

## **OTC DERIVATIVES, CENTRAL COUNTERPARTIES AND TRADE REPOSITORIES**

**Law of 15 March 2016 on OTC derivatives, central counterparties and trade repositories and transposing:**

**Directive 2013/14/EU of the European Parliament and of the Council of 21 May 2013 amending Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) and Directive 2011/61/EU on Alternative Investment Funds Managers in respect of over-reliance on credit ratings; and**

**implementing:**

- 1. Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009;**
- 2. Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories; and**
- 3. Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies; and**

**amending:**

- 1. the Law of 23 December 1998 establishing a financial sector supervisory commission ("Commission de surveillance du secteur financier"), as amended;**
- 2. 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), as amended;**
- 3. the Law of 10 November 2009 on payment services, as amended;**
- 4. the Law of 17 December 2010 relating to undertakings for collective investment, as amended;**
- 5. the Law of 28 October 2011 implementing Regulation (EC) No 1060/2009 of 16 September 2009; and**
- 6. the Law of 12 July 2013 on alternative investment fund managers, as amended.**

(Mém. A 2016, No. 39)

**as amended by:**

- the Law of 30 May 2018 on markets in financial instruments and:
  1. transposing Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU;
  2. transposing Article 6 of Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits;
  3. implementing Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012;
  4. amending:
    - (a) the Law of 5 April 1993 on the financial sector, as amended;
    - (b) the Law of 23 December 1998 establishing a financial sector supervisory commission ("Commission de surveillance du secteur financier"), as amended;
    - (c) the Law of 5 August 2005 on financial collateral arrangements, as amended;
    - (d) the Law of 7 December 2015 on the insurance sector, as amended; and

- (e) the Law of 15 March 2016 on OTC derivatives, central counterparties and trade repositories and amending different laws relating to financial services; and
- 5. repealing the Law of 13 July 2007 on markets in financial instruments, as amended, with the exception of its Article 37

(Mém. A 2018, No 446)

## **Chapter 1 – OTC derivatives, central counterparties and trade repositories**

**Article 1.** (1) The CSSF is the competent authority responsible for carrying out, pursuant to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, the duties with respect to authorisation and supervision of central counterparties established in Luxembourg, without prejudice to the duties of the Banque centrale du Luxembourg under the Treaty on the Functioning of the European Union and the Statute of the European System of Central Banks and of the European Central Bank. The CSSF shall ensure the compliance by the central counterparties with the provisions of Titles IV and V of Regulation (EU) No 648/2012 and is the competent authority for the purposes of applying Article 54 of that regulation. The CSSF is also competent to withdraw the authorisation of a central counterparty pursuant to Article 20 of Regulation (EU) No 648/2012.

(2) The CSSF is the competent authority to ensure that the financial counterparties subject to its supervision and the non-financial counterparties comply with the provisions of Title II of Regulation (EU) No 648/2012.

The Commissariat aux Assurances is the competent authority to ensure that the financial counterparties subject to its supervision comply with the provisions of Title II of Regulation (EU) No 648/2012.

Moreover, the CSSF and the Commissariat aux Assurances are the competent authorities for the purposes of applying Article 88(2) of Regulation (EU) No 648/2012 in accordance with their respective competences.

(3) Without prejudice to paragraph 4, the CSSF is the competent authority referred to in Title VI of Regulation (EU) No 648/2012 in Luxembourg.

(4) In Luxembourg, the Commissariat aux Assurances is the competent authority referred to in Title VI of Regulation (EU) No 648/2012, where a trade repository is an entity authorised by or registered at the Commissariat aux Assurances.

(5) For the purposes of applying Regulation (EU) No 648/2012, the CSSF may exchange information and cooperate with the competent authorities of other Member States, the European Commission, the European Securities and Markets Authority, the European Banking Authority, the European Central Bank, the Banque centrale du Luxembourg and the other members concerned of the European System of Central Banks, within the limits, under the conditions and according to the terms defined by that regulation.

**Article 2.** (1) For the purposes of applying Regulation (EU) No 648/2012, the CSSF has all the powers of supervision, intervention, inspection and investigation which are necessary to exercise its functions within the limits set in the above-mentioned regulation.

