

## QUESTIONS AND ANSWERS ON HOW TO OBTAIN AUTHORISATION AS PFS

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

(version dated 24 October 2018)

### 1. What does “PFS” mean?

Article 1 (definition no. 27) of the law of 5 April 1993 on the financial sector (the “LFS”)<sup>1</sup> provides that the professionals of the financial sector which fall 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).

### 2. Who requires authorisation as PFS?

Generally speaking, persons whose business activity consists in carrying out a financial sector activity as well as persons whose business activity consists in exercising a connected or ancillary activity to a financial sector activity referred to under Chapter 2, Section 2, Subsection 3 of the LFS are required to seek authorisation prior to exercising this activity, except for those entities referred to under Article 1-1(2) of the LFS who are subject to specific laws or may benefit from a legal exemption (cf. Q&A no. 5).

Part I (Chapters 1 and 2) of the LFS deals with “Access to professional activities in the financial sector” and classifies activities according to different statuses. Chapter 1 of Part I lays down and defines the conditions relating to the obtaining of an authorisation to exercise the activities of Luxembourg credit institutions (or banks), Chapter 2 lays down and defines the conditions relating to the obtaining of an authorisation to exercise activities of professionals of the financial sector within the scope of the LFS other than credit institutions i.e. of PFS.

Article 13 of the LFS thus provides that Chapter 2 of Part I of the LFS “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 (...).”

It follows that no person may have as their regular occupation or business activity a financial sector activity or one of the connected or ancillary activities to a financial sector activity laid down by the LFS without prior written authorisation of the Minister responsible for the CSSF. Equally, no person may be authorised to carry out any business activity of the financial sector either through another person or as intermediary for the carrying-out of such an activity.

<sup>1</sup> [https://www.cssf.lu/en/regulatory-framework/?entity\\_type=13](https://www.cssf.lu/en/regulatory-framework/?entity_type=13)

### 3. What does it mean to exercise a financial activity as a business activity?

Any activity dealing with financial matters or money constitutes a financial activity. The existence of a money flow is an important indication to establish whether an activity qualifies as a financial sector activity. However, the CSSF shall decide for each specific activity whether authorisation is required.

The exercise of a financial sector activity or of one of the connected or ancillary activities is only subject to prior authorisation and to the supervision by the CSSF where it is a regular occupation or business activity which implicates a repetitive nature.

The fact that a professional 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 leads to the conclusion that an activity amounts to a business activity.

### 4. What are the different categories of PFS?

The LFS distinguishes between three PFS categories which are divided into different statuses, notably:

1. Investment firms (Articles 24 to 24-9 of the LFS);

- Investment advisers
- Brokers in financial instruments
- Commission agents
- Private portfolio managers
- Professionals acting for their own account
- Market makers
- Underwriters of financial instruments
- Distributors of units/shares in UCIs
- Financial intermediation firms
- Investment firms operating an MTF<sup>2</sup> in Luxembourg

Investment firms may benefit from the “European passport” (cf. Q&A no. 24) whereas specialised PFS and support PFS may not.

2. Specialised PFS (Articles 13 and Articles 25 to 28-11 of the LFS):

- Registrar agents
- Professional depositaries of financial instruments
- Professional depositaries of assets other than financial instruments
- Operators of a regulated market authorised in Luxembourg
- Currency exchange dealers
- Debt recovery
- Professionals performing lending operations
- Professionals performing securities lending
- Family Offices
- Mutual savings fund administrators
- Corporate domiciliation agents

<sup>2</sup> MTF means a multilateral trading facility within the meaning of Article 1(18) of the law of 13 July 2007 on markets in financial instruments.

- Professionals providing company incorporation and management services
- Central account keepers
- PFS authorised under Article 13 of the LFS: for the application of this article, the CSSF shall evaluate whether an activity belongs by virtue of its nature to the financial sector and thus be subject to the general provisions of the LFS.

