cssf

Commission de Surveillance
du Secteur Financier

Questions and answers on the statuses of “PFS” - Part II

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Commission de Surveillance du Secteur Financier

In case of discrepancies between the French and the English text, the French text shall prevail.

Questions and answers on the statuses of "PFS" - Part II

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Commission de Surveillance du Secteur Financier

Questions and answers on the statuses of "PFS" - Part II

Whereas Part I refers to the general manner in which to obtain an authorisation as a "PFS", Part II of the Questions and Answers refers to the different "PFS" statuses, as well as to general questions which apply to these statuses.

It should be borne in mind that Article 1 of the Law of 5 April 1993 on the financial sector (the "**LFS**")[1] provides that the professionals of the financial sector falling within the scope of application of this law are credit institutions and "PFS". "**PFS**" means "a group composed of:

- investment firms referred to in Part I, Chapter 2, Section 2, Subsection 1;
- specialised PFS referred to either in Part I, Chapter 2, Section 2, Subsection 2 or in Article 13 and which do not belong to the categories of the first and third indent of this definition;
- support PFS referred to in Part I, Chapter 2, Section 2, Subsection 3."

(Article 1 of the LFS, definition no. 28). This document does not apply directly to credit institutions; however, some comments regarding activities which, where applicable, are also exercised by banks may be useful for information purposes.

Part II of the Questions and Answers on the PFS statuses begins with general questions (A), followed by questions on investment firms (B), questions regarding specialised PFS (C) and questions regarding support PFS (D).

The answers in this document reflect and summarise the stances adopted by the CSSF following questions asked in the past. This document was elaborated for transparency purposes and in order to provide further indications and explanations to the public concerned. The information provided in the FAQs is only informative. They do not set requirements and do not bind the CSSF to its decisions. For every specific file, the applicant shall refer to the legal and regulatory standards and to the CSSF circulars in force at the moment.

The CSSF circulars, a large number of which is indeed applicable to the different PFS statuses, are available on the CSSF's website: www.cssf.lu[2]. In order to emphasise the importance of the CSSF circulars in this context, please find below a non-exhaustive indicative list of the main CSSF circulars currently applicable to PFS and of which reference is made in this document.

[1] *https://www.cssf.lu/en/Document/law-of-5-april-1993/*

[2] *https://www.cssf.lu/en/regulatory-framework/?content_type=567*

Circular CSSF 13/563 of 19 March 2013: Update of Circular CSSF 12/552 on the central administration, internal governance and risk management;

Circular letter of 21 January 2013 relating to the entry into force of the Law of 21 December 2012 relating to the Family Office activity;

Circular CSSF 13/554 of 7 January 2013: Evolution of the usage and control of tools for managing information technology resources and the management of access to these resources;

Circular CSSF 12/552 of 11 December 2012: Central administration, internal governance and risk management

Salient elements concerning Circular CSSF 12/552;

Questions and answers on Circular CSSF 12/552;

Circular CSSF 12/544 of 18 July 2012: Optimisation of the supervision exercised on the "support PFS" by a risk-based approach;

Circular CSSF 12/538 of 29 June 2012: Lending in foreign currencies;

Circular CSSF 11/515 of 14 June 2011 relating to the entry into force of the Law of 28 April 2011;

Circular CSSF 11/506 of 11 March 2011 relating to the principles of a sound stress testing programme;

Circular CSSF 11/505 of 11 March 2011 concerning details relating to the application of the principle of proportionality when establishing and applying remuneration policies that are consistent with sound and effective risk management as laid down in Circulars CSSF 10/496 and CSSF 10/497 ("CRD III Circulars"), transposing Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for trading book and re-securitisations, and the supervisory review of remuneration policies ("CRD III");

Circular CSSF 11/504 of 11 March 2011 relating to frauds and incidents due to external computer attacks;

Circular CSSF 11/503 of 3 March 2011 relating to the reminder on the obligations applicable to the transmission and publication of financial information and relating deadlines;

Circular CSSF 11/501 of 28 February 2011 relating to amendments to Annexe 1 of Circulars CSSF 06/273 and CSSF 07/290, as amended, defining capital ratios pursuant to Article 56 of the amended Law of 5 April 1993 on the financial sector;

Circular CSSF 11/500 of 13 January 2011 regarding statistics on guaranteed deposits and instruments to be provided to the CSSF by the members of the Association pour la Garantie des Dépôts, Luxembourg (Deposit guarantee association, Luxembourg); information to be provided by investment firms (acting on behalf of third parties) to their depositaries of funds or financial instruments;

Circular CSSF 10/442 of 10 March 2010 regarding the notification procedure concerning the exercise of activities in another Member State by a credit institution or an investment firm incorporated under Luxembourg law;

Circular CSSF 08/369 of 31 July 2008 regarding the electronic transmission of "Statistical ad-hoc information" (tables II.1. - II.22.) to be submitted to the CSSF by the "other professionals of the financial sector" (PFS); Change of the ad-hoc statistics' periodicity and adaptation of the transmission method of the PFS' prudential reporting;

Circular CSSF 08/364 of 22 July 2008 regarding financial information to be submitted to the CSSF on a quarterly basis by "the other professionals of the financial sector" (PFS) performing a support PFS activity;

Circular CSSF 08/350 of 22 April 2008 regarding details relating to the amendments introduced by the Law of 13 July 2007 on markets in financial instruments to the PFS statuses referred to in articles 29-1, 29-2, 29-3 or 29-4 and designated "support PFS"; Amendment to the prudential supervisory procedures for support PFS;

Circular CSSF 07/325 of 19 November 2007 regarding provisions relating to credit institutions and investment firms of EU origin established in Luxembourg by way of branches or exercising activities in Luxembourg by way of free provision of services;

Circular CSSF 07/307 of 31 July 2007 regarding MiFID: Conduct of business rules;

Circular CSSF 07/290 of 3 May 2007 (as amended by Circulars CSSF 10/451, 10/483 and 10/497) regarding the definition of capital ratios pursuant to article 56 of the amended law of 5 April 1993 on the financial sector (application to investment firms and management companies subject to chapter 13 of the Law of 20 December 2002 as amended);

Circular CSSF 06/240 of 22 March 2006 regarding administrative and accounting organisation; IT outsourcing and details regarding services provided under the status of support PFS, articles 29-1, 29-2 and 29-3 of the Law of 5 April 1993 on the financial sector as amended; amendment of IT outsourcing conditions for branches located abroad;

Circular CSSF 05/178 of 11 April 2005 regarding administrative and accounting organisation; outsourcing of IT services; abrogation of point 4.5.2. of circular IML 96/126 and replacement by point 4.5.2. of current circular;

Circular CSSF 02/65 of 8 July 2002 regarding the Law of 31 May 1999 governing the domiciliation of companies; precisions as regards the concept of "seat" ("siège");

Circular CSSF 01/47 of 21 December 2001 regarding professional obligations of domiciliation agents of companies and general recommendations; Amendment to Circular CSSF 01/28;

Circular CSSF 01/32 of 11 July 2001 regarding the publication of information on financial instruments;

Circular CSSF 01/29 of 7 June 2001 regarding the minimum content required for an agreement on the domiciliation of companies;

Circular CSSF 01/28 of 6 June 2001 regarding the verification by banks and PFS that the legal requirements on domiciliation are satisfied;

Circular CSSF 00/22 of 20 December 2000 regarding the supervision of investment firms on a consolidated basis carried out by the CSSF;

Circular IML 98/143 of 1 April 1998 (as amended by Circular CSSF 04/155) regarding the internal control;

Circular IML 96/126 of 11 April 1996 regarding the administrative and accounting organisation;

Circular IML 95/120 of 28 July 1995 regarding the central administration;

Circular IML 93/102 of 15 October 1993 regarding the rules concerning the organisation and internal control of the activities of brokers or commission agents exercised by other financial sector professionals

In addition to the circulars published by the CSSF, PFS shall also comply with **CSSF Regulation 12-02** on the fight against money laundering and terrorist financing and **CSSF Regulation 16-07** relating to the out of-court resolution of complaints.

A. GENERAL QUESTIONS IN RELATION TO ALL CATEGORIES OF PFS

1. Who may become a shareholder or member of a PFS?

Published on 29 November 2010

Natural and legal persons are eligible as shareholders or members in a PFS (Article 18 of the LFS).

2. What does the capital base which the PFS shall have consist of?

Updated on 3 April 2014

The capital base consists of a subscribed and fully paid-up capital, share premiums, legally formed reserves and profits brought forward after deduction of possible losses for the current financial year. It shall be permanently available to the PFS and invested in the PFS' own interest (Article 20 of the LFS). Indeed, the comment to the articles of the Law of 13 July 2007 sets out in this context that it shall "*(...) be ensured that the capital base is not tied up in the holdings or via the granting of loans. (...) be ensured that the capital base is used in the interest of the PFS and of its clients and not in the interest of its shareholder or its group. Concretely, the aim of this requirement is to prohibit the common practices among some support PFS which consist of returning/investing the capital to/with the shareholder and/or a company of the group according to different forms (placing, investment in a cash pooling managed at group level ...)*." (cf. also Question 19 of the Q&A Part I)

3. How financially strong are direct shareholders of a PFS required to be?

Updated on 3 April 2014

The shareholders or members of a PFS must have the necessary capital base in order to be able to use it in case of need. The CSSF requires direct shareholders to finance their entire holding with their own funds after deduction of other possible holdings or losses brought forward. The purpose is to avoid that direct shareholders refinance their holding with borrowed funds (Article 20 of the LFS), cf. Questions 14 and 19 of the Q&A Part I. Thus, it is prohibited that the authorised capital is brought in via loans which the PFS shareholder received from this PFS.

4. Can a PFS finance the acquisition of its shares by a shareholder?

Updated on 10 October 2011

No.

In this context, it should be pointed out that Article 49-6(1) of the Law of 10 August 1915 on commercial companies sets out that, in principle, "*a company may not advance funds nor make loans nor provide security with a view to the acquisition of its shares by a third party*". Exceptions to this principle are specifically listed in the above-mentioned Article 49-6. This provision also details the conditions which shall be fulfilled for such a financial assistance to be granted.

5. Can a lawyer be involved in the daily management of a PFS?

Updated on 10 October 2011

A lawyer cannot be involved in the daily management of a PFS. Thus, a lawyer who sits on the board of directors of a PFS which adopted the form of a public limited company [*société anonyme*] will by no means be able to interfere in the daily management which in fine shall be delegated to other persons formally authorised by the CSSF as the persons in charge of the daily management.

This position is entirely in line with the Internal Regulation of the Association of Lawyers of the Luxembourg Bar (*Ordre des avocats du Barreau de Luxembourg*). Indeed, the regulation lays down in Article 2.2., regarding the involvement of lawyers in the activities of commercial companies, that a lawyer may be member of the board of directors or management board [*conseil de gérance*] of commercial companies but cannot be in charge of the daily management of commercial companies, partner of a limited partnership [*société en commandite*] or member of a "*société en nom collectif*".

In particular, as regards the representation of the lawyer in a management board [*conseil de gérance*] of a limited liability company [*société à responsabilité limitée*] under the CSSF's supervision, the CSSF decided to adopt the same stance as for public limited companies [*sociétés anonymes*]. Thus, the CSSF admits, looking at the practice and the development of the legislation in process (draft law No. 5730 updating the Law of 10 August 1915 on commercial companies), which sets out that a lawyer may sit on the management board [*conseil de gérance*] of a limited liability company [*société à responsabilité limitée*] under the CSSF's supervision provided that the daily management of this company is expressly delegated by the management board [*conseil de gérance*] to persons other than the lawyer and that these persons are formally accepted by the CSSF. Draft law No. 5730 shall allow, inter alia, delegating the daily management to managers in case of limited liability companies [*sociétés à responsabilité limitée*] and shall introduce the institutionalisation of executive committees of public limited companies [*sociétés anonymes*] and limited liability companies [*sociétés à responsabilité limitée*].

6. Who is in charge of the daily management of a PFS which has the legal form of S.à r.l. (limited liability company)?

Updated on 7 October 2019

In principle, the management board [*conseil de gérance*] of an S.à r.l. (limited liability company) exercises the daily management and is responsible for it. Nevertheless, the management board [*conseil de gérance*] may, in accordance with Article 710-15(4) of the Law of 10 August 1915 as amended by the Law of 10 August 2016, delegate the daily management to persons that do not necessarily have to be members of the management board [*conseil de gérance*].

7. Can a legal person become a member of the board of directors or the management board [*conseil de gérance*] of a PFS?

Updated on 7 October 2019

A legal person may become a member of the board of directors or the management board [*conseil de gérance*] of a PFS. Where a legal person is a member of the board of directors of a PFS, it must designate a permanent representative (Article 59a of the Law of 10 August 1915 on commercial companies; cf. Question 8 below).

A legal person may also become a member of the management board [*conseil de gérance*] of a PFS provided that the daily management of the PFS is entrusted to at least two other natural persons. The identity of the permanent representative, or, where such a representative was not designated, of all the persons representing the legal person in the management board [*conseil de gérance*] shall be communicated to the CSSF.

The natural persons representing a legal person shall fulfil the same conditions of professional standing as those of the legal person they represent.

A natural person may not be, at the same time, director in his own name and permanent representative, shareholder or economic beneficiary of a legal person director of an investment firm.

8. What are the responsibilities of a legal person which is director or authorised person in the board of directors of a supervised entity?