The powers of the CSSF include the right to:

1. have access to any document in any form whatsoever, and to receive a copy of it;
2. request information from financial counterparties subject to its supervision, non-financial counterparties, central counterparties and trading venues including persons who are successively involved in the transmission of orders or execution of the operations concerned, as well as their principals, and if necessary, to summon and hear any person;
3. carry out on-site inspections and investigations at financial counterparties subject to its supervision, central counterparties and trading venues;
4. require financial counterparties subject to its supervision, non-financial counterparties, central counterparties and trading venues to communicate the existing telephone and existing data traffic records;
5. order financial counterparties subject to its supervision, non-financial counterparties, central counterparties and trading venues to cease any practice that is contrary to Regulation (EU) No 648/2012.

(2) For the purposes of applying Regulation (EU) No 648/2012, the Commissariat aux Assurances has all the powers of supervision, intervention, inspection and investigation which are necessary to exercise its functions within the limits set in the above-mentioned regulation.

The powers of the Commissariat aux Assurances include the right to:

1. have access to any document in any form whatsoever, and to receive a copy of it;
2. request information from financial counterparties subject to its supervision, including persons who are successively involved in the transmission of orders or execution of the operations concerned, as well as their principals, and if necessary, to summon and hear any person;
3. carry out on-site inspections or investigations at financial counterparties subject to its supervision;
4. require financial counterparties subject to its supervision to communicate the existing telephone and data traffic records;
5. order financial counterparties subject to its supervision to cease any practice that is contrary to Regulation (EU) No 648/2012.

**Article 3.** (1) The CSSF may sanction:

1. financial counterparties subject to its supervision and non-financial counterparties for non-compliance with the provisions laid down in Articles 4, 5, 9, 10 or 11 of Regulation (EU) No 648/2012 or with the measures taken in execution of these articles;
2. central counterparties for non-compliance with the provisions laid down in Articles 7, 9, 15, 16, 26 to 31 or 33 to 53 of Regulation (EU) No 648/2012 or with the measures taken in execution of these articles;
3. trading venues for non-compliance with the provisions laid down in Article 8 of Regulation (EU) No 648/2012 or with the measures taken in execution of this article;
4. financial counterparties subject to its supervision, non-financial counterparties, central counterparties and trading venues in cases where, in the framework of or pursuant to the provisions of Regulation (EU) No 648/2012 or measures taken in execution of this regulation:
  - a) they publish information that is incomplete, incorrect or false;
  - b) they refuse to provide documents or other requested information required by the CSSF for the purposes of applying Regulation (EU) No 648/2012;
  - c) they provided documentation or other information that is incomplete, incorrect or false;
  - d) they preclude the performance of the powers of supervision, intervention and, where applicable, inspection and investigation of the CSSF;
  - e) they fail to act in response to the orders of CSSF issued in accordance with point (5) of Article 2(1).

(2) The Commissariat aux Assurances may sanction financial counterparties subject to its supervision where:

1. they do not comply with the provisions laid down in Articles 4, 5, 9, 10 or 11 of Regulation (EU) No 648/2012 or with the measures taken in execution of these articles;
2. in the framework of or pursuant to the provisions of Regulation (EU) No 648/2012 or its implementing measures, they publish information that is incomplete, incorrect or false;
3. in the framework of or pursuant to the provisions of Regulation (EU) No 648/2012 or measures taken in execution of this regulation, they refuse to provide documents or other requested information required by the Commissariat aux Assurances for the purposes of applying Regulation (EU) No 648/2012;
4. in the framework of or pursuant to the provisions of Regulation (EU) No 648/2012 or measures taken in execution of this regulation, they provided documents or other information that is incomplete, incorrect or false;
5. in the framework of or pursuant to the provisions of Regulation (EU) No 648/2012 or measures taken in execution of this regulation, they preclude the performance of the powers of supervision, intervention, inspection and investigation of the Commissariat aux Assurances;
6. in the framework of or pursuant to the provisions of Regulation (EU) No 648/2012 or measures taken in execution of this regulation, they fail to act in response to the orders of the Commissariat aux Assurances issued in accordance with point (5) of Article 2(2).

