

**COMMISSION de SURVEILLANCE
du SECTEUR FINANCIER**

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

Luxembourg, 19 November 2007

To all credit institutions and
investment firms incorporated in
Luxembourg

CIRCULAR CSSF 07/326
as amended by Circulars CSSF 10/442
and CSSF 13/568

Re: Provisions relating to Luxembourg incorporated credit institutions and investment firms established in another Member State by way of branches or exercising their activities in another Member State by free provision of services

Ladies and Gentlemen,

This circular is issued pursuant to the transposition into Luxembourg law of Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments (“MiFID Directive”) through the law of 13 July 2007 on markets in financial instruments (“MiFID Law”) amending the law of 5 April 1993 on the financial sector (“LFS”) and updates the circulars that existed in this field (IML 93/99, IML 98/148). The purpose of this circular is to provide further details on the principles of freedom of establishment by way of branches and the freedom to provide services in another Member State for Luxembourg incorporated credit institutions and investment firms.

The MiFID Directive incorporates the principles that had already been set down in Directive 93/22/EEC on investment services in the securities field, such as the single authorisation recognised in all the Member States of the European Union. Nevertheless, it raises the level of harmonisation in order to ensure increased investor protection and to allow credit institutions and investment firms to provide their banking and investment activities/services in all Member States based on the principle of supervision by the home supervisory authority. For branches of credit institutions and investment firms, certain

fields of prudential supervision, however, 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 better placed to detect and intervene in order to ensure compliance with the rules imposed on branches.

The purpose of this circular is to provide additional information on the role of the CSSF as home authority and to point out to credit institutions and investment firms incorporated in Luxembourg the provisions under the new regime that must be complied with when establishing a branch or providing services in another Member State. Most of the requirements concern both credit institutions and investment firms. Nevertheless, the legislator purposely differentiated between both statuses in certain cases.

Table of contents

I. Scope	4
II. Branches of credit institutions and investment firms incorporated in Luxembourg established in another Member State (“the branch” or “the branches”)	4
II.1. Notifications relating to the establishment of a branch	4
II.1.1 Notification file to be drawn up by a credit institution or investment firm incorporated in Luxembourg wishing to establish a branch in another Member State	4
II.1.2 Changes to the notification	6
II.1.3 Procedure following the introduction of a notification file by a credit institution or an investment firm wishing to set up a branch in another Member State	6
II.1.4 Opening of additional places of business	7
II.2 Designation of a person responsible at the head office of the credit institution and the investment firm	7
II.3 Delegation of powers to the persons responsible within the branch	7
II.4. Risk management function, compliance function and internal audit function of the branch	8
II.5. Supervision of the branch	8
II.5.1 General provisions	8
II.5.2 Scope of the supervision by the competent authority of the host Member State	9
II.5.3 Instruments of supervision	10
1. Periodic reports to be drawn up	10
2. External audit	11
3. On-site inspections by the CSSF and by the competent authority of the host Member State	11
II.5.4 Measures in case of non-compliance by the branch with the legal and regulatory provisions of the host Member State and in cases of urgency	11
III. Free provision of services in another Member State by Luxembourg incorporated credit institutions and investment firms	12
III.1. Notifications relating to the freedom to provide services	12
III.2 Supervision of credit institutions or investment firms incorporated in Luxembourg operating by way of free provision of services in another Member State	13
III.3 Non-compliance of credit institutions or investment firms incorporated in Luxembourg with the laws and regulations of the host Member State	13
IV. Transitional provisions	13
V. Repealing provisions and entry into force	13