### 3. Support PFS (Articles 29-1 to 29-6 of the LFS):

- Client communication agents
- Administrative agents of the financial sector
- Primary IT systems operators of the financial sector
- Secondary IT systems and communication networks operators of the financial sector
- Dematerialisation service providers of the financial sector
- Conservation service providers of the financial sector

The LFS regulates the exercise of a number of technical, administrative or client communication activities where these are exercised on a connected or ancillary basis to a financial activity. The development of these support activities is a result of the fact that financial professionals tend to concentrate more and more on their original profession or on one or more very specific activities and delegate the exercise of technical or administrative tasks to specialised third parties. While taking into account the specificity of such activities, the legislator has deemed necessary to place these support activities under the PFS regime, in particular to impose confidentiality rules and given the risks the execution of these tasks can entail.

## 5. Which persons or entities do not need to obtain authorisation as PFS?

Article 1-1(2) of the LFS lays down the exemptions to the scope of application of the LFS by listing the persons and entities not subject to the requirement to obtain authorisation as a credit institution or PFS. The entities mentioned in this article are either covered by specific laws or they benefit from a legal exemption.

Other legal provisions may apply to these persons or entities, requiring them to be authorised or approved in accordance with specific legislation. For instance, management companies of UCIs covered by the laws of 17 December 2010 relating to undertakings for collective investment and of 13 February 2007 relating to specialised investment funds do not need to obtain authorisation as PFS under the LFS but shall be authorised by the CSSF according to their specific laws.

That said, the requirement to obtain authorisation as PFS does not apply to:

- insurance or reinsurance undertakings governed by the law of 6 December 1991 on the insurance sector, as amended;
- persons which provide an investment service exclusively to their parent undertaking, to their subsidiaries or to another subsidiary of their parent undertaking;
- persons which provide a service under the LFS, exclusively to one or more undertakings forming part of the same group as the person providing the service, unless otherwise provided;
- persons which provide a service under Chapter 2 of Part I of the LFS where that service is provided in an incidental manner in the course of a professional activity and if the latter is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service;

- persons which do not provide any investment service or activity other than dealing on own account unless they are market makers 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 them;
- persons which provide investment services consisting exclusively in the administration of employee-participation schemes;
- persons which provide investment services which only involve both administration of employee-participation schemes and the provision of investment services exclusively to their parent undertaking, to their subsidiaries or to another subsidiary of their parent undertaking;
- the members of the European System of Central Banks nor to other national bodies performing similar functions, nor to other public bodies charged with or intervening in the management of the public debt;
- undertakings for collective investment governed by the law of 13 February 2007 relating to specialised investment funds or the law of 17 December 2010 relating to undertakings for collective investment nor to their managers;
- pension funds governed by the law of 13 July 2005 on institutions for occupational retirement provision in the form of sepcav or assep nor to pension funds subject to the supervision of the *Commissariat aux Assurances*, nor to their liability managers;
- persons dealing on own account in financial instruments, or providing investment services in commodity derivatives or derivative contracts included in Annexe II, Section B, point 10 to the clients of their main business, provided that this is an ancillary activity to their main business, when considered on a group basis, and that the main business is not the provision of investment services within the meaning of Sections A and C of Annexe II or the exercise of one or more of the activities listed in Annexe I of the LFS;
- persons providing investment advice in the course of carrying out another professional activity not covered by Sub-sections 1 and 2 of Chapter 2 of Part I of the LFS provided that the provision of such advice is not specifically remunerated;
- persons whose main business consists of dealing on own account in commodities and/or commodity derivatives. This exemption does not apply where persons dealing on own account in commodities and/or commodity derivatives are part of a group the main business of which is the provision of other investment services listed in Sections A and C of Annexe II or the exercise of one or more activities listed in Annexe I of the LFS;
- firms which provide investment services and/or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets or which deal for the account of other members of those markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such firms is assumed by clearing members of the same markets;
- undertakings within the meaning of the law of 15 June 2004 relating to the investment company in risk capital (SICAR), nor to their managers;
- securitisation undertakings, nor to fiduciary-representatives having dealings with such undertakings;
- payment institutions governed by the law of 10 November 2009 on payment services;

- other persons carrying out any activity the taking up and pursuit of which are governed by special laws.