(3) The CSSF and the Commissariat aux Assurances may issue, in order of gravity:

1. a warning;
2. a reprimand;
3. an administrative fine amounting to not less than EUR 125 and not more than EUR 1,500,000, or if the infringement procured direct or indirect pecuniary benefit to the persons referred to in this article, a fine of an amount that cannot be less than the profit made or exceed five times that amount;
4. a prohibition, either limited in time or permanent, to carry out one or several activities or transactions on a category of financial instruments or to provide certain services.

When imposing a sanction, the CSSF and the Commissariat aux Assurances take into account the nature, the duration and the gravity of the infringement, the conduct and the background of the natural or legal person to be sanctioned, the damage to third parties and the advantages or profits which could have been or which were made through the infringement.

(4) The CSSF and the Commissariat aux Assurances publish on their website, without undue delay, the sanctions imposed pursuant to this article for infringements to Articles 4, 5 and 7 to 11 of Regulation (EU) No 648/2012, in accordance with Article 12(2) of that regulation.

Any information published pursuant to the first subparagraph shall remain on the website of the CSSF and of the Commissariat aux Assurances for five years.

**Article 4.** An action for reversal against the decisions adopted by the CSSF or by the Commissariat aux Assurances in implementation of this law may be brought before the *Tribunal administratif* (Administrative Tribunal).

## **Chapter 2 – Amending provisions**

**Article 5.** Article 2-1 of the Law of 23 December 1998 establishing a financial sector supervisory commission ("Commission de surveillance du secteur financier"), as amended, shall be amended as follows:

1. Paragraph 1a is added and reads as follows:

"(1a) For credit institutions, investment firms, management companies, investment companies, alternative investment fund managers and central counterparties as defined in the above-mentioned regulation, established in Luxembourg and subject to the supervision of the CSSF, the latter, taking into account the nature, scale and complexity of these entities' activities, shall monitor the adequacy of their credit risk assessment processes, assess the use of contractual references to credit ratings and, where appropriate, encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on credit ratings, in line with the specific regulation applicable to them."; » ;

2. In paragraph 2, the words "Article 4(1)" are replaced by "Article 4(1) or Article 5a, 8b, 8c or 8d".

**Article 6.** 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), as amended, shall be amended as follows:

1. Article 77(2) is replaced by the following:

"(2) The amount of the additional assets above technical provisions held shall be at least equal to the amount which results from application of the rules laid down in accordance with Article 303 of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)."; » ;

2. A new subparagraph is inserted at the end of Article 78 which reads as follows:

"Taking into account the nature, scale and complexity of the activities of pension funds, the CSSF shall monitor the adequacy of the pension funds' credit assessment processes, assess the use of references to credit ratings issued by credit rating agencies as defined in Article 3(1)(b) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, in their investment policies and, where appropriate, encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on such credit ratings." ».

**Article 7.** The Law of 10 November 2009 on payment services, as amended, shall be amended as follows:

1. In the last sentence of Article 14(1)(a), the word "Luxembourg" is deleted;
2. In the last sentence of Article 24-10(1)(a), the word "Luxembourg" is deleted;
3. In Article 58(2), the words ", the provisions laid down in Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009" are added after the words "Regulation (EC) No 2560/2001" and the abbreviation "No." is replaced by the abbreviation "n°" three times;
4. Article 111 is replaced by the following:

"Article 111. – Settlement finality in systems referred to in Article 108

(1) Even in the event of insolvency proceedings against a participant, transfer orders and netting in systems referred to in Article 108 shall be legally enforceable between parties and binding on third parties, provided that transfer orders were entered into the system before the moment of opening of such insolvency proceedings. This shall apply even in the event of insolvency proceedings against a participant in the system concerned or in an interoperable system or against the system operator of an interoperable system which is not a participant in the system concerned.