Updated on 3 April 2014

In company law, Article 51a of the Law of 10 August 1915 on commercial companies specifies the regime of the representation of a legal person appointed director as well as rules relating to the responsibility of this representative. Article 51a of the Law of 10 August 1915 provides that: "Where a legal entity is appointed as director, it shall designate a permanent representative to exercise that duty in the name and for the account of the legal entity. Such representative shall be subject to the same conditions and shall incur the same civil responsibility as if he fulfilled such duty in his own name and for his own account, without prejudice to the joint and several liability of the legal entity which he represents. (...)". Pursuant to Article 59 of the Law of 10 August 1915 on commercial companies, a director which is a legal person is liable to the company in accordance with common law for the execution of the mandate which it received and for misconduct in the management of the company's affairs. Moreover, the directors, whomever they might be, are jointly and severally liable both towards the company and any third party for damages resulting from the violation of the Law of 10 August 1915 or the articles of association of the company. A legal person will be discharged from such liability in the case of a violation to which it was not a party provided no misconduct is attributable to it and it has reported such violation to the first general meeting after it had acquired knowledge thereof.

The admission of a legal person as a director, and thus as an authorised person in the board of directors of a supervised entity, has no essential impact on the legal mission of the CSSF. The CSSF verifies the responsibilities of the directors of a supervised entity with reference to the requirements of "fit and proper" (cf. Question no. 10 of the Q&A Part I[3]) and in the context of its powers of administrative police. Thus, the above applies to the members of the administrative, management and supervisory bodies as well as to the shareholders or associates who have a qualifying holding. These bodies include members of the board of directors and members of the management. When a legal person is appointed director in a supervised entity, the CSSF checks also the "fit and proper" requirements of the permanent representative acting in the name of and on behalf of the legal person. In this context, all natural or legal persons to be authorised by the CSSF have to sign the declaration of honour before being approved.

The provisions of the special penal law (Penal Code and particular laws) also apply to legal persons after the entry into force of the Law of 3 March 2010 introducing the criminal liability towards legal persons in the Penal Code (*Code pénal*) and in the Code of Criminal Proceedings (*Code d'instruction criminelle*). The criminal liability of the legal person candidate to an authorised activity has an impact on the assessment of the legal person's propriety as it is also the case for the assessment of the natural person's propriety. It should be taken into account if the legal person has committed infringements likely to corrupt a favourable assessment of professional standing. The CSSF published a specific form, "Declaration of honour", on its website that the legal persons which will exercise an authorised function must fill in, sign and send to the CSSF.

9. Is the provision of services to an undertaking of the same group subject to authorisation?

Updated on 10 October 2011

Article 1-1(2) of the LFS provides that this law does not apply to:

"*(...) b) persons which provide investment services exclusively for their parent undertaking, for their subsidiaries or for another subsidiary of their parent undertaking;*

[3] https://www.cssf.lu/en/regulatory-framework/?entity_type=13&content_type=1483

c) persons which provide a service under this Law, exclusively to one or more undertakings forming part of the same group as the undertaking providing the service, unless otherwise provided; (...).".

The scope of these provisions may be explained by the origin of these texts. Indeed, point b) of this article was introduced into Luxembourg law by transposing Directive "Investment Services" and was taken up with the transposition of Directive 2004/39/EC of 21 April 2004 on markets in financial instruments (MiFID) of which Article 2(1) provides that "*This Directive shall not apply to (...) b) persons which provide investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings; (...)*". Thus, point b) only refers to "investment services" within the meaning of MiFID (cf. Annexe II Section A: "Investment services and activities" of the LFS) which are provided to the parent undertaking, their subsidiaries or to another subsidiary of the parent undertaking.

However, point c) is a national provision which was introduced to the LFS by the Law of 2 August 2003. The scope of point c) is larger since it refers to the concept of "group" and does not exclusively apply to investment services but to all financial services which are referred to in the LFS. As regards point c), the LFS and thus the requirement of a PFS authorisation does not apply to persons who provide a service under the LFS exclusively to one or several undertakings belonging to the same group as the person providing the service. The concept "group exception" means that an entity of a group may exercise activities governed by the LFS without falling under the scope of this law if it provides its services exclusively to other entities of the group to which it belongs. According to the Luxembourg doctrine, the criterion taken into account by company law for the definition of group is control, i.e. the management of the group by the parent company. Thus, the latter has to control all its subsidiaries but does not necessarily have to form an economic unity with them.

10. What do the terms "holding" and "qualifying holding" mean?

Updated on 10 October 2011

As regards the definition of the words "holding" and "qualifying holding", you should refer to Article 1(24) and (25) of the LFS. These provisions take up EU definitions.

Article 1(24) of the LFS sets out that a "holding" means "*the ownership of rights in the capital of a company, materialised by securities or not, which, by creating a lasting link with the latter, are meant to contribute to the activity of the company, or the direct or indirect ownership of 20% or more of the voting rights or capital of an undertaking.*"

In addition, Article 1(25) of the LFS sets out that a "qualifying holding" means "*any direct or indirect holding in an undertaking which represents 10% or more of the capital or of the voting rights, in accordance with Articles 8 and 9 of the Law of 11 January 2008 on transparency requirements and the conditions regarding the consolidation of voting rights as set out in Article 11(4) and (5) of this law, or which makes it possible to exercise a significant influence over the management of that undertaking.*

For the purpose of Articles 6 and 18 of this law, rights or shares which credit institutions or investment firms may hold as a result of providing the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis included under 6 of Section A of Annex II of this law shall not be taken into consideration, provided that those rights are, on the one hand, not exercised or otherwise used to intervene in the management of the issuer and, on the other, disposed of within one year of acquisition."

11. Can a PFS grant loans to its shareholders, managers, employees or to third parties?

Updated on 10 October 2011

Due to prudential considerations, a PFS cannot grant loans to its shareholders, managers or employees. Indeed, on the one hand, it is essential that all holding in the authorised capital of a professional of the financial sector is financed through own funds and not through borrowed funds. The granting of advances and loans to shareholders results in the return of the authorised capital to the shareholders.

In this context, it should be pointed out that Article 49-6(1) of the Law of 10 August 1915 on commercial companies sets out that, in principle: "*a company may not advance funds nor make loans nor provide security with a view to the acquisition of its shares by a third party.*". The exceptions to this principle are specifically listed in the above-mentioned Article 49-6. This provision also details the conditions which shall be fulfilled for such a financial assistance to be granted.

On the other hand, the CSSF considers that the credit or loan activity, whether for shareholders, managers, employees or third parties, is not a regular activity of a PFS, except for the categories of PFS authorised to exercise this activity by their ministerial authorisation, i.e. where the law expressly provides it. Thus, Article 28-4 concerning professionals carrying on lending operations authorises PFS to grant loans to the public in the framework of their ministerial authorisation. Nevertheless, even professionals carrying on lending operations may only grant loans to their shareholders if the arm's length principle is observed, if the loan complies with the entity's own interest and if it complies with a shrewd and prudent professional management.

12. Can a private equity structure or a SICAR be a PFS shareholder?

Updated on 4 February 2015

Private equity structures and SICARs are in principle not acceptable as shareholders of a PFS or of another supervised entity unless they plausibly justify that their presence in the shareholder structure does not threaten the stability of the entity concerned, for example by committing to remain for an extended period in the shareholder structure or through an agreement concluded with other shareholders or partners of this entity (*shareholders' agreement*).

13. Can a company be incorporated before receiving the required authorisation to exercise its activity?

Published on 29 November 2010

Legal persons whose corporate purpose requires that they receive an authorisation under the LFS may be incorporated with this corporate purpose before receiving the Minister's authorisation provided that they filed an application for authorisation for scrutiny by the CSSF and that they commit themselves in writing not to exercise the activity subject to the authorisation before receiving the latter. Changes in the corporate purpose of a company already incorporated is permissible but subject to the same conditions.

14. Shall the corporate purpose cover all the activities of the financial sector subject to an authorisation?

Updated on 10 October 2011

A company or other legal person which has an authorisation for a specific activity of the financial sector shall not have a corporate purpose which includes another activity of the financial sector not covered by this authorisation. In general, the wording of the corporate purpose of a PFS shall only reflect the activities exercised by the PFS and for which it received the authorisation(s) required by the LFS and, where applicable, the other laws that might be applicable to it.

15. Are the transactions on allowances for CO2 emissions included in the scope of the LFS?

Updated on 3 April 2014

Derivative contracts relating to emission allowances are financial instruments, i.e. instruments laid down in point 10 of Section B of Annexe II[4] of the LFS.

However, emission allowances do not intrinsically represent a financial instrument within the meaning of Annexe II of the LFS. Only derivative contracts relating to emission allowances may be financial instruments.

In accordance with Recital (4) of the MiFID Directive, "*it is appropriate to include in the list of financial instruments certain commodity derivatives and others which are constituted and traded in such a manner as to give rise to regulatory issues comparable to traditional financial instruments*." Moreover, the European Commission indicated in this context: "*Emission allowances (EUAs) are not explicitly mentioned in Article 2(1) of Regulation 1287/2006. They are mentioned under Section C10 of Annex I of Directive 2004/39/EC as an underlying the derivatives of which are to be considered financial instruments pursuant to Article 38(3) of Regulation 1287/2006 distinct from, but under the same conditions as, derivative contracts relating to commodities in Sections C5, C6 and C7.*"[5]

In any case, in the light of the characteristics of the emission allowances and of the stock exchange market for their trading, the CSSF considers that brokerage of emission allowances is a financial sector activity subject to authorisation under Article 13 of the LFS by the Minister of Finance.

[4] *Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls.*

[5] *Question asked to the European Commission (ID 862 Definitions Commodity; internal reference 284).*

16. What is the meaning of "support PFS"?

Published on 29 November 2010

Support PFS include financial professionals which have been authorised only under Articles 29-1, 29-2, 29-3 or 29-4 of the LFS. The term "support" has been defined by the market in agreement with the CSSF. The support PFS do not receive deposits from the public and act mainly as subcontractors for operational functions on behalf of other financial professionals. These support PFS have an activity which is *a priori* not of the financial sector but they provide an activity for an entity which falls under the LFS. Therefore, they are subject to an authorisation.

Circular CSSF 08/350 of 22 April 2008 is the first circular applying specifically to support PFS. It covers the following four points: (1) Description of the activities of OSIP (primary IT systems operators) and OSIS (secondary IT systems and communication networks operators), (2) Method for supervision of support PFS, (3) Prudential rules and rules of conduct and (4) Transitional provisions.

Circular CSSF 06/240 deals with administrative and accounting organisation; IT outsourcing and details regarding services provided under the status of support PFS, Articles 29-1, 29-2 and 29-3 of the Law of 5 April 1993 on the financial sector as amended; amendment of IT outsourcing conditions for branches located abroad.

17. How shall Article 52(3) of the LFS which sets out that "no person may make use for commercial purposes of his entry in an official list or of the fact of being subject to supervision by the CSSF" be interpreted?

Updated on 10 October 2011

The authorisation as PFS cannot be interpreted as corporate image and the fact of being under the supervision of the competent authority does not de facto constitute a quality label. An application for authorisation as a PFS is introduced based on the activities exercised which must fall under the scope of the LFS. Such application cannot be motivated by the will to access the PFS status for the purposes of advertising or using it as a corporate image.

18. Under which conditions can an authorisation be withdrawn?

Updated on 10 October 2011

Article 23 of the LFS provides that the authorisation shall be withdrawn if the PFS does not make use of the authorisation within 12 months, expressly renounces the authorisation or has performed no activity for which it was granted authorisation for an ongoing period of six months. There may be no partial withdrawal of the authorisation. The withdrawal only affects the authorisation granted in accordance with the LFS and not the authorisations granted under other laws. This means that, for example, support PFS, in case their authorisation has been withdrawn, which carry on activities other than those covered by the PFS authorisation that has been withdrawn, may continue to carry on those other activities (cf. Circular CSSF 11/515).

The authorisation shall also be withdrawn if the conditions for the grant thereof cease to be fulfilled, if it has been obtained by making false statements or by any other irregular means. The authorisation shall be withdrawn if the investment firm has seriously and systematically infringed any of Articles 37-2 to 37-8 of the LFS or Articles 21, 22, 23, 26, 27 or 28 of the law on markets in financial instruments. The authorisation is withdrawn if a PFS which does not belong to the category of investment firms seriously and systematically infringed any of Articles 36, 36-1 or 37 of the LFS.

The violation of a provision of the Law of 10 August 1915 on commercial companies may also result in the withdrawal of the authorisation.

A ministerial decision of withdrawal of the authorisation shall be justified in fact and in law. An appeal against the decision may be lodged within one month, and may be struck out if it is not so lodged, before the *tribunal administratif* [administrative court], which shall determine the matter as a court adjudicating on the substance (cf. Article 23 of the LFS).

The decision of withdrawal is taken by the Minister of Finance and, as from the notification to the PFS concerned, entails *ipso jure* the suspension of any payments while the administrative decision of withdrawal is not final, i.e. during the court action. As regards PFS other than those involved in the management of third-party assets, the regime of suspension of payments applies (Articles 593 et seqq. of the Commercial Code [*Code de commerce*]).

Withdrawal decisions are published on the CSSF website as soon as the decision is communicated to the CSSF by the Minister.[6]

[6] https://searchentities.apps.cssf.lu/search-entities/search?lng=en

19. Does a company exercise a credit institution activity if it refinances itself with the parent company?

Published on 29 November 2010

If a company refinances itself exclusively with the parent company without receiving any deposits or other repayable funds from the public, it does not exercise a credit institution activity.

20. What are the conditions to comply with in case of data transfer by a central administration or a depositary to another service provider?

Updated on 30 October 2020

Pursuant to Article 41 (2a) of the amended Law of 5 April 1993 on the financial sector, in case a central administration agent or a depositary (a credit institution, an investment firm or a professional of the financial sector) is outsourcing services implying a transfer of relevant information to a third party, the central administration agent or the depositary must ensure that its client, the Board of Directors ("BoD") of the SICAV or of the IFM for common funds, has accepted the outsourcing of the relevant outsourced services, the type of information transmitted in the context of the outsourcing and the country of establishment of the entities that provide the outsourced services.

