companies held as assets underlying unit-linked insurance liabilities. In these situations, the insurance undertaking is required to take measures, including procedures, to ensure that it is aware of the nature and extent of its participation in those companies. If its participation enables it to exercise a dominant influence or control over the companies, the undertaking is required to take all necessary steps enabling it to become acquainted with any transaction envisaged by those companies and to have an overview of its financial flows in order to ensure that those companies are not used for purposes of money laundering or terrorist financing.

Article 33:

In accordance with the provisions of the Grand-Ducal Regulation, the professional is required to review his customer due diligence measures with regard to the level of risk allocated to the client or the business relationship. Nevertheless, the frequency of this review may not exceed 7 years. The professional is therefore required to put in place procedures that define the frequency of updates of customer due diligence measures.

The above principle is however subject to exceptions, i.e., in situations described as "appropriate times", customer due diligence actions must be taken without delay, regardless of when the customer due diligence was last updated.

Articles 34 to 35:

These articles do not call for comments.

Chapter 4

Article 36:

This article does not call for comments.

Article 36a:

This article only covers situations where the professional is at the head of the group.

Article 37:

This article does not call for comments.

Articles 38 to 41:

- Article 38

The Responsible for Compliance must be appointed at management level as defined in Article 1, paragraph 1, point (f) of the Regulation.

Nevertheless, the following clarifications should be made:

- for insurance agencies: as mentioned above, the obligations towards them are incumbent on the insurance undertakings. They are therefore not required to appoint a Responsible for Compliance and a Compliance Officer.
- for brokerage firms: an executive of a brokerage firm may act as Responsible for Compliance if the latter is a member of the management body of the brokerage firm.
- for independent brokers, i.e. natural persons not linked to a brokerage firm: the independent broker is the Responsible for Compliance and, if required with regard to its activities, the Compliance Officer.
- for branches established in Luxembourg: the Responsible for Compliance is the legal representative of the branch.

The professional is required to appoint a Compliance Officer when the nature of the activities, the size and the organisation of the professional require it. Failing this, the Responsible for Compliance may be appointed to this function. For professionals who do not practise the classes of activity falling within the scope of the Law for which they have been authorised, only the appointment of a Responsible for Compliance is required.

The CAA forms relating to the notification of an individual for a function with a professional supervised by the CAA will be updated in a timely manner. Pending the new forms, the Responsible for Compliance shall be notified as the "Head of Anti-Money Laundering function (AML/CFT)".

- Article 39

This article does not call for comments.

- Article 40

The first paragraph indicates that the Compliance Officer has the power to propose to the effective management and the management the measures he considers necessary to implement the AML/CFT policy and procedures. This provision means that the Compliance Officer shall first contact the effective management and if the response given by the latter is not adequate in his opinion, he must contact the professional's management body (board of directors).

In accordance with the provisions of the Law, the Compliance Officer is the privileged contact of the competent AML/CFT authorities and more particularly of the FIU. It should be specified in this respect that the Compliance Officer is not to be considered as the exclusive contact of the CAA.

- Article 41

The CAA will judge on a case-by-case basis which functions other than those provided for in the Regulation can be performed by the Compliance Officer and the Responsible for Compliance.

Articles 42 and 43:

These articles do not call for comments.

Article 44:

In the first paragraph of this Article reference is made to CAA Regulation No 19/01 of 26 February 2019 on insurance and reinsurance distribution. In this respect, it should be

clarified that any AML/CFT training taken in order to comply with the requirements of the Regulation may be taken into account for the number of training hours required in accordance with the provisions of Article 39(6) of the abovementioned regulation.

Chapter 5

This chapter does not call for comments.

Chapter 6

This chapter does not call for comments.