Transfer orders entered into a system after the moment of opening of insolvency proceedings and carried out within the business day, as defined by the rules of the system, during which the opening of such proceedings occur, shall be legally enforceable and binding on third parties only if the system operator can prove that, at the time that such transfer orders become irrevocable, it was neither aware, nor should have been aware, of the opening of such proceedings.

Furthermore, from the moment of entry into a system, a netting can no longer be challenged for whatever reason, notwithstanding any legal, regulatory, contractual or usual provision which provides for the setting aside of contracts and transactions concluded before the moment of opening of insolvency proceedings.

The moment of entry of a transfer order into a system referred to in Article 108 is defined by the rules of said system.

In the case of interoperable systems, the system operator authorised in Luxembourg shall consult the system operators of the other systems concerned in order to agree, to the extent possible, on common rules on the moment of entry of a transfer order into the interoperable systems.

Unless expressly provided for by the rules of all the systems that are party to the interoperable systems, the rules of a system authorised in Luxembourg which define the moment of entry of a transfer order into said system shall not be affected by any rule of the other systems with which it is interoperable.

(2) A transfer order can no more be revoked by a participant in a system referred to in Article 108 or by a third party from the moment defined by the rules of that system.

In the case of interoperable systems, the system operator authorised in Luxembourg shall consult the system operators of the other systems concerned in order to agree, to the extent possible, on common rules on the moment of irrevocability of a transfer order in the interoperable systems.

Unless expressly provided for by the rules of all the systems that are party to the interoperable systems, the rules of a system authorised in Luxembourg which define the moment of irrevocability of a transfer order in that system shall not be affected by any rule of the other systems with which it is interoperable.

(3) The opening of insolvency proceedings against a participant or a system operator of an interoperable system shall not prevent funds or securities available on the own settlement account of that participant from being used to fulfil that participant's obligations in the system or in an interoperable system on the business day of the opening of the insolvency proceedings.

Any credit facility of said participant connected to the system can be used against available, existing collateral security to fulfil that participant's obligations in the system or in an interoperable system.

(4) Insolvency proceedings shall not have retroactive effects on the rights and obligations of a participant arising, or in connection with, its participation in a system before the moment of opening of an insolvency procedure. This shall apply, inter alia, as regards the rights and obligations of a participant in an interoperable system or of a system operator of an interoperable system which is not a participant.

(5) No settlement account held with a system operator or settlement agent, as well as no transfer, via a credit institution incorporated under Luxembourg law or foreign law to such settlement account, may be seized, sequestered or blocked in any way by a participant (other than the system operator or settlement agent), a counterparty or a third party." ; » ;

5. The following subparagraph is inserted at the end of Article 112(2):

"Where a system operator has provided collateral security to another system operator in connection with an interoperable system, the rights of the providing system operator to that collateral security shall not be affected by insolvency proceedings against the receiving system operator." ».

**Article 8.** The Law of 17 December 2010 relating to undertakings for collective investment, as amended, shall be amended as follows:

1. Article 42 is amended as follows:

a) Paragraph 1 shall be replaced by the following:

"(1) A management company having its registered office in Luxembourg shall employ a risk-management process which enables it to monitor and measure at any time the risk of the positions and their contribution to the overall risk profile of the portfolio of a UCITS. In particular, it shall not solely or mechanistically rely on credit ratings issued by credit rating agencies as defined in Article 3(1)(b) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, for assessing the creditworthiness of the UCITS' assets.

It must employ a process for accurate and independent assessment of the value of OTC derivatives. It shall communicate to the CSSF regularly, in accordance with the detailed rules the latter shall define, the types of derivative instruments, the underlying risks, the quantitative limits and the methods which are chosen in order to estimate the risks associated with transactions in derivative instruments regarding each managed UCITS.