I. Scope

1. The circular concerns credit institutions incorporated in Luxembourg that perform activities covered by their authorisation as defined in Annex I to the LFS in another Member State¹ by means of a branch or the freedom to provide services. Pursuant to Annex I of Directive 2006/48/EC on the taking up and pursuit of the business of credit institutions (“CRD Directive”), the services and activities provided for in sections A and B of Annex I to the MiFID Directive, when referring to the financial instruments provided for in section C of Annex I to that Directive, are subject to mutual recognition in accordance with the CRD Directive.
2. The circular also concerns investment firms incorporated in Luxembourg that provide in another Member State, by way of a branch or under the freedom to provide services, investment services/activities covered by their authorisation as defined by Annex II to the LFS.
3. Where a credit institution or investment firm incorporated in Luxembourg appoints a tied agent (as defined in article 1(1) of the LFS) established in another Member State, this tied agent shall be subject to the national provisions applicable to branches of EU credit institutions and investment firms. For a credit institution or investment firm incorporated in Luxembourg appointing a tied agent in another Member State while already having a branch there, the tied agent shall be considered as an additional business place of this branch, as described in point II.1.4. below.

II. Branches of credit institutions and investment firms incorporated in Luxembourg established in another Member State (“the branch” or “the branches”)

II.1. Notifications relating to the establishment of a branch

II.1.1 Notification file to be drawn up by a credit institution or investment firm incorporated in Luxembourg wishing to establish a branch in another Member State

4. Article 33 of the LFS provides that credit institutions or investment firms incorporated in Luxembourg are permitted to establish themselves by way of a branch in another Member State after having notified their intention to the CSSF. This notification shall contain the following information:
 - (a) the Member State within the territory of which it plans to establish a branch;
 - (b) a programme of operations (cf. point 8 and Annex 1 for credit institutions; point 9 and Annex 2 for investment firms);

¹ In accordance with article 1(14) of the LFS, “Member State” shall mean a Member State of the European Union. The States that are contracting parties to the European Economic Area Agreement other than the Member States of the European Union, within the limits set forth by this agreement and related acts are considered as equivalent to Member States of the European Union. “Another Member State” shall mean a Member State other than Luxembourg.

- (c) the address of the head place of business in the host Member State from which documents may be obtained;
 - (d) the name(s) of those to be responsible for the management of the branch.
5. The credit institution or investment firm shall appoint a person within the management who will be responsible for the branch and shall include the name of that person in the notification to the CSSF (cf. II.2 below).
 6. The credit institution or investment firm shall inform the CSSF of the limit systems and the powers delegated to the branch as described in section II.3 below.
 7. As regards credit institutions, the coming into force of the MiFID law does not amend the notification procedure for the establishment of a branch. Nevertheless, the MiFID law amends the list of investment services/activities that can be provided by a credit institution, as well as the financial instruments for those services/instruments².

(Circular CSSF 10/442)

- “8. As regards credit institutions, the programme of operations shall be set in accordance with Annex 1 of this circular which incorporates Annex 2 of “Guidelines for passport notifications” drawn up by CEBS.”
9. As regards investment firms, the programme of operations shall be set in accordance with Annex 2 of this circular which incorporates Annex 2³ set up by CESR in its document CESR/07-317 “Protocol on MiFID Passport Notifications”.
 10. Credit institutions and investment firms shall include the following information in their notification with respect to the manager(s) of the branch:
 - (a) the curriculum vitae;
 - (b) a sworn statement;
 - (c) an extract from the judicial record.

The manager(s) whose name must be communicated to the CSSF shall have appropriate experience and qualifications, as well as the necessary reputation to perform his (their) functions.

11. Where a credit institution or investment firm wishes to operate in another Member State by using a tied agent, it shall provide the CSSF with a programme of operations setting out the types of business performed by the tied agent and the supervisory and control measures to which it envisages to subject that tied agent.
12. In accordance with article 33(7) of the LFS, a credit institution or investment firm incorporated in Luxembourg referred to in article 24-9 of the LFS that wishes to

² Footnote removed by Circular CSSF 10/442.