### 6. From whom can the authorisation as PFS be obtained?

The authorisation application must be filed by the entity applying for authorisation (or a representative of the future PFS) with the Minister responsible for the CSSF, currently the Minister of Finance. The Minister only grants the authorisation after prior investigation of the file by the CSSF and verification by it of all the conditions required by the law. Where the services offered or activities performed by a PFS also concern insurance products, the authorisation is granted upon written application and after investigation by the CSSF and by the *Commissariat aux Assurances* on the conditions required under both the LFS and the law of 6 December 1991 on the insurance sector (Article 15(1) of the LFS).

Motivated legal and factual reasons shall be given whenever a decision over an authorisation is taken by the Minister and the applicant shall be notified thereof within six months of receipt of the application by the Minister or, should the application be incomplete, within six months of receipt of the information required for the decision. A decision shall, in any case, be taken within 12 months of the receipt of the application, failing which the absence of a decision shall be deemed to constitute notification of a decision refusing the application. The decision may be referred to the *Tribunal administratif* (administrative court) which deals with the substance of the case. The case shall be filed within one month, or else shall be time-barred. (Article 15(7) of the LFS).

Given that the CSSF is the competent authority to give an opinion on applications by persons that intend to exercise a financial activity, it plays an important role in the process of taking up an activity in the financial centre and attaches a particular importance to the suitability of persons that intend to exercise a financial activity in Luxembourg. The CSSF's intention is to establish a personalised contact, in order to provide these persons with the necessary details, to allow them to present their project or to guide them during the setting-up of their file for authorisation.

### 7. From whom can the authorisation to change status or for a new PFS status be obtained?

The authorisation requested by a PFS to change status or to obtain a new PFS status (a status replacing the one the PFS already has or an additional status) is handled the same way as a new authorisation and is therefore the remit of the Minister of Finance. This type of authorisation request is reviewed by the CSSF.

### 8. Are there any special conditions linked to the obtaining of an authorisation for an activity which involves the management of third-party funds?

The authorisation for any activity involving the management of third-party funds may be granted only to legal persons having the form of a public entity or a commercial company (Article 16 of the LFS). In principle, the authorisation may only be granted to a natural person where the PFS activity does not involve the management of third-party funds.

The Luxembourg law recognises as commercial companies with legal personality the following: *société en nom collectif* (general corporate partnership), *société en commandite simple* (limited corporate partnership), *société anonyme* (public company limited by shares), *société en commandite par actions* (corporate partnership limited by shares), *société à responsabilité*

*limitée* (private limited liability company), *société coopérative* (co-operative society) and *société européenne* (European company).

### 9. How long is the period of validity for the authorisation?

The validity of the authorisation is in principle unlimited (provided the PFS complies on a continuous basis with all the legal requirements) and the PFS may commence its activities from the moment it is delivered (Article 15(2) of the LFS) (cf. Q&A no. 23).

### 10. Who needs to prove professional standing and how?

In order to obtain authorisation, natural persons and, in the case of legal persons, the members of the bodies performing administrative, management and supervisory functions, and the shareholders or members with a qualifying holding must produce evidence of their professional standing. Professional standing shall be assessed on the basis of police records and of any evidence tending to show that the persons concerned are of good repute and offer every guarantee of irreproachable conduct (Article 19(1) of the LFS).

Thus, professional standing is not only assessed on the basis of police records but also on the basis of any evidence tending to show that the persons concerned are of good repute and offer every guarantee of irreproachable conduct. As regards the notion of “good repute”, attention should be drawn to the explanations to the draft law no. 3344 which underlie this provision of the LFS<sup>3</sup> and which state that the text is inspired by the new wording laid down in the law of 28 December 1988 on establishment which it completes and reinforces by using wording from Swiss banking law. The text thus takes into account the requirement for a particular severity in the financial sector, established by the jurisprudence of the *Conseil d'Etat*. The chosen wording clearly sets out that good repute is subject to a different and more rigorous assessment in the financial sector than under common law. (...). As a matter of fact, the aforementioned 1971 Swiss banking law and its practical implementation are at the root of a general requirement of “irreproachable business” (“*activité irréprochable*”; “*einwandfreie Geschäftstätigkeit*”). This requirement shall in particular provide the public with confidence in authorised entities and ensure the Luxembourg financial centre’s good repute. The presentation of all the “guarantees of irreproachable business” will include for instance all the personal and professional characteristics which allow an individual to correctly manage a professional supervised by the CSSF. Past and present professional activities of a person are substantial indicators in assessing and evaluating the professional standing of such persons when considering their future activities in the sector, be this during the authorisation procedure or in the context of the CSSF’s analysis of incidents or irregularities in the course of activities carried out by the persons concerned. Practice by different European regulators has led to the development of certain criteria which help assess in a specific case whether a director or administrator of a supervised entity does not or no longer presents sufficient professional standing (e.g. communication of misleading or incomplete information to a market or a regulator, insufficient internal controls, market abuse, violation of internal rules, embezzlement, etc.).