Any transfer of information related to investors should be disclosed prior to the transfer, by the UCI, respectively the IFM for common funds, to investors through appropriate means, namely the prospectus and the application form combined, if appropriate, with a reference to a website. Existing investors should be informed by the UCI, respectively the IFM for common funds, prior to the transfer of their information, about any update of the fund documents aiming at the aforesaid disclosure by means of a letter, email or any other means of communication provided for by the prospectus.

Due to transparency and confidentiality requirements, the same conditions apply to UCI/IFM acting as central administration.

The aforesaid requirements apply independently from the General Data Protection Regulation (EU) 2016/679, if applicable.

B. INVESTMENT FIRMS

21. What are the differences between the investment firms and the PFS which do not belong to the category of investment firms as regards authorisation conditions?

Updated on 1 June 2017

Among PFS, the investment firms are subject to four additional authorisation conditions, namely:

- investment firms must participate in an investor compensation scheme set up in Luxembourg and recognised by the CSSF. Investment firms are thus required to participate in the Système d'Indemnisation des Investisseurs Luxembourg (SIIL, Investor Compensation Scheme Luxembourg) (Article 22-1 of the LFS);
- investment firms must comply with the organisational requirements defined in Article 37-1 of the LFS;
- investment firms must set up a compliance function (cf. Article 6 of Grand-ducal regulation of 13 July 2007 and Circular CSSF 12/552 for investment firms and professionals performing lending operations);
- investment firms must put in place a risk management function where appropriate and proportionate in view of the nature, scale and complexity of the activity as well as the nature and range of investment services and activities provided or performed in the course of their business (Article 7(3) of Grand-ducal regulation of 13 July 2007).

In this context, we may also mention for the record that, following the authorisation, investment firms shall notably:

- observe the ratios as defined in legal provisions;
- have own funds the amount of which is higher compared to PFS which do not belong to the category of investment firms.

22. What is the difference between the terms "financial instruments" and "transferable securities"?

Published on 29 November 2010

"Financial instruments" within the meaning of MiFID are restrictively listed in Section B of Annexe II of the LFS.[7]

[7] *Section B: Financial Instruments*

The transferable securities (still within the meaning of MiFID) are a sub-group of these financial instruments. They are defined as "*classes of securities which are negotiable on the capital markets, with the exception of instruments of payment, such as:*

a) *shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;*
b) *bonds or other forms of securitised debt, including depositary receipts in respect of such securities;*
c) *any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.*"

Thus, the two terms are important for determining the scope of the MiFID rules. These rules aim at strengthening the investors' protection and improving their trust in financial markets. They apply to investment firms that provide investment services or perform investment activities. This set of rules is referred to as conduct of business rules in the financial sector. Some of these rules may be pointed out: the strengthened rules on best execution of client orders, the client order handling rules and the requirements relating to the management of conflicts of interest.

1. Transferable securities.
2. Money-market instruments.
3. Units in collective investment undertakings.
4. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash.
5. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event).
6. Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market or an MTF.
7. Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6., and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls.
8. Derivative instruments for the transfer of credit risk.
9. Financial contracts for differences.
10. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls.

23. Which requirements resulting from the conduct of business rules shall be observed by investment firms?

Updated on 10 October 2011

The professional conduct of business rules require, among others, that the investment firms split their clients in different categories and specify the investment firms' obligations towards each category of clients (information requirement). These conduct of business rules impose on investment firms to assess if the product or service provided to the individual client is suitable or appropriate for the latter and to guarantee the best execution, i.e. try to obtain the best possible result for their clients.

The purpose of Circular CSSF 07/307 of 31 July 2007 regarding "MiFID: Conduct of business rules in the financial sector" is to explain and specify certain provisions of the Law of 13 July 2007 on markets in financial instruments transposing Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 (MiFID).

B1. Investment advisers

Art. 24 Investment advisers

"*(1) Investment advisers are professionals whose activity consists in providing personal recommendations to a client, either at the initiative of the investment firm, or upon request of that client, in respect of one or more transactions relating to financial instruments.*

(2) Investment advisers are not authorised to intervene directly or indirectly in the implementation of the advice provided by them.

(3) The mere provision of information is not covered by this law.

(4) Authorisation to carry on business as investment adviser shall be conditional on the production of evidence of:

(a) a subscribed and fully paid-up share capital of not less than 50,000 euros, where the applicant is a legal person or own assets of not less than 50,000 euros, where the applicant is a natural person, or

(b) a professional indemnity insurance covering the whole territory of the European Union or another comparable guarantee against liability arising from professional negligence, representing at least 1,000,000 euros applying to each claim and in aggregate 1,500,000 euros per year for all claims, or

(c) a combination of a subscribed and fully paid-up share capital or own assets and professional indemnity insurance in a form resulting in a level of coverage equivalent to points (a) and (b) of this subparagraph.

Where an investment adviser is also registered under Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, it must comply with the requirement established by Article 4(3) of that Directive and in addition it must have:

(a) a subscribed and fully paid-up share capital of not less than 25,000 euros, where the applicant is a legal person or own assets of not less than 25,000 euros, where the applicant is a natural person, or

(b) a professional indemnity insurance covering the whole territory of the European Union or another comparable guarantee against liability arising from professional negligence, representing at least 500,000 euros applying to each claim and in aggregate 750,000 euros per year for all claims, or

(c) a combination of a subscribed and fully paid-up share capital or own assets and professional indemnity insurance in a form resulting in a level of coverage equivalent to points (a) and (b) of this subparagraph.

(5) For the purpose of this article, a personal recommendation is a recommendation that is made to a person in his capacity as an investor or potential investor or in his capacity as an agent for an investor or potential investor.

That recommendation must be presented as suitable for that person, or must be based on a consideration of the circumstances of that person, and must constitute a recommendation to take one of the following sets of steps:

(a) to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument;

(b) to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument.

A recommendation is not a personal recommendation if it is issued exclusively through distribution channels within the meaning of Article 1(18) of the Law of 9 May 2006 on market abuse or to the public."

24. What does the activity of investment adviser consist of and what is the meaning of "personal recommendation"?

Published on 29 November 2010

The activity of investment advisers consists in providing personal recommendations to a client, either at the initiative of the investment firm, or upon request of that client, in respect of one or more transactions relating to financial instruments.

An authorisation is required when the personal recommendation is made to a person in his capacity as an investor or potential investor or in his capacity as an agent for an investor or potential investor. This recommendation shall be presented as suitable for that person or must be based on a consideration of the circumstances of that person.

The term personal recommendation includes two elements: (i) the purpose of the recommendation and (ii) the personal nature.

(i) Thus, the recommendation will be about:

- the execution of buying, selling, subscribing, exchanging, redeeming, holding transactions or the underwriting of a particular financial instrument;
- to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument.

(ii) In addition, the recommendation shall be personal. The status of investment adviser is required when the recommendation is made to a specific person in his capacity as an investor or potential investor or in his capacity as an agent for an investor or potential investor. This recommendation shall be presented as suitable for that person or must be based on a consideration of the circumstances of that person.

The following shall not be considered as an investment adviser activity within the meaning of Article 24 of the LFS:

- recommendations concerning the asset allocation;
- general recommendations relating to financial instruments disseminated via distribution channels or intended for the public;
- communication of information published by companies;
- communication of information published in the press;
- simple explanation of risks and advantages of one or more specific financial instruments;
- drawing-up of tables classifying the performance of financial instruments compared to published reference indicators.

Investment advisers cannot intervene in the implementation of the advice they give since their activity is limited to providing recommendations.

The remuneration of the investment advisers may be in the form of a set commission or a lump sum or it may consist of a percentage of the value of the assets subject to advice. It is not prohibited for investment advisers to receive reassignments or other types of remuneration from promoters of financial instruments that the advisers recommended, provided that they observe the MiFID rules (Circular CSSF 07/307).

In addition to personal recommendations, investment advisers may also provide general recommendations. The provision of such general recommendations concerning transactions relating to a financial instrument or a type of financial instrument is an ancillary service pursuant to Annexe II, Section C, point 5 of the LFS. The general recommendations are defined as opposed to personal recommendations. These recommendations are not intended for a particular person, do not take into account the particular situation of a given person and the financial instruments subject to these recommendations were not identified as being adapted to a given client. These are recommendations which are intended, among others, for distribution channels or for the public. The provision of general recommendations to a client is not an activity which requires an authorisation based on the LFS.

Advice regarding financial instruments published in a newspaper, a magazine, on the Internet or any other publication intended for a wide audience or disseminated on a television or radio programme shall not be considered as personal recommendations for the purposes of the definition of the investment adviser.

25. Does the communication of objective information on the development of the financial markets constitute an activity under the LFS?

Published on 29 November 2010

No.

26. May natural and legal persons receive the status of investment adviser? What capital base shall they have?

Published on 29 November 2010

The status of investment adviser is accessible not only to legal persons but also to natural persons.

The authorisation to act as an investment adviser is conditional on the production of evidence showing the existence of a capital base of not less than 50,000 euros. The investment adviser may have, instead of a capital base, a professional indemnity insurance or a combination of both.

Where investment advisers are also registered under Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, they shall have an additional capital base of not less than 25,000 euros or a professional indemnity insurance or a combination of both. In this case, the professional shall also be authorised by the Commissariat aux Assurances in order to exercise this regulated activity.

B2. Brokers in financial instruments

Art. 24-1 Brokers in financial instruments

"*(1) Brokers in financial instruments are professionals whose activity consists in receiving or transmitting orders in relation to one or more financial instruments, without holding funds or financial instruments of the clients. This activity includes bringing two or more parties together with a view to the conclusion of a transaction between the parties.*

(2) Authorisation to carry on business as broker in financial instruments shall be conditional on the production of evidence of:

(a) a subscribed and fully paid-up share capital of not less than 50,000 euros, where the applicant is a legal person or own assets of not less than 50,000 euros, where the applicant is a natural person, or

(b) a professional indemnity insurance covering the whole territory of the European Union or another comparable guarantee against liability arising from professional negligence, representing at least 1,000,000 euros applying to each claim and in aggregate 1,500,000 euros per year for all claims, or

(c) a combination of a subscribed and fully paid-up share capital or own assets and professional indemnity insurance in a form resulting in a level of coverage equivalent to points (a) and (b) of this subparagraph.

When a broker in financial instruments is also registered under Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, it must comply with the requirement established by Article 4(3) of that Directive and in addition it must have:

(a) a subscribed and fully paid-up share capital of not less than 25,000 euros, where the applicant is a legal person or own assets of not less than 25,000 euros, where the applicant is a natural person, or

(b) a professional indemnity insurance covering the whole territory of the European Union or another comparable guarantee against liability arising from professional negligence, representing at least 500,000 euros applying to each claim and in aggregate 750,000 euros per year for all claims, or

(c) a combination of a subscribed and fully paid-up share capital or own assets and professional indemnity insurance in a form resulting in a level of coverage equivalent to points (a) and (b) of this subparagraph."

27. What does the activity of broker in financial instruments consist of?

Published on 29 November 2010

The activity of broker in financial instruments is defined in Article 24-1 of the LFS. The status of broker in financial instruments is accessible to legal and natural persons.

When a broker in financial instruments is also registered under Directive 2002/92/EC on insurance mediation, the professional shall also be authorised by the Commissariat aux Assurances in order to exercise this regulated activity.[8]

B3. Commission agents

Art. 24-2 Commission agents

"*(1) Commission agents are professionals whose activity consists in the execution on behalf of clients of orders in relation to one or more financial instruments. Execution of orders on behalf of clients means acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients.*

(2) Authorisation to act as commission agent shall only be granted to legal persons. It is conditional on the production of evidence of a subscribed and fully paid-up share capital amounting to not less than 125,000 euros.

(3) Commission agents shall be automatically authorised to act, in addition, as investment adviser and broker in financial instruments."

B4. Private portfolio managers

Art. 24-3 Private portfolio managers

"*(1) Private portfolio managers are professionals whose activity consists in managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more financial instruments.*

(2) Authorisation to act as private portfolio manager shall only be granted to legal persons. It is conditional on the production of evidence of a subscribed and fully paid-up share capital amounting to not less than 125,000 euros.

[8] http://www.caa.lu/

(3) Private portfolio managers shall be automatically authorised to act, in addition, as investment adviser and broker in financial instruments."

28. What does the activity of private portfolio manager consist of?

Published on 29 November 2010

Private portfolio managers are professionals whose activity consists in managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more financial instruments. The private portfolio manager ensures the management of its clients' assets, which are legal or natural persons, based on a mandate, i.e. the manager acts in the name and on behalf of the client. The private portfolio manager ensures the management of its client's assets on a discretionary client-by-client basis.

It is prohibited for private portfolio managers to receive or keep on deposit their clients' assets. The clients' assets shall be deposited with an authorised depositary subject to an official supervision, notably with a credit institution. The relevant assets are not part of the PFS' assets in case of collective liquidation of the latter. They cannot be taken by the PFS' personal creditors. Thus, the private portfolio manager shall separate its clients' assets and its own assets during accounting.

29. What does the notion of "discretionary management" mean?

Updated on 10 October 2011

Discretionary management means that the private portfolio manager may make decisions regarding the investment of assets of its client, which is a legal or a natural person, based on a mandate given by the client, i.e. the manager acts in the name and on behalf of the client. (Notion introduced by Circular CSSF 2000/15 which was replaced by Circular CSSF 07/307).

30. Does a private portfolio manager have to sign a written management agreement with the client?

Updated on 10 October 2011

In the framework of its activity, the private portfolio manager must sign a management agreement with its client. All the client's accounts and other assets which are subject to this written agreement shall be specified therein. The private portfolio manager has no right to use the client's assets in its favour. Moreover, the management agreement shall emphasise the private portfolio manager's aim, the nature of the authorised transactions, the information which shall be communicated to the client owner of the account, the manager's remuneration method, the term of the agreement and the cancellation procedure. The private portfolio manager may make decisions on the investment of its client's assets provided it acts within the limits laid down in the management agreement. (cf. Circular CSSF 2000/15 which was replaced by Circular CSSF 07/307).