³ Annex II to the LFS was amended by article 165 of the MiFID law, which introduces in Section A relating to investment services and activities three new points, i.e. points 5. Investment advice, 7. Placing of financial instruments without a firm commitment basis and 8. Operation of Multilateral Trading Facilities. Section B of Annex II to the LFS on financial instruments also changed as regards instruments referred to in points 4 to 10. Investment research and new services have been introduced under points 5 and 7 respectively in Annex C of the LFS relating to ancillary services.

operate an MTF in another Member State by means of a branch must meet the criteria laid down in article 20 of the MiFID law. To this end, it shall communicate to the CSSF the relevant information, including a programme of operations listing the types of business envisaged, the rules governing the functioning and the organisational structure, in order to enable the CSSF to assess compliance with article 20 of the MiFID law.

13. The notification file shall be drawn up in English or in another language that is accepted both by the CSSF and the competent authority of the host Member State.

II.1.2 Changes to the notification

14. The credit institutions shall notify any change to the information communicated pursuant to point 4(b), (c) and (d) to the competent authority of their host country, as well as to the CSSF in writing at least one month before making the change (article 33(6) of the LFS).
15. The investment firms shall notify any change concerning Annex 2 to this circular in writing at least one month before the change comes into force only to the CSSF which will communicate the change to the competent authority of the host Member State (article 33(6) of the LFS).

II.1.3 Procedure following the introduction of a notification file by a credit institution or an investment firm wishing to set up a branch in another Member State

16. Article 33(2) of the LFS provides that, unless the CSSF has reason to doubt the adequacy of the project, the CSSF shall communicate to the competent authority of the host Member State the notification file it has received from the notifying institution within three months of receipt of that file at the most. “It informs the notifying institution of the transmission and specifies the transmission date.”⁴
17. Pursuant to article 33(5) of the LFS, the branch may commence business on receipt of a communication from the competent authority of the host Member State, or failing such communication at the latest after two months from the date of transmission of the communication by the CSSF. The credit institution or investment firm shall inform the CSSF upon receipt of the communication covering the conditions governing the conduct of business of the branch in the host country and shall inform the CSSF of the date on which the branch intends to commence business.
18. Pursuant to article 33(4) of the LFS, where the CSSF refuses to communicate the information to the competent authority of the host Member State, it shall give reasons for its refusal to the institution concerned within three months of receiving all information. That institution may lodge an appeal against such refusal before the “tribunal administratif” (administrative court) which shall determine the matter as a court adjudicating on the substance.

⁴ Circular CSSF 10/442.

II.1.4 Opening of additional places of business

19. A credit institution or investment firm incorporated in Luxembourg having a branch in another Member State may freely open additional places of business within that Member State without having to use the notification procedure referred to in point II.1.1 and II.1.3 of this circular. In accordance with article 27 of the CRD Directive and article 4(1)(26) of the MiFID Directive, any number of places of business set up in the same Member State by a credit institution or investment firm with headquarters in another Member State shall be regarded as a single branch.
20. The credit institution or investment firm incorporated in Luxembourg shall designate one of the places of business as the head office of the institution in another Member State.
21. Where opening additional places of business constitutes a change of the programme of operations and/or implies a change to the address of the head place of business, the credit institution or investment firm incorporated in Luxembourg established by way of a branch in another Member State shall inform the competent authorities beforehand, in accordance with points 14 and 15 above, of the opening of additional places of business.
22. Credit institutions and investment firms shall transmit annually, by 31 January, to the CSSF a list stating the addresses of the places of business that the branch has in another Member State.

II.2 Designation of a person responsible at the head office of the credit institution and the investment firm

23. It is essential that the credit institution or investment firm ensures that the branch applies and complies with the guidelines set down by the managing bodies of the credit institution or investment firm as far as the business policy of the branch is concerned. To this end, the credit institution or investment firm incorporated in Luxembourg shall designate among its management a person whose function consists moreover in coordinating the information flow between the branches of the credit institution or investment firm and the CSSF. The name of that person shall be communicated to the CSSF together with the notification file, as well as any subsequent change thereto.

II.3 Delegation of powers to the persons responsible within the branch

24. It is essential that the credit institution or investment firm defines explicitly the powers delegated to the branch in order to ensure that the competent bodies of the head office are involved in every material transaction.