At European level, the former “Forum of European Securities Commissions” (FESCO) - which has become the “Committee of European Securities Regulators” (CESR), and subsequently the “European Securities and Markets Authority” (ESMA) dedicated certain standards to the assessment of the “fit and proper” notion and in particular as regards the notion of good repute “propriety”.<sup>4</sup> According to FESCO: “*This means that such individuals will be expected to meet*

<sup>3</sup> Draft law no. 3344 on the supervision of certain professional activities of the financial sector and on stock markets, commentary of articles, in particular pages 15 and 16

<sup>4</sup> FESCO, European Standard on fitness and propriety to provide investment services

*high standards of personal integrity in all respects and to be competent and capable of performing the functions or role currently performed or which it is proposed they should perform in the firm*". The document points out by way of example that: *"the provision of inaccurate or misleading information may (...) be grounds for failing the fit and proper test"*. In this context, all natural or legal persons to be authorised by the CSSF have to sign a declaration of honour before being approved. By signing this declaration of honour, the applicant confirms personal information and undertakes to inform the CSSF without delay if elements included in the declaration were to change. The person signing the declaration also recognises and accepts that where this declaration of honour should become incorrect, his/her professional standing will be compromised. As a matter of fact, by signing a declaration of honour, the applicant commits to act in an open and loyal manner towards the CSSF and to appropriately and actively provide any information which the CSSF can reasonably expect to receive in the exercise of its supervision, in addition to the information and documentation which is explicitly required by law.

In order to assess the professional standing of the persons indicated above, the natural and legal persons concerned shall fill in, sign and transmit to the CSSF the document "Declaration of honour", available for download on the CSSF website<sup>5</sup>. The Declaration of honour being an essential document to assess the professional repute of a person, the person filling in the form must ensure this is done properly and exhaustively. Moreover, natural persons shall transmit a copy of their identity document, a *curriculum vitae* and a recent extract from the police record to the CSSF. Legal persons shall transmit a copy of their coordinated articles of association, a recent extract from the trade and companies register and the annual reports (balance sheet and profit and loss account and the annex) for the last 3 years.

### **11. Who shall be in charge of the daily management and how shall the daily management be executed?**

The persons responsible for the daily management must be empowered to effectively direct the business and must possess adequate professional experience by virtue of them having previously carried out similar activities at a high level of responsibility and autonomy (Article 19(2) of the LFS).

Where authorisation is granted to a legal person, the daily management must be entrusted to at least two natural persons, who must both have professional standing and experience and closely equal powers. This two-man management principle allows mutual control and common decision-taking, but it does not necessarily imply that these persons must act together to commit the PFS.

Investment firms must moreover comply with Circular CSSF 12/552 on central administration, internal governance and risk management.

In the case of a PFS which is a natural person directed by a single person, the authorisation is subject to the production of evidence by the applicant to the CSSF that it has taken alternative arrangements to ensure the sound and prudent management of the investment firm.

The persons in charge of the daily management shall, in principle, be permanently based at the PFS's registered office. Any exemption to this principle, notably during the start-up phase of the activity (i.e. the first six months), shall be authorised by the CSSF. These persons must be reachable by the CSSF at any time in case of need. These requirements are fulfilled where the persons in charge of the day-to-day management of the PFS reside in Luxembourg or in the *Greater Region*.

<sup>5</sup> [https://www.cssf.lu/en/publication-data/?content\\_type=551&keyword=declaration+of+honour](https://www.cssf.lu/en/publication-data/?content_type=551&keyword=declaration+of+honour)

### 12. Is an authorisation from the CSSF required for a change affecting the persons required to meet the legal conditions of professional standing and professional experience?