31. Can a private portfolio manager grant Lombard loans to its clients?

Published on 29 November 2010

Private portfolio managers may grant Lombard loans to their clients on an incidental basis provided that this activity is covered by their agreement. Indeed, the granting of a credit or a loan to an investor in order to allow him/her to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction, is included in the list of ancillary services of the MiFID (Annexe II, Section C of the LFS). The private portfolio managers which would like to grant Lombard loans to their clients shall explicitly mention this ancillary service in their application for authorisation.

B5. Professionals acting for their own account

Art. 24-4 Professionals acting for their own account

"*(1) Professionals acting for their own account are professionals whose business is in trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments where they also provide investment services or perform in addition other investment activities or deal on own account outside a regulated market or an MTF on an organised, frequent and systematic basis, by providing a system accessible to third parties in order to engage in dealings with those third parties.*

(2) Authorisation to act as professional acting for their own account shall only be granted to legal persons. It is conditional on the production of evidence of a subscribed and fully paid-up share capital amounting to not less than 730,000 euros.

(3) Professionals acting for their own account shall be automatically authorised to act, in addition, as investment adviser, broker in financial instruments, commission agent and private portfolio manager."

32. Are the persons managing their own assets covered by the LFS?

Published on 29 November 2010

Dealing on own account is an investment activity within the meaning of MiFID. However, this activity is only subject to MiFID provisions when it is exercised together with another service or another investment activity. In Luxembourg law, the persons managing their own assets as, for example, the high net worth individuals or the SOPARFI which do not provide any investment service or activity other than dealing on own account only fall within the scope of the LFS if they are market makers or if they deal on own account outside a regulated market or an MTF on an organised, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them.

B6. Market makers

Art. 24-5 Market makers

"*(1) Market makers are professionals whose business is to hold itself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against its proprietary capital at prices fixed by it.*

(2) Authorisation to act as market maker shall only be granted to legal persons. It is conditional on the production of evidence of a subscribed and fully paid-up share capital amounting to not less than 730,000 euros."

33. What does the activity of market maker consist of?

Published on 29 November 2010

A market maker is a market participant who has a direct access to trading the orders and acts for its own account. The market maker intervenes on a continuous basis in capital markets by permanently displaying the purchase and sale price for specific quantities of a security. Thus it contributes to market liquidity of one or several designated securities. The legal status of market makers is subject to the condition that the market making of selected financial instruments be ensured by purchases and sales.

B7. Underwriters of financial instruments

Art. 24-6 Underwriters of financial instruments

"*(1) Underwriters of financial instruments are professionals whose business is to underwrite financial instruments and/or place financial instruments with or without a firm commitment.*

(2) Authorisation to act as underwriter shall only be granted to legal persons. It is conditional on the production of evidence of a subscribed and fully paid-up share capital amounting to not less than 125,000 euros and not less than 730,000 if the underwriter of financial instruments places financial instruments on a firm commitment basis."

34. To which professionals does Article 24-6 of the LFS apply?

Updated on 24 October 2013

The status of underwriter of financial instruments comprises two types of investment services within the meaning of the MiFID:

1. The underwriting of financial instruments

The underwriting of financial instruments consists in intervening on the primary securities market by immediately subscribing, at their issuance, all or part of the financial instruments in order to place them, at a later stage, on own account, with clients.

2. The placing of financial instruments on a firm commitment basis or without a firm commitment basis

The placing of financial instruments is a financial service provided by an investment firm to an issuer which consists in placing financial instruments on behalf of the issuer. The activity of placing financial instruments may be with or without a firm commitment, depending on the agreement between the issuer and the investment firm. As with the underwriting of financial instruments, the placing of financial instruments refers to a primary market activity and concerns thus only newly issued financial instruments. In practice, the placing activity often includes distribution activities.

B8. Distributors of units/shares in UCIs

Art. 24-7 Distributors of units/shares in UCIs

"*(1) Distributors of units/shares in UCIs are professionals whose business is to distribute units/shares of UCIs admitted to trading in Luxembourg.*

(2) Authorisation to act as distributor of units/shares of UCIs shall only be granted to legal persons. It is conditional on the production of evidence of a subscribed and fully paid-up share capital amounting to not less than 50,000 euros and not less than 125,000 euros if the distributor accepts or makes payments.

(3) Distributors of units/shares in UCIs allowed to accept or make payments are ipso jure allowed to also perform the activity of registrar agent."

35. What does the activity of distributor of units/shares in UCIs consist of?

Published on 29 November 2010

Distributors of units/shares in UCIs are professionals whose business is to distribute units/shares of UCIs admitted to marketing in Luxembourg. Authorisation to act as distributor of units/shares in UCIs shall only be granted to legal persons. This activity is covered by the European passport. The investment service corresponding to this activity is the reception and transmission of orders relating to financial instruments and in particular to units/shares of UCIs.

However, the simple activity of registering orders relating to units/shares of UCIs does not require an authorisation as distributor of units/shares in UCIs.

According to the status adopted by the distributor, it may accept or make payments by executing subscription or redemption orders which it receives. Distributors of units/shares in UCIs allowed accepting or making payments are *ipso jure* authorised to also perform the activity of registrar agent. In this case, however, the European passport only covers the activity of reception and transmission of orders defined in the status of distributor of units/shares in UCIs.

36. Is a distributor of units/shares in UCIs authorised to select and control other distributors of units/shares in UCIs?

Published on 25 May 2012

A distributor of units/shares in UCIs authorised under Article 24-7 LFS may, on an ancillary basis, assist a UCI or a global distributor in the selection of other distributors, by, in particular, performing the due diligence of candidates, proposing eligible candidates to the UCI or the global distributor, designating the candidates accepted as distributors by the UCI or the global distributor and monitoring the activities of the distributors that it has designated itself.

An ancillary activity consisting of assisting a UCI or a global distributor may also be carried out by a financial sector administrative agent authorised under Article 29-2 LFS or by an entity that is not authorised under the LFS, provided that the designation of the distributors is made by the UCI or the global distributor.

B9. Financial intermediation firms

Art. 24-8 Financial intermediation firms

"*(1) Financial intermediation firms are professionals whose business is to:*

(a) provide personal recommendations to a client, either at their own initiative, or upon request of the client, in respect of one or more transactions relating to financial instruments or insurance products, and

(b) receive and transmit orders relating to one or more financial instruments or insurance products without holding funds or financial products of the clients. This activity includes bringing two or more parties together with a view to the conclusion of a transaction between the parties, and

(c) perform on behalf of investment advisers and brokers in financial instruments and/or insurance products affiliated to them administrative and client communication services which are inherent to the professional activity of these affiliates, by means of an outsourcing contract.

(2) Authorisation to act as financial intermediation firm shall only be granted to legal persons. It is conditional on the production of evidence of:

(a) a subscribed and fully paid-up share capital of not less than 125,000 euros, or

(b) a professional indemnity insurance covering the whole territory of the European Union or another comparable guarantee against liability arising from professional negligence, representing at least 2,000,000 euros applying to each claim and in aggregate 3,000,000 euros per year for all claims, or

(c) a combination of a subscribed and fully paid-up share capital and professional indemnity insurance in a form resulting in a level of coverage equivalent to points (a) or (b) of this subparagraph."

37. What does the activity of financial intermediation firms consist of?

Published on 29 November 2010

Financial intermediation firms are professionals whose business is to:

- provide personal recommendations to a client, either at their own initiative, or upon request of the client, in respect of one or more transactions relating to financial instruments or insurance products, and
- receive and transmit orders relating to one or more financial instruments or insurance products without holding the funds or financial products of clients. This activity includes bringing two or more parties together with a view to the conclusion of a transaction between the parties, and

- perform on behalf of investment advisers and brokers in financial instruments and/or insurance products affiliated to them administrative and client communication services which are inherent to the professional activity of these affiliates, by means of an outsourcing contract.

38. What shall the purpose of a financial intermediation firm be?

Published on 29 November 2010

The status of financial intermediation firm offers the possibility for financial agents networks operating on a cross-border basis to domicile their central administration in Luxembourg and to provide, from Luxembourg, services of investment advice and of reception and transmission of client orders in relation to both financial instruments and insurance products.

These financial intermediation firms may thus provide members and affiliates with services for marketing, contract and commission administration, product selection, compliance or training.

Financial intermediation firms may also provide ancillary services such as investment research or make general recommendations on financial product transactions, on condition that these ancillary services be explicitly covered by their authorisation. Financial investment firms shall thus include the ancillary services they intend to provide in their application for authorisation.

Financial intermediation firms are allowed dealing with financial instruments and insurance products under a single authorisation. The single authorisation is granted by the Minister of Finance after scrutiny of the applicant's file by the Commissariat aux Assurances and the CSSF. The supervision of financial intermediation firms is performed by both authorities which must closely cooperate for that purpose. Financial intermediation firms have the European passport under MiFID and Directive 2002/92/EC on insurance mediation.

B10. Investment firms operating an MTF in Luxembourg

Art. 24-9 Investment firms operating an MTF in Luxembourg

"*(1) Investment firms operating an MTF in Luxembourg are those professionals whose business is to operate an MTF in Luxembourg, excluding the professionals that operate markets within the meaning of the law on markets in financial instruments.*

(2) Authorisation to act as investment firm operating an MTF in Luxembourg shall only be granted to legal persons. It is conditional on the production of evidence of a subscribed and fully paid-up share capital amounting to not less than 730,000 euros."

39. What is the difference between a regulated market and an MTF?

Updated on 24 October 2013

Regulated markets are different from multilateral trading facilities (MTF) mainly in the fact that the admission of an instrument to trading on a regulated market triggers the application of a certain number of related provisions such as for example (i) the provisions of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading, (ii) the provisions of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, and (iii) all the provisions (prohibitions and requirements) of Directive 2003/6/EC on market abuse. These requirements shall provide investors with a high protection which is harmonised at EU level.

Operating an MTF is an investment activity within the meaning of MiFID and the MTF are operated by a market operator within the meaning of MiFID[9], a credit institution or an investment firm. (cf. C4.)

40. Shall a credit institution have an authorisation to operate an MTF?

Published on 29 November 2010

The persons whose regular occupation or business is the operation of an MTF on a professional basis shall apply for an authorisation as investment firm. Credit institutions are entitled to operate an MTF in Luxembourg under their banking authorisation and do not need to obtain a separate authorisation for this investment activity.

41. Where may the operation of an MTF take place?

Published on 29 November 2010

Article 24-9 of the LFS only deals with the operation of an MTF in Luxembourg. The operation of an MTF in another Member State falls under Article 19(2) of the law on markets in financial instruments as regards the free provision of services and Article 33 of the LFS as regards the right of establishment.

[9] A market operator within the meaning of MiFID is defined as "a person or persons who manages and/or operates the business of a regulated market. The market operator may be the regulated market itself".

42. Does the activity consisting in offering access to a platform to market participants in Luxembourg fall within the scope of the LFS?

Published on 29 November 2010

Offering access to a platform to market participants in Luxembourg by implementing electronic trading screens in Luxembourg and offering the right to trading on the Stock Exchange does not fall within the scope of the LFS.

C. SPECIALISED PFS

C1. Registrar agents

Art. 25 Registrar agents

"*(1) Registrar agents are professionals whose business is to maintain the register of one or more financial instruments. The maintaining of the register includes the reception and execution of orders relating to such financial instruments, of which they are the necessary accessory.*

(2) Authorisation to act as registrar agent shall only be granted to legal persons. It is conditional on the production of evidence of capital amounting to not less than 125,000 euros.

(3) Registrar agents are automatically authorised to perform the business of administrative agent of the financial sector and the business of client communication agent."

43. What does the activity of registrar agent consist of?

Published on 29 November 2010

Registrar agents are active more particularly in the fields of UCIs, SIFs and SICARs for which these agents take on the tasks of central administration. This status allows a service provider to perform all the tasks of the central administration for one or several UCIs, SIFs or SICARs. Registrar agents may *ipso jure* exercise the activity of administrative agents of the financial sector which includes, among others, the calculation of the NAV and the activity of client communication agents.

The registrar agent activity consists in listing in a shareholder, holder of securities or unitholder register, all the subscription, redemption and conversion orders concerning an issuer's shares, securities or units which the registrar agent received. The registrar agent also issues and cancels certificates of nominative registration concerning shares, securities and units subject to the agent's activity.

The registrar agents may not provide investment advice or distribute shares, securities or units subject to the registrar agent's activity since their activity is strictly limited to the execution of administrative tasks related to receipt and execution of orders concerning shares, securities or units for the issuer. Thus, the activity of a registrar agent referred to in Article 25 does not fall under Directive 2004/39/EC of 21 April 2004 on markets in financial instruments (MiFID).

44. Do registrar agents benefit from the European passport?

Published on 29 November 2010

No.

45. Can an accountant exercise the activity of registrar agent?

Published on 29 November 2010

An accountant cannot exercise the activity of registrar agents. Indeed, the Law of 10 June 1999 on the organisation of the accounting profession does not cover the activity of registrar agents of one or several financial instruments. Thus, a specific authorisation as PFS is required for this activity.

C2. Professional depositaries of financial instruments

Art. 26 Professional depositaries of financial instruments

"*(1) Professional depositaries of financial instruments are professionals who engage in the receipt into custody of financial instruments exclusively from the professionals of the financial sector, and who are entrusted with the safekeeping and administration thereof, including custodianship and related services, and with the task of facilitating their circulation.*

(2) Authorisation to act as professional depositary of financial instruments shall only be granted to legal persons. It is conditional on the production of evidence of capital amounting to not less than 730,000 euros."