An investment company having its registered office in Luxembourg is subject to the same obligation." » ;

b) Paragraph 3a is added and reads as follows:

"(3a) Taking into account the nature, scale and complexity of the UCITS' activities, the CSSF shall monitor the adequacy of the credit assessment processes of the management or investment companies having their registered office in Luxembourg, assess the use of references to credit ratings, as referred to in the second sentence of paragraph 1, in the UCITS' investment policies and, where appropriate, encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on such credit ratings." » ;

2. In Part IV, Chapter 15, the following is inserted after Title D:

a) Title E, called:

"Title E. – Management companies in a financial conglomerate";

b) Under this Title E, one single Article 124-1 is inserted and reads as follows:

"Article 124-1. Without prejudice to the supervisory provisions laid down in this law, where a management company authorised pursuant to this chapter is part of a financial conglomerate within the meaning of Article 2(14) of Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council, this management company shall also be subject to supplementary supervision carried out by the CSSF in accordance with Part III, Chapter 3b, of the Law of 5 April 1993 on the financial sector, as amended." ».

**Article 9.** Article 1 of the Law of 28 October 2011 implementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies shall be amended as follows:

1. The first subparagraph is repealed;
2. A new subparagraph is added at the end of the article and reads as follows:

"For the persons referred to in the first subparagraph of Article 4(1) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, subject to the supervision of the Commissariat aux Assurances, the latter, taking into account the nature, scale and complexity of these entities' activities, shall monitor the adequacy of their credit risk assessment processes, assess the use of contractual references to credit ratings and, where appropriate, encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on credit ratings, in line with the specific regulation applicable to them." ; ».

**Article 10.** The Law of 12 July 2013 on alternative investment fund managers, as amended, shall be amended as follows:

1. A fifth subparagraph is added in Article 2(1) which reads as follows:

"Without prejudice to the supervisory provisions laid down in this law, where they are part of a financial conglomerate within the meaning of Article 2(14) of Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council, the AIFMs referred to in this paragraph shall also be subject to supplementary supervision carried out by the CSSF in accordance with Part III, Chapter 3b, of the Law of 5 April 1993 on the financial sector, as amended." ; » ;

2. Article 14 is amended as follows:

a) Paragraph 2 is replaced by the following:

"(2) AIFMs shall implement adequate risk management systems in order to identify, measure, manage and monitor appropriately all risks relevant to each AIF investment strategy and to which each AIF is or may be exposed. In particular, AIFMs shall not solely or mechanistically rely on credit ratings issued by credit rating agencies as defined in Article 3(1)(b) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, for assessing the creditworthiness of the AIFs' assets.

AIFMs shall review the risk management systems with appropriate frequency at least once a year and adapt them whenever necessary." ; » ;

b) Paragraph 3a is added and reads as follows:

"(3a) Taking into account the nature, scale and complexity of the AIFs' activities, the CSSF shall monitor the adequacy of the credit assessment processes of the AIFMs, assess the use of references to credit ratings, as referred to in the first subparagraph of paragraph 2, in the AIFs' investment policies and, where appropriate, encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on such credit ratings." . ».



(Law of 30 May 2018)

**“Chapter 3 – Transitional and final provisions”**

(Law of 30 May 2018)

**“Article 10-1.** The CSSF may grant the following exemptions:

1. until 3 January 2021, the clearing obligation set out in Article 4 of Regulation (EU) No 648/2012 and the risk mitigation techniques set out in Article 11(3) thereof shall not apply to C6 energy derivative contracts as defined in Article 1, point 8, of the Law of 30 May 2018 on markets in financial instruments (hereinafter “C6 energy derivative contracts”) entered into by non-financial counterparties that meet the conditions in Article 10(1) of Regulation (EU) No 648/2012 or by non-financial counterparties that shall be authorised for the first time as investment firms as from 3 January 2018; and
2. until 3 January 2021, such C6 energy derivative contracts shall not be considered to be OTC derivative contracts for the purposes of the clearing threshold set out in Article 10 of Regulation (EU) No 648/2012.

C6 energy derivative contracts benefiting from the transitional regime set out in the first subparagraph shall be subject to all other requirements laid down in Regulation (EU) No 648/2012.

The CSSF shall notify ESMA of the C6 energy derivative contracts which have been granted an exemption in accordance with the first subparagraph.”

**Article 11.** Reference to this law shall be made in abbreviated form by using the following designation: "Law of 15 March 2016 on OTC derivatives, central counterparties and trade repositories and amending different laws relating to financial services".