After the authorisation is granted, any change affecting the persons required to meet the legal conditions of professional standing and professional experience is subject to prior approval of the CSSF. A PFS submitting an authorisation request ex post may be exposed to sanctions. The CSSF may request any necessary information regarding the persons who may be required to fulfil the legal requirements with respect to professional standing and professional experience.

The CSSF shall refuse the proposed change if these persons are of insufficient professional standing and, where applicable, of insufficient professional experience or where there are objective and demonstrable grounds for believing that the proposed change would pose a threat to the sound and prudent management of the PFS. The decision of the CSSF may be referred to the *Tribunal administratif* (administrative court) which deals with the substance of the case. The case shall be filed within one month, or else shall be time-barred (Article 19(4) of the LFS).

### 13. Are there any specific conditions linked to the structure of the shareholding?

The authorisation is subject to the condition that the PFS' structure of direct or indirect shareholding be transparent and organised in such manner that the authorities responsible for the prudential supervision of the PFS and, where applicable, of the group to which it belongs be clearly identifiable. This transparency requirement shall allow the prudential supervision to be exercised without hindrance and in the most efficient way. Moreover, supervision on a consolidated basis of the group to which the PFS belongs shall be ensured (Article 18(2) of the LFS).

### 14. What conditions do shareholders of a PFS need to fulfil?

Natural and legal persons are acceptable as shareholders or members in a PFS. The authorisation shall be subject to communication to the CSSF of the identity of the shareholders or members, whether direct or indirect and whether natural or legal persons, that have qualifying holdings in the PFS to be authorised, and of the amounts of those holdings (Article 18(1) of the LFS). "Qualifying holding" means any direct or indirect holding in the PFS which represents 10% or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of the PFS in which that holding subsists.

The authorisation shall be subject to the condition that the shareholders or members with a qualifying holding fulfil the required conditions to ensure a sound and prudent management. The concept of sound and prudent management shall be assessed in light of the criteria listed in Article 18(9) of the LFS (Article 18(1) of the LFS). The main criteria are: (1) the professional standing of the shareholders or members, (2) the professional standing and experience of any person who will direct the business of the PFS upon obtaining the authorisation, (3) the financial soundness of the shareholders or members, (4) the risk of money laundering and terrorist financing.

Where the influence exercised by the shareholders or members that have qualifying holdings in the PFS is likely to be prejudicial to the sound and prudent management of the PFS, the CSSF takes appropriate measures to put an end to that situation. The CSSF can notably make use of its rights of injunction or suspension laid down in Article 59 of the LFS. The LFS also provides that the CSSF can impose an administrative fine ranging from

EUR 125 to EUR 12,500 on the persons responsible for the administration or management of the PFS concerned, who act such as to jeopardise the sound and prudent management of the PFS (Article 18(18) of the LFS).

### **15. Where shall the PFS's central administration be located and how shall the PFS's infrastructure be organised?**

The authorisation for an applicant which is a legal person is subject to the production of evidence of the existence in Luxembourg of the central administration and the registered office of the applicant. The authorisation for an applicant who is a natural person is subject to the production of evidence that this person effectively conducts business in Luxembourg and has his central administration in Luxembourg (Article 17 of the LFS).

Any PFS belonging to the category of investment firms shall have robust internal governance arrangements, which include a clear organisational structure with well defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks they are or might be exposed to, and adequate internal control mechanisms, including sound administrative and accounting procedures, as well as control and security arrangements for information processing systems. The internal governance arrangements, processes, procedures and mechanisms shall be comprehensive and proportionate to the nature, scale and complexity of the investment firm's activities. The investment firm shall fulfil the organisational requirements defined in Article 37-1 of the LFS for the investment services provided or the investment activities performed as well as for the ancillary services provided (Article 17 of the LFS). Investment firms shall have an internal audit and a compliance function. Investment firms must moreover comply with Circular CSSF 12/552 on central administration, internal governance and risk management.