C3. Professional depositaries of assets other than financial instruments

Art. 26-1 Professional depositaries of assets other than financial instruments

"*(1) Professional depositaries of assets other than financial instruments are professionals whose activity consists in acting as depositary for:*

- specialised investment funds within the meaning of the Law of 13 February 2007, as amended;

- investment companies in risk capital within the meaning of the Law of 15 June 2004, as amended;

- alternative investment funds within the meaning Directive 2011/61/EU;

which have no redemption right that can be exercised during five years as from the date of the initial investments and which, pursuant to their main investment policy, generally do not invest in assets which shall be held in custody pursuant to Article 19(8)(a) of the Law of 12 July 2013 on alternative investment fund managers or which generally invest in issuers or non-listed companies in order to eventually acquire control thereof in accordance with Article 24 of the Law of 12 July 2013 on alternative investment fund managers.

The professional depositaries of assets other than financial instruments may, through delegation, also ensure the safe-keeping of assets other than liquidities or financial instruments the custody of which may be ensured, where this mission is delegated to them by a single depositary of an alternative investment fund within the meaning of Directive 2011/61/EU.

(2) Authorisation to act as a professional depositary of assets other than financial instruments shall only be granted to legal persons. It is conditional on the production of evidence of a subscribed and fully paid-up share capital amounting to not less than 500,000 euros."

C4. Operators of a regulated market authorised in Luxembourg

Art. 27 Operators of a regulated market authorised in Luxembourg

"*(1) Operators of a regulated market in Luxembourg are persons who manage and/or operate the business of a regulated market authorised in Luxembourg, excluding investment firms operating an MTF in Luxembourg.*

(2) Authorisation to carry on business as operator of a regulated market authorised in Luxembourg is conditional on the production of evidence showing the existence of a capital base of not less than 730,000 euros."

46. Who may operate a regulated market?

Updated on 10 October 2011

The regulated markets which are not legal persons are operated by an operator of a regulated market authorised in Luxembourg as a specialised PFS, whereas if the regulated market is a legal person, the operator may be the regulated market itself.

C5. Currency exchange dealers

Art. 28-2 Currency exchange dealers

"*(1) Currency exchange dealers are professionals who carry out operations involving the purchase or sale of foreign currencies in cash.*

(2) Such persons shall be required to display the rates applied to the various currencies dealt in and to issue to clients, in respect of each operation, a statement indicating the name of the foreign exchange office, the amounts in the currencies dealt in, the rates applied and the date of the operation.

(3) Authorisation to perform cash-exchange transactions is conditional on the production of evidence showing the existence of a capital base of not less than 50,000 euros."

47. What are the activities and requirements of currency exchange dealers?

Updated on 10 October 2011

The activity consisting of carrying out purchase or sale operations of foreign currencies in cash is defined in Article 28-2 of the LFS.

During the investigation of an authorisation request, the CSSF ensures that the person contemplating the exercise of such activity will apply the prices prevailing on the markets and will have an agreement with a bank of the financial centre guaranteeing that the necessary currencies are available. This activity may also be carried out by a natural person.

C6. Debt recovery

Art. 28-3 Debt recovery

"*The recovery of debts owed to third parties, to the extent that it is not reserved by law to certificated bailiffs, shall be authorised only with the assent of the Minister of Justice.*"

48. What does “debt recovery” mean under Article 28-3?

Published on 13 January 2015

Debt recovery is the process initiated by a creditor seeking payment, from the debtor, of the amount of money (debt), which the latter owes to the creditor.

When confronted with a debtor unwilling to honour his debts, the creditor may resort to amicable debt recovery and legal proceedings to recover his due.

Article 28-3 does not apply to the debt recovery activity in a judicial capacity.

Debt recovery companies may thus neither assist nor represent their clients in justice.

Article 28-3 does not apply to the enforcement of debt recovery either. Pursuant to Article 13 of the Law of 4 December 1990 on the organisation of bailiffs, the bailiff (huissier de justice), a ministerial official, alone can carry out the enforcement of judgements and of enforceable acts or titles.

The debt recovery activity referred to in Article 28-3 concerns the amicable debt recovery by a duly authorised third party (other than a bailiff) on the basis of a mandate granted by the creditor.

Any activity which consists in contacting a defaulting debtor requesting him to repay his debt is subject to an authorisation pursuant to Article 28-3.

Various means may be used for recovering a debt, including, but not limited to, the sending of reminder letters or letters of formal notice, phone or SMS reminders, as well as visits at the debtor's domicile or place of work.

The professional shall refrain from any abusive use of these reminder practices in carrying out its activities. Repeated and intrusive phone calls or harassment through written or other messages are considered as privacy breaches pursuant to Article 6 of the Law of 11 August 1982 concerning the protection of privacy.

The debt recovery activity presupposes that the concerned debt has become due. The debt must thus be outstanding, i.e. the due date for repayment set out in the agreement must have passed. As a result, Article 28-3 does not apply to invoicing services which are limited to sending out invoices to the client company's customers.

49. Who is in charge of examining the application file for exercising the activity of debt recovery?

Updated on 13 January 2015

The CSSF examines the application file and ensures that the file and the CSSF's opinion are transmitted jointly to the Ministry of Justice.

The activity of debt recovery shall be authorised only with the assent of the Minister of Justice.

50. Is an authorisation required even if the person offering the debt recovery service is not entitled to cash in the funds or to have them credited on its account?

Published on 29 November 2010

An authorisation pursuant to Article 28-3 of the LFS is required even if the person offering the debt recovery service is not entitled to cash in the funds or to have them credited on its account.

51. Does the debt recovery by the assignor or by a third party on behalf of a securitisation undertaking fall within the scope of Article 28-3 of the LFS?

Published on 29 November 2010

No.

In accordance with Article 60 of the law on securitisation, a "*securitisation undertaking may entrust the assignor or a third party with the collection of claims it holds as well as with any other tasks relating to the management thereof, without such persons having to apply for an authorisation under the legislation on the financial sector*", i.e. without receiving authorisation for debt recovery as referred to in Article 28-3 of the LFS.

C7. Professionals performing lending operations

Art. 28-4 Professionals performing lending operations

"*(1) Professionals performing lending operations are professionals engaging in the business of granting loans to the public for their own account.*

(2) The following, in particular, shall be regarded as lending operations for the purposes of this article:

(a) financial leasing operations involving the leasing of moveable or immoveable property specifically purchased with a view to such leasing by the professional, who remains the owner thereof, where the contract reserves unto the lessee the right to acquire, either during the course of or at the end of the term of the lease, ownership of all or any part of the property leased in return for payment of a sum specified in the contract;

(b) factoring operations, either with or without recourse, whereby the professional purchases commercial debts and proceeds to collect them for his own account when he makes the funds available to the transferor before maturity or before payment of the transferred debts.

(3) This article shall not apply to persons engaging in the granting of consumer credit, including financial leasing operations as defined in paragraph 2(a) of this article, where that activity is incidental to the pursuit of any activity covered by the Law of 28 December 1988 on the right of establishment.

This article shall not apply to persons engaging in securitisation operations.

(4) Authorisation to act as professional carrying on lending operations may be granted only to legal persons and shall be conditional on the production of evidence showing the existence of a share capital of not less than 730,000 euros."

52. What does the activity requiring the status of professional performing lending operations consist of and to whom does this status apply?

Updated on 15 June 2021

a. Refinancing

The status of "professional carrying on lending operations" governed by Article 28-4 of the LFS consists in granting loans, for their own account, to the public. Unlike the activity of a credit institution, it does not allow collecting savings from the public, in any form whatsoever, for refinancing purposes.

Indeed, the activity of a credit institution cannot be defined only by the use of its resources, i.e. granting loans, but also by the origin of these resources, i.e. receiving deposits or other repayable funds from the public. Since no other[10] than a credit institution is allowed to carry out the business of taking deposits or other repayable funds from the public, the PFS referred to in Article 28-4 of the LFS shall refinance themselves exclusively through other means and notably within their group or on the inter-bank market.

b. Exclusions from the scope of Article 28-4

The text of Article 28-4(3) specifies that, as need be, Article 28-4 of the LFS does not concern the persons that refinance themselves through securitisation operations. These persons are governed by the law on securitisation.

[10] *Apart from the exceptions specified in Article 2(3) of the LFS.*

Likewise, the PFS status governed by Article 28-4 of the LFS does not cover the activities exclusively reserved to banks issuing mortgage bonds. The professionals concerned are thus not allowed refinancing themselves by issuing debt instruments known as mortgage bonds based on rights in rem in immoveable property or charges on real property guaranteeing the mortgage loans they are granting.

Besides securitisation undertakings and banks issuing mortgage bonds, neither Article 28-4 nor the LFS itself, apply to professionals excluded from the scope of the LFS in accordance with its Article 1-1(2), including notably UCIs, SIFs, pension funds, SICARs and any other persons carrying out an activity the taking up and pursuit of which are governed by special laws.

c. Granting of loans to the public

By definition, the professional activity of a "professional carrying on lending operations" governed by Article 28-4 of the LFS consists in granting, for its own account, loans to the public.

In that respect, it should be noted that the aforementioned non-application of Article 28-4 of the LFS (concerning securitisation undertakings, banks issuing mortgage bonds, as well as the professionals excluded from the scope of the LFS in accordance with its Article 1-1(2), including notably UCIs, SIFs, pension funds, SICARs and any other persons carrying out an activity the taking up and pursuit of which are governed by special laws) also applies where these regulated entities grant loans through a Luxembourg SPV they hold at 100% or they directly or indirectly control (look-through approach).

The reference to the professional character of the credit activity implies that it is performed repetitively and that unique or one-off credit operations are neither governed by Article 28-4 of the LFS, nor by the LFS in general.

The reference to the public, in addition to the principle of "group exception" laid down in Article 1-1(2) of the LFS, also implies that neither Article 28-4 of the LFS nor the LFS in general apply to professionals that grant loans exclusively to one or several companies belonging to the group to which they belong themselves.[11]

Apart from the aforementioned exceptions, the CSSF stresses that under the terms of Article 14 of the LFS, no person may have as their regular occupation or business activity a financial sector activity without prior written authorisation of the Minister responsible for the CSSF and that granting loans is such an activity.

[11] *Intra-group operations being outside the scope of the LFS is without prejudice to the possible application of Regulation 2001/No.8 of the BCL relating the statistical collection from companies contracting loans or issuing debt instruments or derivated financial products for the account of affiliated companies.*

The concept of public generally refers to a multitude of non-identifiable persons. That is why the CSSF considers that, where loans are granted to a limited circle of **previously determined** persons, they are not granted to the public and the concerned lending activity does thus not fall within the scope of Article 28-4 of the LFS. This is also true where loans are granted through a Luxembourg SPV and granted to a limited circle of previously determined persons by the entity that holds the SPV at 100% or directly or indirectly controls it.

Moreover, the CSSF considers that a credit activity is not aimed at the public within the meaning of Article 28-4 of the LFS, where (i) the nominal value of the loan amounts to EUR 3,000,000 at least (or the equivalent amount in another currency) and (ii) the loans are granted exclusively to professionals such as defined in Article L. 010-1.2) of the Consumer Code.

d. Prior information of the CSSF

As credit activities are developing outside traditional banking circuits (shadow-banking), regulatory authorities are required to pay attention to these activities as well, notably where they imply a maturity transformation risk or where the professional uses leverage.

The CSSF has recently seen credit origination operations, operations consisting in acquiring drawn or undrawn credit lines and transfers of loans contracted simultaneously with or immediately after the loans were granted by a credit institution. Without questioning their legal validity, the CSSF considers that these operations may be lending operations and, therefore likely to fall within the scope of the LFS.

Where the applicability of Article 28-4 of the LFS cannot be excluded by way of the explanations provided above, the persons contemplating to grant or acquire loans are invited to submit to the CSSF a detailed description of the activities envisaged, allowing the CSSF to determine whether or not the activities carried out are subject to an authorisation.

e. Lending operations concerned

Article 28-4 of the LFS applies to all types of loans granted to the public, including mortgage loans and, subject to Article 28-4(3) (cf. Question 55), consumer credits, whether or not the loans are secured.

Leasing operations (cf. Question 53) and factoring operations (cf. Question 54) are lending operations within the meaning of Article 28-4 of the LFS insofar as they include a credit element. However, besides these two types of operations mentioned in the LFS, other activities may also be considered as lending operations.

53. What does a "financial leasing operation" mean for the purposes of Article 28-4 of the LFS?

Updated on 22 July 2014

The financial leasing operation (financial leasing) is a particular type of consumer credit consisting in the leasing of moveable or immoveable property specifically purchased with a view to such leasing by the professional, who remains the owner thereof, where the contract reserves unto the lessee the right to acquire, either during the course of or at the end of the term of the lease, ownership of all or any part of the property leased in return for payment of a sum specified in the contract.

However, the operational leasing operations (operational leasing) consist in the leasing of moveable or immoveable property without any purchase option and they are not referred to in Article 28-4 of the LFS.

The activity of lease-sale in real estate shall be considered as financial leasing operations and, thus, as a lease with a purchase option since the lessee may exercise the purchase option and acquire the property concerned during the whole leasing period and at the latest at the end of the lease in return for payment of a sum specified in the contract. An authorisation under the terms of Article 28-4 of the LFS is thus necessary in order to exercise this activity.

54. What does a "factoring operation" mean for the purposes of Article 28-4 of the LFS?

Updated on 4 April 2012

Factoring operations consisting in the acquisition of commercial debts and in its recovery for own account are referred to in Article 28-4 of the LFS, no matter whether or not the professional which executes these operations covers the potential losses resulting from insolvent debtors.

Thus, a factoring operation allows the subrogated creditor to immediately have funds at its disposal which a factoring company advanced. From an economic point of view, this operation may be considered as a loan given by the factor to a subrogated creditor. Consequently, Article 28-4 provides that factoring operations shall be considered as lending operations. However, the CSSF considers that factoring operations which do not have credit elements do not fall within the scope of Article 28-4 of the LFS, among others because the acquirer of the claim only pays the assignor after the recovery of the amount of the claim from the assigned debtor.