25. The credit institution or investment firms shall thus set down a consistent limit system for foreign-exchange and other financial instruments positions that the branch could enter into.
26. The credit institution shall draw up, among others, the detailed procedures and limits as regards lending.
27. Credit institutions or investment firms shall include information on the procedures in this regard as well as on the delegated powers in the notification file.

II.4. Risk management function, compliance function and internal audit function of the branch

28. The internal control, compliance and risk management rules of a credit institution or investment firm, as required by articles 5 and 17 of the LFS and specified in “Circular CSSF 12/552 on central administration, internal governance and risk management”⁵, as well as in point 3.3 of Circular CSSF 07/307 on conduct of business rules in the financial sector, shall be applied by the branches established in another Member State, without prejudice to the local rules in this area.
29. Where the credit institution or investment firm has a branch of a certain size, it shall set up an internal audit and compliance function specific to that branch. From a hierarchical and functional point of view, such functions shall report to the internal audit and compliance function respectively of the head office.
30. At least once a year, the internal audit function of the head office shall audit representatively every aspect of the activities performed on the premises of the branch. The summary report drawn up for the purpose of internal audit in accordance with “points 116 and 156 of Circular CSSF 12/552 on central administration, internal governance and risk management”⁶ and to be submitted annually to the CSSF, shall include a chapter relating to the controls performed on the premises of every branch.

II.5. Supervision of the branch

II.5.1 General provisions

31. In accordance with article 45(1) of the LFS, the supervision by the CSSF of a credit institution or an investment firm incorporated in Luxembourg acting as competent authority of the home Member State also applies to activities that the credit institution and investment firm exercises in another Member State by means of a branch.
32. The CSSF is competent as the authority of the home Member State for the supervision of services/activities provided by the branch, without prejudice to the provisions relating to the competences that the MiFID Directive confers on the competent authority of the host Member State.

⁵ Circular CSSF 13/568.

⁶ Circular CSSF 13/568.

33. The competent authorities of the host country and the CSSF shall actively cooperate in the context of their respective supervisory missions; the arrangements for this cooperation may be fixed in bilateral Memoranda of Understanding between the authorities concerned.

II.5.2 Scope of the supervision by the competent authority of the host Member State

34. In accordance with article 32(7) of the MiFID Directive, the supervision of investment services/activities that the branch provides on the territory of its host Member State is the responsibility of the competent authority of the host Member State which shall ensure that the branch complies with the obligations laid down in articles 19 (conduct of business obligations when providing investment services to clients), 21 (obligation to execute orders on terms most favourable to the client) and 22 (client order handling rules) of the MiFID Directive, as well as the measures laid down in accordance with those provisions in the host Member State.
35. The supervisory authority of the host Member State is also competent for ensuring that the investment services/activities provided on its territory by the branch comply with the obligations laid down in articles 25 (obligation to uphold integrity of markets, report transactions and maintain records), 27 (obligation for investors to make public firm quotes) and 28 (post-trade disclosure by investment firms) of the MiFID Directive, as well as with the measures taken pursuant to those provisions in the host Member State.
36. The power of the competent authority of the host Member State to collect information for statistical purposes remains intact.
37. 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.
38. Pursuant to article 32(7) of the MiFID Directive, the supervision by the competent authority of the host Member State as described above is a limited exception to the principle of supervision by the CSSF as competent authority of the home country which remains responsible for the supervision of the services/activities of the branches in another Member State of a credit institution or investment firm incorporated in Luxembourg as regards the services/activities performed in Luxembourg and the services/activities provided in another Member State as that in which the branch is established. Indeed, all services/activities provided by a branch outside the territory of the host Member State are considered as services/activities performed by the credit institution or investment firm, and not by the branch.
39. As regards exclusively branches of credit institutions, article 41 of the CRD Directive entrusts the competent authority of the host Member State, in cooperation with the CSSF, with the supervision of the liquidity of these branches.