Any PFS not belonging to the category of investment firms shall produce evidence that it has a sound administrative and accounting organisation and adequate internal control procedures. The administrative and accounting organisation and internal control procedures shall be comprehensive and proportionate to the nature, scale and complexity of the activities of PFS other than investment firms (Article 17 of the LFS). The applicant shall hence have an adequate infrastructure which allows performing the activities considered. Besides the registered office, the applicant shall also have his decision-taking and administrative centres in Luxembourg. The applicant shall therefore put in place, at its registered office, an appropriate infrastructure, i.e. its own executing personnel, its own execution systems, the documentation relating to the transactions as well as the support functions in accounting, IT and internal control, allowing it to perform the activities considered. Moreover, PFS shall have an internal audit function.

### **16. May a PFS outsource its IT infrastructure to a third party?**

Under certain conditions, a PFS may rely on a PFS performing a connected or ancillary activity to a financial sector activity or may even outsource abroad to a supervised group entity provided the subcontractor is a supervised entity of the group. The outsourcing of technical services as well as the drafting of outsourcing contracts have to comply with Circulars [CSSF 05/178](#) et [CSSF 06/240](#).

### **17. May a PFS outsource its accounting to a third party?**

In the case of outsourcing of the accounting function, the Luxembourg professional's accounting organisation shall be such as to ensure that the basic accounting system as well as the accounting documents be available in Luxembourg and to

allow an autonomous drawing-up of a balance sheet and a profit and loss account in the event that the service provided by the service provider is discontinued. Moreover, the person in charge of the accounting in Luxembourg shall have adequate knowledge. In addition, the guarantee also needs to be given that no third party has access to confidential data and that the professional secrecy is respected.

### **18. What capital base do applicants for authorisation need to prove?**

The authorisation for any professional activity in the financial sector precluding the applicant for authorisation from managing funds for third parties shall be conditional on the production of evidence showing the existence of a capital base amounting to not less than EUR 50,000. The authorisation for any professional activity in the financial sector involving the management of third-party funds by the applicant shall be conditional on the production of evidence showing the existence of a subscribed and fully paid-up share capital amounting to not less than EUR 125,000 (Article 20 of the LFS). Article 20(5) of the LFS provides that if the capital base or authorised capital required for a PFS falls below the amount required by the law, the CSSF may, where the circumstances so justify, allow the PFS a limited period in which to rectify its situation or cease its activities.

Where several PFS statuses are held concurrently, the applicant shall have a capital base which is at least equal to the amount of subscribed and fully paid-up share capital of the highest capital base among those requested for the different statuses concerned. The funds shall be permanently available to the PFS and be invested in its own interest (Article 20(4) of the LFS). The minimum authorised capital must be subscribed and fully paid-up in cash. The CSSF does not accept any investment in kind, such as contribution of outstanding claims, neither at the incorporation of the company nor in case of a subsequent capital increase in the company's lifetime.

Certain PFS categories are submitted to more stringent capital base requirements pursuant to the LFS. These requirements should thus be verified for each case by taking into account the relevant legal provisions.

### **19. (24.10.2018) What costs are involved for the assessment by the CSSF of an authorisation request as a PFS?**

In accordance with Grand-ducal regulation of 21 December 2017 relating to the fees to be levied by the Commission de Surveillance du Secteur Financier, as amended, a single lump sum of EUR 15,000 shall be charged for the examination of each authorisation request by a new PFS. This fee amounts to EUR 8,000 for the examination of an authorisation extension request for an existing PFS which implies adding one or several additional statuses.

### **20. Can a natural person residing abroad be authorised as PFS?**

Natural persons residing abroad can be authorised as PFS in Luxembourg provided that they actually carry out their activities in Luxembourg and that their central administration be in Luxembourg.

### **21. Who shall review the accounting documents?**

The authorisation is subject to the condition that the PFS entrusts the audit of its accounting documents to one or several *réviseurs d'entreprises agréés* (approved statutory auditors) who prove that they possess adequate professional experience.

The *réviseur d'entreprises agréé* shall be appointed by the body responsible for managing the PFS, i.e. the board of directors for *sociétés anonymes* and the managers (*gérants*) or the management board for *sociétés à responsabilité limitée*.

Any change in the *réviseur d'entreprises agréé* must be authorised in advance by the CSSF (Article 22 of the LFS).

### **22. (1.6.2017) Does the PFS have to participate in an investors' compensation scheme?**

Only PFS belonging to the category of investment firms are subject to this additional authorisation requirement. Investment firms shall compulsorily participate in an investors' 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).

### **23. When can the authorisation be withdrawn?**

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 authorisations granted under other laws. This means that, for example, support PFS that perform activities other than those covered by their withdrawn PFS authorisation, may continue to perform those other activities (cf. Circular [CSSF 11/515](#)).

The authorisation shall be withdrawn if the conditions for the grant thereof cease to be fulfilled. The authorisation shall be withdrawn if it was obtained by false declarations or by any other improper means. The authorisation shall be withdrawn if the investment firm has seriously and systematically infringed certain legal rules among which in particular the legal provisions relating to conflicts of interest, the rules of conduct for the provision of investment services, the obligation to execute orders on terms most favourable for the client, the rules regarding the execution of client orders, the requirements relating to investment firms that appoint tied agents and the provisions on the law on markets in financial instruments.

A ministerial decision of withdrawal of the authorisation shall be motivated in fact and in law. The decision concerning the withdrawal of an authorisation may be referred to the *Tribunal administratif* (administrative court) which deals with the substance of the case. The case shall be filed within one month, or else shall be time-barred. (Article 23 of the LFS).

### **24. Which PFS can hold a "European passport" and which services fall under this regime?**

Only PFS belonging to the category of investment firms can hold a "European passport".

According to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments ("**MiFID**"), the "European passport" covers the freedom of establishment by way of establishing a branch and the free provision of services on the territory of another Member State of the European Union by companies whose usual activity consists in the provision of investment activities and services as a business activity to third parties.

As a matter of fact, EU law provides that the carrying-out of investment activities and services is subject to prior authorisation in the Member State in which the service provider is established (home Member State) and to the supervision by the competent authorities of this home Member State. Based on the principles of mutual recognition and of supervision by the home Member State, service providers need not request a separate authorisation by the Member State in which they intend to carry out their activities (host Member State) by the establishment of a branch or by free provision of services. A simplified procedure referred to as “notification” is provided for in this case (cf. Q&A no. 25).

The investment services and activities laid down by MiFID and covered by a “European passport” are the following (Section A, Annexe II of the LFS):

1. Reception and transmission of orders in relation to one or more financial instruments.
2. Execution of orders on behalf of clients.
3. Dealing on own account.
4. Portfolio management.
5. Investment advice.
6. Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis.
7. Placing of financial instruments without a firm commitment basis.
8. Operation of Multilateral Trading Facilities (MTF).

They also include, if appropriate, the following ancillary<sup>6</sup> services (Section C, Annexe II of the LFS):

1. Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management.
2. Granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction.
3. Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings.
4. Foreign exchange services where these are connected to the provision of investment services.
5. Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments.
6. Services related to underwriting.
7. Investment services and activities as well as ancillary services of the type included under Section A or C of Annexe II to the LFS related to the underlying of the derivatives included under points 5, 6, 7 and 10 of Section B (of Annexe II of the LFS), where these are connected to the provision of investment or ancillary services.

### **25. (1.6.2017) How and in which context can the “European passport” be used?**

Any authorised investment firm which is supervised by the competent authorities of a Member State can carry out its activities in the entire European Union either by the establishment of a branch or through the freedom to provide services, provided that the activities are covered by its authorisation. Exercising these activities is not subject to authorisation by the competent authorities in the host Member State. “European passport” means, for investment firms, the possibility to provide specified services or to establish branches in any other Member State of the European Union based on the authorisation issued and the supervision exercised by the

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<sup>6</sup> Ancillary services may only be provided together with an investment service and/or investment activity (cf. Q&A no. 27).

competent authorities in their home country, by way of notification of their intention to the authority in their home Member State.

The passport covers the investment services listed in Section A of Annexe II of the LFS as well as, where appropriate, one or more of the ancillary services listed in Section C of Annexe II of the LFS provided that these activities are covered by the relevant investment firm's authorisation (cf. Q&A no. 24).

The "European passport" can be used either as the freedom to provide services or as the right of free establishment:

*i) freedom to provide services*

Article 57 of the Treaty on the Functioning of the European Union (previously Article 50 of the Treaty establishing the European Community) underlines that service providers may, in order to do so, temporarily pursue their activity in the country where the service is provided. The European Court of Justice has on more than one occasion specified that the temporary nature of the provision of services shall be assessed on the basis of its duration, frequency, periodicity and continuity.