By assimilating factoring operations to lending operations and by submitting them, thus, to prudential supervision, the legislator's main goal was to ensure the protection of the party whose debt is assigned. The latter are not borrowers since the debt is equivalent to the price paid for the delivery of goods or provision of services. For them, the only change resulting from the factoring operation is the change of the person to whom they have to pay the debt. The loan is not granted in their name, not even indirectly. Nevertheless, the factor's credit risk primarily lies with the party whose debt is assigned even though it may, if necessary, make a claim against the assignor.

55. When is a consumer credit activity ancillary to a main activity referred to in the Law of 2 September 2011 governing access to craft trades, business and industry, and to certain liberal professions?

Updated on 4 April 2012

Article 28-4(3) provides that the LFS does not apply to persons engaging in the granting of consumer credits, including financial leasing operations, where that activity is ancillary to the pursuit of any activity covered by the Law of 2 September 2011 on the right of establishment. Thus, the status of Article 28-4 does not refer to professionals authorised under that law, who, in the framework of their main activity, grant consumer loans to their customers on an ancillary basis, even in the form of financial leasing. Moreover, all the professionals, including the professionals of the financial sector, are required to comply with the provisions of the Consumer Code (Code de la consommation) relating to the consumer credit contracts.

As regards the criterion to determine the importance of the credit activity, the CSSF considers that the total volume of the sale of goods and services should be taken into account. The activity of granting consumer credits exercised within the scope of the main activity will no longer be ancillary to that activity and will only be subject to authorisation by the Minister of Finance and to the supervision of the CSSF if the credit portfolio represents over 50% of the total volume of sales of goods and services.

Where the credit activity is considered as being carried out in addition to the activity authorised under the Law of 2 September 2011 and is not linked thereto, it is irrelevant whether or not the credit activity is performed as an ancillary activity to the activity covered by the authorisation of establishment granted by the Ministère des Classes Moyennes [Ministry of the Middle Classes]. In this case, the credit activity concerned requires an authorisation as professional carrying on lending operations in accordance with Article 28-4 of the LFS.

C8. Professionals performing securities lending

Art. 28-5 Professionals performing securities lending

"*(1) Professionals performing securities lending are professionals engaging in the business of lending or borrowing securities for their own account.*

(2) Authorisation to act as a professional performing securities lending may be granted only to legal persons and shall be conditional on the production of evidence showing the existence of a share capital of not less than 730,000 euros."

56. Which activities can be exercised by the professionals performing securities lending?

Published on 29 November 2010

These activities may be exercised by professionals carrying on securities lending/borrowing operations as co-contractors, i.e. as persons intervening in their own name and for their own account. This status does not refer to professional intermediaries performing securities lending on behalf of third parties. The professionals concerned are authorised to intervene as lenders or borrowers of shares, units, warrants, debt instruments, bonds, bills of exchange, deposit receipts, certificates of deposits ("bons de caisse"), promissory notes and other securities of any nature and which have any options and rights attached thereto, issued or guaranteed by companies or undertakings located in Luxembourg or abroad.

A Luxembourg company which occasionally carries out securities lending operations for its own account in order to improve the quality of the ratios or of the borrower's balance sheet without these operations constituting its main corporate purpose, does not fall under Article 28-5.

57. Which status refers to professional intermediaries performing securities lending on behalf of third parties?

Published on 29 November 2010

The professional intermediaries performing securities lending on behalf of third parties fall under the status of commission agent in case they intervene in their own name or under the status of broker when their role consists in locating the requested securities and to bring together the parties.

C9. Family Offices

Art. 28-6 Family Offices

"*(1) Those persons carrying out the activity of Family Office within the meaning of the Law of 21 December 2012 relating to the Family Office activity and not registered in one of the other regulated professions listed under Article 2 of the above-mentioned law are Family Offices and regarded as carrying on a business activity in the financial sector.*

(2) Authorisation to exercise the activity of Family Office pursuant to this Article may be granted only to legal persons and shall be conditional on the production of evidence showing the existence of a share capital of not less than 50,000 euros."

C10. Mutual savings fund administrators

Art. 28-7 Mutual savings fund administrators

"*(1) Mutual savings fund administrators are natural or legal persons engaging in the administration of one or more mutual savings funds. No person other than a mutual savings fund administrator may carry on, even in an incidental capacity, the business of administering mutual savings funds.*

For the purposes of this article, "mutual savings fund" means any undivided fund of cash deposits administered for the account of joint savers numbering not less than 20 persons with a view to securing more favourable financial terms.

(2) The mutual savings fund administrator and the savers shall be required to conclude in writing an administration agreement clearly setting out their respective obligations and the conditions governing withdrawal from the mutual savings fund.

(3) The assets of the mutual savings fund may be invested only in term or sight deposits and must be deposited for the account of the mutual savings fund with one or more credit institutions having their registered office in Luxembourg or in another Member State. Each credit institution in which assets of the mutual savings fund are deposited must, upon the entry by the fund administrator into business relations, receive a copy of the administration agreement and must thereafter be provided with copies of any amendments made thereto.

(4) The mutual savings fund administrator shall be answerable to the savers in accordance with the general rules governing his mandate. He shall administer the mutual savings fund in accordance with the administration agreement and solely in the interests of the savers. He may make only the investments expressly provided for in the administration agreement. In no circumstances may he use the assets of the mutual savings fund for his own purposes.

(5) The expenses charged by the mutual savings fund administrator may not exceed those which are strictly necessary for the administration of that fund. The remuneration of the mutual savings fund administrator must be fixed in the administration agreement.

(6) Save in the liquidation situations provided for by the administration agreement, the savers may not require the mutual savings fund to be split, divided or dissolved.

(7) The mutual savings fund shall be in a state of liquidation:

- upon expiry of the period, if any, fixed by the administration agreement;

- in the event of cessation of the performance by the administrator of his duties, if he is not replaced within two months;

- in all other cases provided for by the administration agreement. The administrator shall be required to advise the savers in writing of the fact or matter giving rise to the state of liquidation.

(8) Authorisation to act as a mutual savings fund administrator shall be conditional on the production of evidence showing the existence of a capital base amounting to not less than 125,000 euros."

58. How may groups of savers be classified?

Published on 29 November 2010

Often, savers put together their assets in order to benefit, among others, from higher rates which are usually not accessible to an individual saver. These groups of savers exist on different levels. On the one hand, there are groups which gather and invest funds on such a small scale that their activity cannot be considered as professional or addressed to the public. In fact, at a purely private level such as family or neighbours these groups of savers are difficult to identify because they consist of a restricted number of participants. These groups can hardly be subject to public supervision. On the other end, there are entities the activities of which match the definitions of a regulated activity of the financial sector. In such cases, the activity of receiving deposits or other repayable funds from the public exercised by credit institutions and the activity of managing third-party funds under the status of private portfolio manager may be determined.

In between are the systems of mutual investment of savings. The latter are groups of twenty or more people which only gather funds in order to deposit them together. These groups have a commercial dimension, the number of participants exceeds the restricted circle and their material infrastructure is more sophisticated.

59. What does the activity of mutual savings fund administrator consist of?

Updated on 10 October 2011

In order to ensure a sufficient protection of the savers, the LFS defines the tasks and requirements of the persons in charge of the systems of mutual investment of savings. The LFS defines among others the liability of administrators of such a system and limits the risks to which the participants are exposed.

Mutual savings fund administrators are natural or legal persons engaging in the administration of one or more mutual savings funds. No person other than a mutual savings fund administrator may carry on, even in an incidental capacity, the business of administering mutual savings funds. “Mutual savings fund” means any undivided fund of cash deposits administered for the account of joint savers numbering not less than 20 persons with a view to securing more favourable financial terms.

In the framework of its activity, it is important that the administrator of a mutual savings fund signs a written agreement called administration agreement which allows identifying the savers and which clearly sets out the savers’ rights in relation to him. Thus, the activity and powers of the administrator shall be subject to a precise description in the administration agreement. The mutual investment of funds shall be limited to sight or term deposits.

Administrators of mutual savings funds are not allowed receiving or keeping the savers’ assets as deposits. These assets shall be deposited with one or more Luxembourg or EU credit institutions. An opening account agreement is signed for this purpose by the administrator and every credit institution concerned. Furthermore, every depositary institution shall receive the text of the administration agreement which governs the mutual fund so that there will be no confusion as to the nature of the fund or the powers of its administrator.

The administrator administers the fund’s assets for the account of the savers. The administration activity consists of administrative tasks, i.e. acts necessary for safekeeping and for turning into profit the assets of the fund as opposed to the management decisions involving a transformation of the fund’s assets. The supervision in relation to money laundering is an integral part of the functions of the mutual savings fund administrator. The activity of administrator of mutual savings funds does not allow any management for own account. The potential remuneration of the administrator shall clearly be determined in the administrative agreement.

Like the common funds, the mutual savings funds do not have legal personality. The assets of the mutual savings fund is an undivided fund of cash of which the savers are joint owners. Article 815 of the Civil Code pursuant to which “nobody can be forced to stay in the joint ownership” does not apply to mutual savings funds.

60. Do the mutual savings funds benefit from the deposit guarantee?

Updated on 1 June 2017

Neither the administrators of mutual savings funds which are PFS nor mutual savings funds which are undivided funds of cash without a legal personality may become member of the Fonds de Garantie des Dépôts Luxembourg (FGDL), which is the Luxembourg deposit guarantee scheme[12]. Thus, they do not pay contributions to the FGDL.

In accordance with Article 28-7(3) of the LFS, the assets of the mutual savings fund may be invested only in term or sight deposits; they must be deposited on behalf of the mutual savings fund with one or more credit institutions having their registered office in Luxembourg or in another Member State. Where the funds are deposited with a Luxembourg credit institution, each person absolutely entitled may benefit from the deposit guarantee of the FGDL pursuant to Article 174 of the Law of 18 December 2015 on the failure of credit institutions and certain investment firms, as amended. If the accounts of the mutual savings funds are held in a bank in another Member State, it is essential for the administrator of the mutual savings fund to verify if and under which conditions the deposited funds benefit from the deposit guarantee scheme of which the bank is member.

In this context, it is important to point out that every depositary bank of mutual savings funds' assets must, upon the entry into business relations with the fund administrator, receive a copy of the administration agreement signed between the administrator and the fund and must thereafter be provided with copies of any amendments made thereto. For the depositary bank, no misunderstanding should be possible as regards the nature of the deposit and, in particular, as regards the fact that the administrator of the mutual savings fund acts on behalf of the fund. The administrator of the fund must inform the bank, on a regular basis, of the number of persons absolutely entitled and the respective amount every one of them is entitled to, in order for the bank to correctly calculate the total amount of guaranteed deposits it holds. In case of a bank failure, the administrator must provide the FGDL or the CPDI (Council for the Protection of Depositors and Investors[13]) the identity of the persons absolutely entitled in order to benefit from the guarantee.

[12] The FGDL has taken over the functions exercised in the past by the Association pour la Garantie des Dépôts, Luxembourg (AGDL, Deposit Guarantee Association Luxembourg).

[13] The CPDI is the internal executive body of the CSSF in charge of managing and administering the FGDL and the Système d'Indemnisation des Investisseurs Luxembourg (SIIL).

C11. Corporate domiciliation agents

Art. 28-9 Corporate domiciliation agents

"*(1) Corporate domiciliation agents referred as other professionals of the financial sector in the list of paragraph 1 of Article 1 of the Law of 31 May 1999 governing the domiciliation of companies and referred to in this Article, are natural or legal persons who agree to the establishment at their address by one or more companies of a seat and who provide services of any kind connected with that activity. This Article does not refer to the other persons listed in the above-mentioned list.*

(2) Authorisation to act as a corporate domiciliation agent is conditional on the production of evidence showing the existence of a capital base of not less than 125,000 euros."

61. What does the activity which requires the status of corporate domiciliation agent consist of?

Updated on 10 October 2011

Article 28-9 defines corporate domiciliation agents as natural or legal persons which agree to the establishment of a seat at their address by one or more companies in order to exercise an activity pursuant to their corporate purpose and which provide services of any kind connected with that activity. Thus, the domiciliation activity consists in making a registered office available and providing services.

62. What does the concept of "seat" mean?

Published on 29 November 2010

Circular CSSF 02/65 specifies the meaning of the concept of "seat" while, at the same time, pointing out that the concept of "a seat" shall be read in a broader sense in order to encompass artificial situations which might constitute an abuse. One may retain that a "seat", within the meaning of the Law of 31 May 1999 governing the domiciliation of companies, exists as soon as a third party puts an address in Luxembourg at the disposal of a company in order to be used by the latter vis-à-vis other third parties.

This is notably the case where the company has been authorised to use the address and/or the name of the professional or the designated third party as its own address vis-à-vis other third parties. It is therefore considered as having a seat at this address.

Having a seat as referred to under said law does not require the existence of an effective material presence (offices, staff, etc.) but it may be limited to its simplest form (letter box or telecommunications installation).

63. Is the letting of premises to companies likely to be a corporate domiciliation activity?

Updated on 30 June 2015

The letting of business premises to companies, in particular the letting of individual office spaces in a business centre, which may also include technical and administrative infrastructures (staffed reception, meeting room(s)), is not considered as a domiciliation activity if it meets the criteria of a real letting, i.e. a permanent letting which ensures the tenant's private occupation and exclusive use of the premises.

Each of these premises must be reserved for the exclusive use of the respective tenant company and must have a separate entrance. Moreover, an effective material presence of the tenant company must be possible with regard to the size of the rented location.

If the criteria of real letting are not fulfilled, the activity has to be considered as the provision of a seat to a company within the meaning of the Law of 31 May 1999 governing the domiciliation of companies.

The letting of working spaces to several companies within the same premises (for example an individual desk in an open space or a part-time use of a shared space) must be considered as a domiciliation of companies, as the criteria of real letting are not fulfilled.

C12. Professionals providing company incorporation and management services

Art. 28-10 Professionals providing company incorporation and management services

"*(1) Professionals providing company incorporation and management services are natural and legal persons engaging in the provision of services relating to the incorporation or management of one or more companies.*

(2) Authorisation to act as a professional providing company incorporation and management services shall be conditional on the production of evidence showing the existence of a capital base amounting to not less than 125,000 euros.

(3) Corporate domiciliation agents as referred to in Article 28-9 and the notaries and registered members of other regulated professions listed in Article 1(1) of the Law of 31 May 1999 governing the domiciliation of companies shall be automatically authorised to act, in addition, as professionals providing company incorporation and management services. In consequence, such persons shall not be subject to prior approval by the Minister responsible for the CSSF or to prudential supervision by the CSSF."

64. What does the activity of professional providing company incorporation and management services (PIM) consist of and which are the activities that a PIM may carry out?

Updated on 27 January 2015

1. General provisions

As PIMs were transferred from the category of support PFS to specialised PFS by the legislator in 2011, PIMs have become subject to the LFS as regards their authorisation and the prudential supervision by the CSSF due to their activity as defined in Article 28-10(1) of the LFS, even if their clients are exclusively persons not belonging to the financial sector.

Since PIMs are specialised PFS, and as such part of the financial sector, the CSSF presupposes, in accordance with the principle of prudence, that their authorisation under the LFS covers all their activities and that the supervision by the CSSF also extends to all of their activities. This conclusion derives from both the letter of the law and its finality, as their activities other than those based on the LFS definition may imply a prudential risk for the activities described in the LFS and for the PFS itself.

In order to mitigate this risk, PIMs shall carry out activities other than those defined in Article 28-10(1) of the LFS only on an ancillary basis, as opposed to what should be their main activity. In practice, setting thresholds above which PIM activities other than those defined in the LFS are considered as significant so that they can no longer be contemplated as ancillary activities, may prove to be difficult. Consequently, such activities should be limited or transferred to a distinct entity.

2. PIM activities defined in Article 28-10(1)

a) Company incorporation services

These services consist in performing, on behalf of a client, all kinds of steps to set up the type of company requested, including the service of intermediary offered to a client to draw up a memorandum of association of a Luxembourg or foreign company, as well as the representation of a client for the incorporation of a company.

Considering the letter of the law and the finality of prudential supervision, the CSSF considers that the sole provision of company incorporation services, excluding any company management service, does not require a PIM status.

b) Company management services

These services consist in making available to third party companies independent directors, executives or managers, who actively intervene in the management of the client company by the fact that they have power of commitment and effective responsibility.

Where the management activity is carried out by natural persons referring to an entity which is itself authorised under Article 28-10, an additional individual authorisation under Article 28-10 shall not be required from these natural persons (for example partners or employees of the authorised entity).

The activity of company management falls under Article 28-10 if the activity is a regular occupation or business activity performed in a professional capacity, in accordance with Article 13 of the LFS.

i. *Professional activity*

Article 28-10 applies to the company management activities performed in a professional capacity, based notably on a contractual relationship between the PIM and its client.

However, if a mandate as administrator is carried out based on a personal relationship between the mandating company and the agent, no authorisation under Article 28-10 is required. This is notably the case where the agent is employed by the mandating company, where he holds a participation in the share capital or voting rights in the mandating company, where he directs another company belonging to the same group or where he is helping out the mandating company by virtue of a personal relationship.

In practice, it may sometimes be difficult to determine whether a person's mandate as administrator or manager is based on a personal or professional relationship in the absence of a formal service provision agreement. Some facts, such as for example the solicitation of potential customers (via a website or any other means of communication) or the existence of a remuneration, represent an indication of a service provision performed on a professional basis and not a mandate carried out in the context of a personal relationship.

ii. Regular activity

The need for an authorisation under Article 28-10 to carry out a mandate as administrator or executive in companies for which a service provision agreement is available must be appreciated by taking into account the scale of the business, i.e. the number of mandates and time requirements to carry out these mandates.

Based on these criteria, the CSSF retains the following guideline: an authorisation under Article 28-10 is required for this activity when it covers at least simultaneously two mandates as executive of a financial sector entity (day-to-day management/conducting officer for UCIs) and at least 20 working hours per week for these mandates.

Apart from this general rule, the following situations should be analysed on a case-by-case basis to determine whether an authorisation under Article 28-10 is required:

- where the activity concerns only one mandate as executive in the financial sector, and also several mandates as administrator in the financial sector as well, the presumption shall require an authorisation under Article 28-10 if the volume or diversity of the mandates so justifies;

- where the mandates as executive are all outside the financial sector, the presumption shall set higher number and time thresholds before requiring an authorisation under Article 28-10;

- where the activity concerns only mandates as administrators (in the financial sector or outside the financial sector), excluding any mandate as executive, the presumption shall thus not require an authorisation under Article 28-10.

In any case, the degree of need for the CSSF to exercise its prudential supervision of the person itself carrying out a mandate has to be taken into account, without prejudice to the supervision or not of the entity in which the mandate is performed.

65. Can a PFS providing company incorporation and management services provide compliance services to a management company?

Published on 10 October 2011

A PFS providing company incorporation and management services may offer compliance services to a management company which is authorised under Chapter 15 of the Law of 17 December 2010 relating to undertakings for collective investment and which only carries out collective management activities, provided the PFS already acts as provider of "substance" services of this management company.

Without prejudice to the requirements with respect to the organisation of the compliance function to which the management company is subject, the PFS will notably have to set out procedures for the management of conflicts of interest for this specific activity which will comply with the provisions laid down in the fifth indent of Article 36(1) or sixth indent of Article 36-1(1) of the LFS, respectively.

66. May the persons authorised to exercise the activity of corporate domiciliation also exercise the activity of company incorporation and management without requiring a specific PFS status?

Updated on 10 October 2011

Pursuant to the close link between domiciliation services and company incorporation and management services, the legislator's goal was that the professionals authorised to exercise the domiciliation activity may also provide *ipso jure* company incorporation and management services. Thus, corporate domiciliation agents as referred to in Article 28-9 of the LFS and the notaries and registered members of other regulated professions listed in Article 1(1) of the Law of 31 May 1999 governing the domiciliation of companies shall be authorised *ipso jure* to act, in addition, as professionals providing company incorporation and management services. In consequence, except for the corporate domiciliation agents referred to in Article 28-9 of the LFS, such persons shall neither be subject to prior approval by the Minister responsible for the CSSF nor to prudential supervision by the CSSF.

C13. Central account keepers

Art. 28-11 Central account keepers

"*(1) Central account keepers are persons whose activity is to keep issuance accounts for dematerialised securities.*

(2) No person other than settlement organisations, within the meaning of the law on dematerialised securities, may carry on the activity of central account keeper without an authorisation from the Minister responsible for the CSSF."

C14. PFS authorised under Article 13 of the LFS

Art. 13 Scope

PFS authorised under Article 13 of the LFS (scope of the general provisions)

"*This Chapter applies to any natural person established in Luxembourg for professional reasons, as well as to any legal person governed by Luxembourg law whose regular occupation or business is to exercise a financial sector activity or one of the connected or ancillary activities referred to in sub-section 3 of section 2 of this Chapter on a professional basis.*"

67. Are there activities which fall within the scope of the LFS apart from those referred to in Articles 24 to 29-5 of the LFS?

Updated on 10 October 2011

Yes.

Where an activity is not specifically governed by Articles 24 to 29-5 of the LFS but belongs nevertheless to the financial sector due to its nature, an authorisation pursuant to the general provisions of the LFS is required.

In this context however, the CSSF shall assess whether it is a regular occupation or business exercised on a professional basis. Thus, the activity shall be a regular occupation or business which implies a repetitive nature. The fact that a service provider can make a living out of the activity or the scale of the activity in question compared to a different activity exercised by the same person may lead to the conclusion that the activity is exercised on a professional basis.

For example, until the adoption and entry into force of the future European regulation on over-the-counter derivatives, central counterparties and trade repositories, the professionals acting as trade repository will be approved as professionals carrying out an activity of the financial sector under Article 13 of the LFS.

68. Is an authorisation necessary for the presentation of clients?

Published on 29 November 2010

The simple activity of introducing clients to one or more financial institutions of the financial centre is not a financial sector activity requiring an authorisation pursuant to the LFS.

In this context, the difference between this activity and that of a "tied agent" shall be pointed out. In accordance with Article 1(1) of the LFS, a "tied agent" is defined as "*a natural or legal person who, under the full and unconditional responsibility of only one credit institution or investment firm on whose behalf it acts,*

- *promotes investment and ancillary services to clients and prospective clients, or*
- *canvasses clients or potential clients, or*
- *receives and transmits instructions or orders from the client in respect of investment services or financial instruments, or*
- *places financial instruments, or*
- *provides advice to clients or potential clients in respect of those financial instruments or services.*"

D. SUPPORT PFS

69. What is the extent of the derogation to the secrecy obligation of Article 41(5) of the LFS?

Updated on 30 November 2015

Article 41(5) of the LFS[14] explicitly allows the communication of information between banks and support PFS under an agreement for the provision of services. This communication is essential because it allows the support PFS to offer services to the banks and thus fulfil their reason.

[14] *Article 41(5) of the LFS: "The obligation to secrecy does not cover credit institutions and support PFS where the information communicated to those professionals is provided under an agreement for the provision of services."*

D1. Client communication agents

Art. 29-1 Client communication agents

"*(1) Client communication agents are professionals engaging in the provision, on behalf of credit institutions, PFS, payment institutions, electronic money institutions, insurance undertakings, reinsurance undertakings, pension funds, UCIs, SIFs, investment companies in risk capital (société d'investissement en capital à risque) and authorised securitisation undertakings established under Luxembourg law or foreign law, of one or more of the following services:*

- the production, in tangible form or in the form of electronic data, of confidential documents intended for the personal attention of clients of credit institutions, PFS, payment institutions, electronic money institutions, insurance undertakings, reinsurance undertakings, contributors, members or beneficiaries of pension funds and investors in UCIs, SIFs, investment companies in risk capital and authorised securitisation undertakings;

- the maintenance or destruction of documents referred to in the previous indent;

- the communication to persons referred to in the first indent, of documents or information relating to their assets and to the services offered by the professional in question;

- the management of mail giving access to confidential data by persons referred to in the first indent;

- the consolidation, pursuant to an express mandate given by the persons referred to in the first indent, of positions which the latter hold with diverse financial professionals.

(2) Authorisation to act as client communication agent shall only be granted to legal persons. It is conditional on the production of evidence of capital amounting to not less than 50,000 euros."

70. What does the activity of client communication agent consist of?

Published on 29 November 2010

- The activity of these specialised agents covers the production, in tangible form or in the form of electronic data, of confidential documents intended for the personal attention of clients of credit institutions, PFS, payment institutions, insurance undertakings, reinsurance undertakings, investors in UCIs and contributors, members or beneficiaries of pension funds.

- Archiving and destroying confidential documents intended for clients of financial professionals such as, for example, transaction confirmations, account statements or tax returns also fall within the scope of this status.
- In addition to these tasks, there is also the communication to the clients of financial professionals of documents or information regarding their assets and services provided by the professional of the financial sector in question.
- The management of mail which provides access to the clients' confidential data is also concerned by this status. Since the following activities inform of the identity and address of the persons concerned, the status also includes sending letters or distributing, through different media and particularly via electronic means, documents of the financial sector to clients of financial professionals, no matter that the content is confidential.
- The consolidation, pursuant to an express mandate, of positions held by clients with different financial professionals is also concerned by this status. These are companies operating an internet website and whose main service is to aggregate data of clients of the financial sector for the different financial institutions present on the internet. At a client's request, these aggregators consolidate, among others, the data of his bank account and of his portfolio of securities so as to present a synthesis of his assets. An express mandate of the client is required for the consolidation of the positions that the client holds with different financial professionals.

The undertaking shall have the technical and human means required to fulfil its functions.

71. Are printing services subject to authorisation by the Minister of Finance?

Published on 29 November 2010

The traditional printing services in the financial sector, i.e. the production and printing of non confidential documents are not subject to an authorisation pursuant to the LFS.

72. May client communication agents provide certain services which are not regulated and which are ancillary to their main activity?

Published on 29 November 2010

Nothing prevents client communication agents from providing unregulated services on an ancillary basis.

D2. Administrative agents of the financial sector

Art. 29-2 Administrative agents of the financial sector

"*(1) Administrative agents of the financial sector are professionals who engage in the provision, on behalf of credit institutions, PFS, payment institutions, electronic money institutions, UCIs, pension funds, SIFs, investment companies in risk capital, authorised securitisation undertakings, insurance undertakings or reinsurance undertakings established under Luxembourg law or foreign law, pursuant to a sub-contract, of administration services forming an integral part of the business activities of the originator.*

This status does not govern the provision of technical services that are not likely to have an impact on the professional activity of the originator.

(2) Authorisation to act as an administrative agent of the financial sector may be granted only to legal persons and shall be conditional on the production of evidence showing the existence of a share capital of not less than 125,000 euros.

(3) Administrative agents of the financial sector shall be automatically authorised to act, in addition, as client communication agents."

73. What does the activity of an administrative agent of the financial sector consist of?

Published on 29 November 2010

Article 29-2 of the LFS regulates professionals which provide purely administrative services by means of an outsourcing contract (as opposed to management and financing activities) which can be qualified as back-office services on behalf of Luxembourg or foreign professionals of the financial sector. In other words, a specialised third-party professional partially executes the administrative section of the activity of a financial professional. The purpose of Article 29-2 is to allow financial professionals of smaller size, which do not have the necessary means to maintain an efficient back-office for an acceptable price, to delegate part of these administrative tasks to specialised professionals.