II.5.3 Instruments of supervision

1. Periodic reports to be drawn up

(a) Requirement for branches to report transactions on financial instruments

40. In accordance with the provisions of article 32(7) of the MiFID Directive, the branches of Luxembourg incorporated credit institutions and investment firms established in another Member State are required to report to the competent authority of the host Member State all the transactions undertaken by them and constituting investment services provided on the territory of the host Member State.
41. The CSSF is the competent authority to receive the reports of transactions concluded by these branches in the course of the investment services provided outside the territory of the host Member State. In accordance with CESR guidelines published in the section *Reporting by branches* of the document *CESR Level 3 Guidelines on MiFID Transaction reporting*, the branches of Luxembourg incorporated credit institutions and investment firms established in another Member State can decide to report to the competent authority of their host Member State, according to the format and the arrangements in use, all the transactions they undertake whether the investment services have been provided within or outside the territory of the host Member State.
42. Where branches choose to report the transactions they conclude in the course of providing investment services outside the territory of the host Member State directly to the CSSF, they shall inform the latter of their choice. Circular CSSF 07/302 provides further clarifications on the obligation to report transactions on financial instruments.

(b) Specific provisions relating to branches of credit institutions incorporated in Luxembourg

43. The reporting to be made by a branch of a credit institution incorporated in Luxembourg corresponds to a large extent to the reporting requirements imposed on credit institutions in general. Details of the reporting to be drawn up by the branch are available in point I.1 of Annex 3 to circular CSSF 07/316.
44. The quality of the data provided by the branches shall be verified by the head office of the credit institution before transmission to the CSSF.
45. The CSSF recommends credit institution incorporated in Luxembourg to ask the Banque Centrale de Luxembourg what information they are required to report to the latter for statistical purposes.

(c) Specific provisions relating to branches of investment firms incorporated in Luxembourg

46. The reporting to be made by a branch of an investment firm incorporated in Luxembourg corresponds to a large extent to the reporting requirements imposed on investment firms in general. Investment firms incorporated in Luxembourg shall provide the CSSF with information relating to:
- (1) the monthly financial situation;
 - (2) the quarterly profit and loss account;
 - (3) the quarterly staff numbers;
 - (4) the quarterly off-balance-sheet.
47. The quality of the data provided on the branches shall be verified by the head office of the investment firm before being transmitted to the CSSF.

2. External audit

48. The audit of the credit institution's or investment firm's annual accounts encompasses the branches.
49. The long-form report to be established by the external auditor in accordance with circulars CSSF 01/27 and CSSF 03/113 shall include a chapter on every branch in which the auditor reviews the financial aspects of the branch's activities, risks and organisation.

3. On-site inspections by the CSSF and by the competent authority of the host Member State

50. The CSSF may perform on-site inspections on the premises of branches of Luxembourg incorporated credit institutions (article 45(8) of the LFS) and investment firms (article 45(10) of the LFS) established in another Member State after having informed the competent authority of that Member State beforehand. It may also request that authority to perform such on-site inspection.

II.5.4 Measures in case of non-compliance by the branch with the legal and regulatory provisions of the host Member State and in cases of urgency

51. Article 62 of the MiFID Directive, as well as articles 30 and 33 of the CRD Directive describe the precautionary measures available to the competent authority of the host Member State. Where such measures are being taken, the competent authority of the host Member State shall inform the CSSF thereof.

III. Free provision of services in another Member State by Luxembourg incorporated credit institutions and investment firms

III.1. Notifications relating to the freedom to provide services

52. As regards credit institutions, the notification procedure for free provision of services has not been amended through the coming into force of the MiFID law. Nevertheless, the MiFID law amends the list of investment services/activities that can be provided by a credit institution, as well as the financial instruments for those services/activities.