*ii) right of establishment*

If a company holds a permanent presence in the Member State in which it provides a service, which is an indication that it carries out its activity on an ongoing, frequent, regular or continuous basis, the relevant company in principle falls under the provisions of the Treaty governing the right of establishment. In this case the company shall establish a branch in the host Member State.

Circular [CSSF 07/326](#) (as amended by Circulars [CSSF 10/442](#) and [CSSF 13/568](#)) provides explanations on the principles of the freedom of establishment by way of establishing a branch and the freedom to provide services for investment firms incorporated under Luxembourg law in another Member State.

### **26. What aspects of supervision fall within the remit of the authority of the host Member State?**

For branches of investment firms incorporated under Luxembourg law, certain areas of prudential supervision fall within the remit of the supervisory authority of the host Member State, considered as the authority that is the closest to the branch and the best placed to detect issues and intervene in order to ensure compliance with the rules imposed on branches (cf. Circular [CSSF 07/326](#)).

The supervisory authority of the host Member State thus controls, *inter alia*, compliance by the branch with the following:

1. the conduct of business obligations when providing investment services to clients;
2. the obligation to execute orders on terms most favourable to the client;
3. the client order handling rules.

Moreover, the legal provisions of the host Member State as regards the fight against money laundering and terrorist financing apply to branches that are established in the Member State inasmuch as they are at least equivalent to the Luxembourg standards in this field.

### **27. Are ancillary services carried out by investment firms also covered by the "European passport"?**

The authorisation of an investment firm incorporated under Luxembourg law can also cover, in addition to one or more investment services and activities, one or more ancillary services specifically listed in MiFID and included in Section C of Annex II of the LFS. Ancillary services only benefit from a “European passport” if they are provided together with an investment service and/or investment activity.

### **28. How shall the exercise of the free provision of services by an investment firm be notified and what legal conditions need to be fulfilled?**

The notification procedure for the free provision of services by a Luxembourg investment firm in another Member State is governed by Article 34 of the LFS. Further details can be found in Circular CSSF 07/326 (point III).

The notification to the CSSF shall be drawn up using the form provided in Annexe 4 to Circular CSSF 10/442.

### **29. How shall the exercise of the free establishment of a branch by an investment firm be notified and what legal conditions need to be fulfilled?**

The notification procedure for the establishment of a branch by a Luxembourg investment firm in another Member State is governed by the legal conditions laid down in Article 33 of the LFS. Further details can be found in Circular CSSF 07/326 (point II).

The notification to the CSSF shall be drawn up using the form provided in Annexe 2 to Circular CSSF 10/442.

### **30. Do professionals which are not established in Luxembourg but which occasionally and temporarily come to Luxembourg in order to provide services governed by the LFS need an authorisation?**

Under the terms of Article 32(5) of the LFS, credit institutions and other persons from a third country carrying on activities of the financial sector and which are not established in Luxembourg but which occasionally and temporarily come to Luxembourg in order, among others, to collect deposits and other repayable funds from the public and to provide any other service under the LFS, must hold an authorisation from the Minister responsible for the CSSF. The granting of the authorisation in Luxembourg is subject to the condition that credit institutions and the other persons exercising activities of the financial sector originating from a third country are subject, in the home State, to authorisation and supervisory rules equivalent to those of the LFS.

Circular CSSF 11/515 specifies the persons referred to in Article 32(5) and the procedure and conditions for obtaining the authorisation.

### **31. Does the establishment in Luxembourg of a Business Continuity Centre require authorisation?**

Establishing in Luxembourg a Business Continuity Centre for a foreign professional of the financial sector does not require an authorisation under the LFS.

No PFS authorisation is required either when the site is activated, as the professional will continue to operate under the authorisation of its seat. However, the professional must inform

the CSSF and the competent authority of the home State without delay of the activation of the site and the operating modus of the site.

### **32. Who should I 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](mailto:PSF.questions@cssf.lu)

or you can reach us by telephone on:

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Luxembourg, 24 October 2018