The activity area of administrative agents of the financial sector encompasses, among others, the following functions: administration of the investors' portfolio, the accounting of transactions in the clients' accounts, valuation of the clients' assets, the accounting of new clients' accounts, accounting verification of the incoming and outgoing sums, the reconciliations, the calculation of the net asset value of the units of undertakings for collective investment as well as the definition of the IT applications parameters. Administrative agents may thus actively intervene in the work process of their clients. This status does not cover the provision of technical services that are not likely to have an impact on the professional activity of the originator.

74. May an administrative agent of the financial sector carry out the maintenance of the register?

Published on 29 November 2010

The authorisation of an administrative agent of the financial sector does not cover the maintenance of the shareholder register. This activity requires the status of registrar agent (Article 25 of the LFS).

75. Are liability managers of SEPCAVs and ASSEPs covered by Article 29-2 of the LFS?

Updated on 13 May 2011

The activity of liability managers of pension funds is governed by the Law of 13 July 2005 on institutions for occupational retirement provision in the form of pension savings companies with variable capital (SEPCAVs) and pension savings associations (ASSEPs) is not covered by the LFS. Liability managers may nevertheless outsource some of their administrative tasks with administrative agents of the financial sector authorised pursuant to Article 29-2 of the LFS.

D3. Primary IT systems operators of the financial sector

Art. 29-3 Primary IT systems operators of the financial sector (OSIP)

"*(1) Primary IT systems operators of the financial sector are those professionals who are responsible for the operation of IT systems allowing to draw up accounts and financial statements that are part of the IT systems belonging to credit institutions, PFS, payment institutions, electronic money institutions, UCIs, pension funds, insurance undertakings or reinsurance undertakings established under Luxembourg law or foreign law.*

(2) Primary IT systems operators of the financial sector are entitled to install and maintain the IT systems referred to in paragraph 1.

(3) Authorisation to act as primary IT systems operator shall only be granted to legal persons. It is conditional on the production of evidence of capital amounting to not less than 370,000 euros.

(4) Primary IT systems operators of the financial sector shall be automatically authorised to act in addition as secondary IT systems and communication networks operator of the financial sector.

(5) repealed

(6) IT systems and communication networks operators of the financial sector, authorised under Article 29-3 as such at the time of the coming into force of this law, shall benefit automatically of the status of primary IT systems operators of the financial sector."

76. What does the activity of primary IT systems operator of the financial sector consist of?

Published on 29 November 2010

Primary IT systems operators of the financial sector are those professionals who are responsible for the operation of IT systems allowing the drawing-up of accounts and financial statements that are part of the IT and communication systems belonging to credit institutions, PFS, payment institutions, UCIs or pension funds, insurance undertakings or reinsurance undertakings established under Luxembourg law or foreign law. Primary IT systems operators of the financial sector are also entitled to install and maintain the IT systems in question.

Primary IT systems are those supporting the applications directly linked to the financial activity of the financial professional, i.e. the applications involved in the drawing-up of accounts and financial statements. For example, we may note applications for banking, trading rooms, management of portfolios, calculation of the net asset value, reconciliations of financial transactions, payments and transfers, credits, establishment or consolidation of securities or exchange prices. All these applications and the IT systems which support them are considered as constituting applications and "primary" systems, respectively. However, office applications and applications for text editing, spreadsheet (provided that the tables do not directly contribute to the establishment of accounts and financial statements), electronic messaging, connection to other applications (terminal or "client" in client-server mode), consultation, anti-money laundering, etc. are covered by the "secondary" systems because they are less crucial for the financial activity of financial professionals. Since the communication networks are not directly involved in the drawing-up of accounts and financial statements, they are considered as falling within the competences of secondary IT systems operators.

77. What kind of establishment of accounts and financial statements is allowed by the status of OSIP?

Published on 29 November 2010

The OSIP status concerns IT systems allowing the establishment of accounts and financial statements, i.e. those which:

- record the accounting entries;
- establish the account balances or the account statements on the basis of management decisions (insofar as they are included in the accounting function);

- establish the account statements on the basis of publications of financial data, including the annual accounts, the intermediary financial statements and the legal and prudential reporting required.

In any other case the OSIS status is sufficient.

78. What are the differences in the definition of the activities between the primary IT systems operators of the financial sector (OSIP), authorised in accordance with Article 29-3 of the LFS, the secondary IT systems and communication networks operators of the financial sector (OSIS), authorised in accordance with Article 29-4 of the LFS and the IT service providers not having a PFS status.

Published on 29 November 2010

In order to distinguish between OSIP and OSIS, it is important to know if the application or the system which uses the application includes accounting rules. Circular CSSF 08/350 provides several examples in this matter, the most striking being a portfolio valuation software.

In case of a software for investment funds accounting, the valuation is included in the accounting application and the status required to operate such a system is OSIP. However, a portfolio valuation for the client, the sole purpose of which is to provide an indication on the assets, is not an accounting software which includes algorithms for accounting entries and the status required is OSIS. Similarly, a system for the management of mass storage and which serves multiple IT systems, even if it contains the database used by the accounting software, does not fall under the scope of the status OSIP because its purpose is not of accounting but of technical nature, i.e. mass storage in the network. However, the systems supporting an accounting application (central units) can only be operated by a PFS which has the status OSIP.

D4. Secondary IT systems and communication networks operators of the financial sector

Art. 29-4 Secondary IT systems and communication networks operators of the financial sector (OSIS)

"*(1) Secondary IT systems and communication networks operators of the financial sector are those professionals who are responsible for the operation of IT systems other than those allowing to draw up accounts and financial statements and of communication networks that are part of the IT systems belonging to credit institutions, PFS, payment institutions, electronic money institutions, UCIs, pension funds, insurance undertakings or reinsurance undertakings established under Luxembourg law or foreign law.*

The activity of secondary IT systems and communication networks operator of the financial sector includes IT processing or transfer of data stored in the IT systems.

These IT systems and communication networks may either belong to the credit institution, PFS, payment institution, electronic money institution, UCI, pension fund, insurance undertaking or reinsurance undertaking established under Luxembourg law or foreign law, or provided to them by the operator.

(2) Secondary IT systems and communication networks operators of the financial sector are entitled to install and maintain the IT systems referred to in paragraph 1.

(3) Authorisation to act as secondary IT systems and communication networks operator shall only be granted to legal persons. It is conditional on the production of evidence of capital amounting to not less than 50,000 euros."

79. What does the activity of secondary IT systems and communication networks operator of the financial sector consist of?

Published on 29 November 2010

Secondary IT systems and communication networks operators of the financial sector are those professionals who are responsible for the operation of IT systems other than those allowing the drawing-up of accounts and financial statements and of communication networks that are part of the IT systems belonging to credit institutions, PFS, payment institutions, UCIs, pension funds, insurance undertakings or reinsurance undertakings established under Luxembourg law or foreign law. The activity of secondary IT systems and communication networks operators of the financial sector includes IT processing or transfer of data stored in the IT systems. These IT systems and communication networks may either belong to the credit institution, PFS, payment institution, pension fund, insurance undertaking or reinsurance undertaking established under Luxembourg law or foreign law, or provided to them at their request by the operator. Secondary IT systems and communication networks operators of the financial sector are also entitled to install and maintain the IT systems and networks concerned.

D5. Dematerialisation service providers of the financial sector and conservation service providers of the financial sector

Art. 29-5 Dematerialisation service providers of the financial sector

"*(1) Dematerialisation service providers of the financial sector are dematerialisation or conservation service providers within the meaning of the Law of 25 July 2015 on e-archiving in charge of the dematerialisation of documents on behalf of credit institutions, PFS, payment institutions, electronic money institutions, UCIs, SIFs, investment companies in risk capital (SICARs), pension funds, authorised securitisation undertakings, insurance undertakings or reinsurance undertakings, governed by Luxembourg law or by foreign law.*

(2) Authorisation to act as dematerialisation service provider of the financial sector shall only be granted to legal persons. It shall be conditional on the production of evidence of a share capital of not less than 50,000 euros.

(3) The CSSF and ILNAS shall cooperate for the purpose of performing their respective tasks of supervising the dematerialisation service providers of the financial sector."

Art. 29-6 Conservation service providers of the financial sector

"*(1) Conservation service providers of the financial sector are dematerialisation or conservation service providers within the meaning of the Law of 25 July 2015 on e-archiving in charge of the conservation of electronic documents on behalf of credit institutions, PFS, payment institutions, electronic money institutions, UCIs, SIFs, investment companies in risk capital (SICARs), pension funds, authorised securitisation undertakings, insurance undertakings or reinsurance undertakings, governed by Luxembourg law or by foreign law.*

(2) Authorisation to act as conservation service provider of the financial sector shall only be granted to legal persons. It shall be conditional on the production of evidence of a share capital of not less than 125,000 euros.

(3) The CSSF and ILNAS shall cooperate for the purpose of performing their respective tasks of supervising the conservation service providers of the financial sector.

(4) Activities of mere data storage which do not consist in storing a copy with probative value or a digital original within the meaning of the aforementioned Law of 25 July 2015 while guaranteeing its integrity do not fall within the scope of this article."

80. What does "dematerialisation or conservation service provider" refer to within the meaning of the Law of 25 July 2015 on e-archiving?

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In accordance with Article 2 of the Law of 25 July 2015 on e-archiving, "dematerialisation or conservation service provider" (PSDC) shall mean any person exercising the activity of dematerialisation or electronic conservation, as a primary or secondary activity, for own needs or on behalf of third parties, and, under the conditions and arrangements set out in the aforementioned law, certified to this end and registered on the list of dematerialisation or conservation service providers held by the Luxembourg Institute for Standardisation, Accreditation, Safety and quality of products and services (Institut Luxembourgeois de la Normalisation, de l'Accréditation, de la Sécurité et qualité des produits et services, ILNAS), and published on ILNAS' website.

ILNAS registers the PSDCs on its list once they are in possession of a conformity assessment certificate according to the technical regulation. Any information on the technical regulation requirements and measures for certifying PSDCs must be requested from the Ministry of Economy.

81. When is an authorisation pursuant to Article 29-5 or 29-6 of the LFS required?

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A PSDC intending to carry out dematerialisation or conservation services for a financial professional must obtain an authorisation pursuant to Article 29-5 or 29-6 of the LFS.

An entity which intends to be a PSDC for its own needs or for the needs of a group of companies to which it belongs must follow the certification process and will be registered on the ILNAS list, but it will not have to and it cannot not obtain the support PFS status pursuant to Articles 29-5 and 29-6 of the LFS.

82. Is the registration on the ILNAS list a prerequisite for obtaining an authorisation pursuant to Articles 29-5 and 29-6 of the LFS?

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Yes. Obtaining authorisation for one of the PSDC statuses pursuant to Articles 29-5 and 29-6 is subject to the condition that the applicant has already obtained a PSDC status within the meaning of the Law of 25 July 2015 and that it is registered on the list held by ILNAS.

83. What does “copy with probative value” refer to?

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Within the meaning of the Grand-ducal Regulation of 25 July 2015 on the dematerialisation and conservation of documents, copies with probative value are copies:

a) made according to a process which neither alters nor interprets the information included in the original, but only creates an identical image of that original;
b) made systematically and without flaws;
c) made in accordance with the working instructions which are maintained as long as the copies; and
d) stored with care, in systematic order, and protected against any alteration.

84. What does “dematerialisation” refer to?

Published on 30 November 2015

The Law of 25 July 2015 on e-archiving defines “dematerialisation” as “the activity consisting in creating a copy with probative value of an original in analogue form in conditions that ensure reliable guarantees as to the conformity of the copy made from the original.”

The Grand-ducal Regulation of 25 July 2015 on the dematerialisation and conservation of documents specifies in its Article 2 that the authenticity of the copy with probative value shall be guaranteed. To that end, the transcript process (i) shall not alter the content and appearance of the original, (ii) each probative copy shall systematically include the date and time of its creation and (iii) a detailed and up-to-date history of the probative copy shall be available at all times.

85. What equipment is necessary to the dematerialisation activity?

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Dematerialisation may be occasional and requires digitisation equipment (scanners, optical character recognition), qualified staff for the performance of these tasks and for indexing documents in order to retrieve information which will be stored. The Grand-ducal Regulation of 25 July 2015 implementing Article 4(1) of the Law of 25 July 2015 on e-archiving defines the requirements and measures allowing setting up an information security management and operational management specifically applicable to the dematerialisation and conservation processes.

86. What is the difference between the archiving activity referred to in Article 29-1 and the conservation activity referred to in Article 29-6?

Published on 30 November 2015

Article 29-1 concerns “physical” paper archiving, whereas Article 29-6 refers to electronic archiving with probative value.

87. What conditions must be fulfilled by e-archiving?

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The Grand-ducal Regulation of 25 July 2015 on the dematerialisation and conservation of documents provides detailed information in relation thereto:

(1) Copies with probative value and digital originals shall be sustainable. The copies with probative value and the digital originals fulfilling this condition are those which:

a) are stored so as to avoid any modification or alteration; or
b) are registered as soon as they are created in a computer-based document which is secured or electronically signed within the meaning of Article 1322-1 of the Civil Code.

(2) If, for any reason, the copies with probative value or the digital originals are transferred from one digital medium or format onto another, the holder shall prove their concordance.

(3) The systems used for electronic conservation of copies with probative value and digital originals shall include the safety measures necessary to avoid any modification or alteration and allow the return at any time of the documents in a format which is immediately readable and which guarantees fidelity to the original.

88. What equipment is necessary to the conservation activity?

Published on 30 November 2015

Conservation requires long-term IT storage equipment in a resilient and secure environment, in accordance with the provisions of the Grand-ducal Regulation of 25 July 2015 implementing Article 4(1) of the Law of 25 July 2015 on e-archiving.

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89. Who to contact for further information?

If you have any further questions of a general nature, you can send an email to the following address:

PSF.questions@cssf.lu

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