(Circular CSSF 10/442)

“53. Any credit institution incorporated in Luxembourg wishing to provide services or carry on business within the territory of another Member State for the first time under the regime of free provision of services, shall notify to the CSSF which banking activities listed in Annex I of LFS and, where applicable, which investment services and/or activities as well as ancillary services as defined in Sections A and C of Annex II of LFS it wishes to perform. To this end, the CSSF requires credit institutions to use the form in Annex 3 of this circular which incorporates Annex 1 of “Guidelines for passport notifications” drawn up by CEBS.”

54. Pursuant to article 34(2) of the LFS, an investment firm incorporated in Luxembourg that wishes to provide investment services/activities as defined in Section A of Annex II to the LFS within the territory of another Member State for the first time, shall communicate the information detailed in Annex 4 to this circular to the CSSF.

It also states whether it intends to use a tied agent within the territory of the host State. At the request of the competent authority of the host Member State, the CSSF shall communicate the identity of the tied agent that the investment firm intends to use in the host Member State to the competent authority of that Member State.

55. The credit institution or investment firm also provides a description of the main commercial strategy it intends to use (regular trips to the host Member State, distance selling, etc.).

56. The CSSF shall transmit the notification of the institution to the authority of the host country within one month. The credit institution or investment firm may commence the provision of its services/activities in the host Member State as soon as it has been informed of this transmission.

57. Any change in the initial particulars included in the notification must be notified in writing to the CSSF at least one month before the implementation of this change. The CSSF will transmit this information to the competent authority of the host Member State.

58. The CSSF recommends credit institutions and investment firms to inquire beforehand at the competent authority of the host Member State about the conditions to meet, notably those adopted in the interests of the general good.

III.2 Supervision of credit institutions or investment firms incorporated in Luxembourg operating by way of free provision of services in another Member State

59. In accordance with article 45(1) of the LFS, the supervision of a credit institution or an investment firm incorporated in Luxembourg by the CSSF as competent authority of the home Member State, also applies to activities that it exercises in another Member State by way of free provision of services.

III.3 Non-compliance of credit institutions or investment firms incorporated in Luxembourg with the laws and regulations of the host Member State

60. The provisions of article 62(1) of the MiFID Directive and the provisions of article 30 of the CRD Directive also apply to the credit institutions and investment firms operating in the host Member State by way of free provision of services.

IV. Transitional provisions

61. Pursuant to article 71 of the MiFID Directive, credit institutions and investment firms incorporated in Luxembourg already authorised to provide investment services/activities in another Member State through the establishment of branches or under the freedom to provide services may continue to perform their activities and provide their services in those countries without having to submit a new notification for the entry into force of the MiFID law on 1 November 2007.
62. However, where credit institutions or investment firms incorporated in Luxembourg intend to exercise for the first time, as from 1 November 2007, new investment activities/services not covered by their existing passport in another Member State, they shall submit a notification for those new services/activities to the CSSF in accordance with articles 33 and 34 of the LFS.

V. Repealing provisions and entry into force

63. This circular enters into force on 19 November 2007. Circulars IML 93/99 and IML 98/148 are repealed with effect from 19 November 2007.

Yours sincerely,

COMMISSION DE SURVEILLANCE DU SECTEUR FINANCIER

Simone DELCOURT
Director

Arthur PHILIPPE
Director

Jean-Nicolas SCHAUS
Director General

Annexes:

- Annex 1 (replaced by Annex 1 of Circular CSSF 10/442)
Notification for branch establishment by a credit institution
English version:
<https://www.cssf.lu/en/Document/branch-passport-notification-form-change-in-branch-passport-notification-form-3/>
- Annex 2 (replaced by Annex 2 of Circular CSSF 10/442)
Notification for branch establishment by an investment firm
French version:

English version:
- Annex 3 (replaced by Annex 3 of Circular CSSF 10/442)
Notification of free provision of services by a credit institution
English version:
<https://www.cssf.lu/en/Document/services-passport-notification-form-change-in-services-passport-notification-form/>
- Annex 4 (replaced by Annex 4 of Circular CSSF 10/442)
Notification of free provision of services by an investment firm
French version:

English version: