

# COMMISSION de SURVEILLANCE du SECTEUR FINANCIER

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

Luxembourg, 14 June 2011

To all the entities under the supervision  
of the CSSF;

To the credit institutions and persons  
exercising financial sector activities  
originating from third countries (outside  
the EU and EEA) and wishing to provide  
activities governed by the LFS in  
Luxembourg

## CIRCULAR CSSF 11/515

**Re: Entry into force of the law of 28 April 2011**

Ladies and Gentlemen,

We are pleased to draw your attention to the publication of the law of 28 April 2011, (the "Law")<sup>1</sup>. This law, published in *Mémorial* A-81 on 5 May 2011, came into force on 9 May 2011. It transposed several European directives and amended a set of laws relating

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<sup>1</sup> Law of 28 April 2011

- transposing Directive 2009/111/EC of the European Parliament and of the Council of 16 September 2009 amending Directives 2006/48/EC, 2006/49/EC and 2007/64/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management
- transposing for credit institutions Directive 2009/49/EC of the European Parliament and of the Council of 18 June 2009 amending Council Directives 78/660/EEC and 83/349/EEC as regards certain disclosure requirements for medium-sized companies and the obligation to draw up consolidated accounts;
- completing the transposition of Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes and the payout delay;
- amending the law of 5 April 1993 on the financial sector, as amended;
- amending the law of 17 June 1992 relating to the accounts of credit institutions, as amended;
- amending the law of 23 December 1998 establishing a financial sector supervisory commission ("Commission de surveillance du secteur financier")
- amending the law of 31 May 1999 governing the domiciliation of companies;
- amending the law of 13 July 2007 on markets in financial instruments;
- amending the law of 11 January 2008 on transparency requirements in relation to issuers of securities;
- amending the law of 10 November 2009 on payment services.

to the financial sector, and in particular, the law of 5 April 1993 on the financial sector (hereafter the "LFS"). This circular describes the main changes introduced by the Law.

## **I. Transposition of several European directives into the LFS**

The first part of the Law transposes Directive 2009/111/EC<sup>2</sup>, commonly known as "CRD II" (the "Directive"), which amended Directives 2006/48/EC and 2006/49/EC, commonly known as CRD I (Capital Requirements Directives). Moreover, the Law completes the transposition of Directive 2009/14/EC on deposit-guarantee schemes<sup>3</sup>.

The amendments introduced by the LFS through the transposition of the aforementioned European directives mainly concern the CSSF's obligations in its capacity as consolidating supervisory authority and in the field of crisis management. These are not key revisions insofar as the transposed provisions are already largely applied in the supervisory process in Luxembourg.

The lawmaker stressed the importance of a swift transmission of prudential information to the central banks and the competent departments of the Ministries of Finance in order to allow intervention through injection of liquidities into the market, respectively through government aids for the rescue of banks in distress<sup>4</sup>. That is why Article 44-2 of the LFS was supplemented, in order to allow the CSSF to exchange, henceforth, more relevant information with the central banks of the European System of Central Banks and other bodies with a similar function in their capacity as monetary authorities.

Along the same lines, the rewritten Articles 50-1 and 51-6b, respectively, of the LFS, specify the functions and missions performed by the CSSF, as well as its cooperation with the competent authorities of other Member States, when it is in charge of the supervision on a consolidated basis of a credit institution or an investment firm authorised in Luxembourg, which is either a parent credit institution or a parent investment firm in the European Union, or controlled by an EU parent financial holding company.

It should be noted that the new technical provisions of the directive (determination of the capital requirements for credit risk of securitised exposures, determination of limits for large exposures, definition of own funds) were transposed by Circulars CSSF 10/475 for banks and 10/483 for investment firms.

The completion of the transposition of Directive 2009/14/EC on deposit-guarantee schemes and the payout delay aims at preserving depositor confidence. It notably extends the credit institutions' information obligation towards their customers. Henceforth, credit

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<sup>2</sup> Directive 2009/111/EC of the European Parliament and of the Council of 16 September 2009 amending Directives 2006/48/EC, 2006/49/EC and 2007/64/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements and crisis management.

<sup>3</sup> Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes and the payout delay.

<sup>4</sup> Draft law No. 6165(3), report of the "Commission des finances et du budget", p.4.

institutions must inform the depositor, in an easily understandable manner, if his/her deposit may be excluded from the coverage or be guaranteed to a lesser extent by a deposit-guarantee scheme<sup>5</sup>. Similarly, the deposit payout delay laid down in Article 62-3(1) of the LFS has been reduced from three months to twenty working days, and may only be extended once for a maximum of ten working days.

## **II. Other amendments to the LFS**

### **1. Introduction of an authorisation and notification procedure for changes affecting the authorisation conditions of credit institutions and PFS**

The Law introduces a new authorisation and notification procedure applicable to the changes affecting the conditions based on which an authorisation was granted by the competent Minister.

Thus, on the one hand, in order to reduce the administrative burden, the authorisation that credit institutions and PFS incorporated under Luxembourg law need to have in order to change their corporate purpose, corporate name or legal form will henceforth be granted directly by the CSSF without requiring the Minister's intervention. Similarly, an authorisation granted by the CSSF will now be sufficient to create and acquire subsidiaries in Luxembourg and abroad. The creation of agencies and branches in Luxembourg is no longer subject to any authorisation.

Moreover, the authorisation that investment firms must have in order to extend their activities to investment services or activities or to ancillary services not covered by their existing authorisation, is henceforth the sole competence of the CSSF.

These authorisations will be granted by the CSSF based on a written request submitted by the entity concerned directly to the CSSF. The request must contain all the relevant information and supporting documents allowing the CSSF to assess the request.

On the other hand, the Law specifies that the granting of the authorisation implies for the members of the administrative, management and supervisory bodies of the credit institutions and PFS, the obligation to submit to the CSSF on their own initiative a complete, consistent and understandable written notification on any change concerning the substantial information on which the CSSF had based the review of the authorisation request. This information notably concerns the repute of the members of the aforementioned bodies, the shareholder structure of the credit institution or PFS, as well as its central administration and infrastructure. The transmission of this information will allow the CSSF to have up-to-date information.

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<sup>5</sup> Article 62-4(1) LFS; Draft law 6165(3), Report of the "Commission des finances et du budget", p. 12.

## **2. Adaptation of PFS statuses**

The Law amends the definition of PFS and the order of the PFS catalogue, as well as the scope of certain PFS statuses, in order to take into account the real development of the different PFS categories. Thus, since the entry into force of the Law, PFS (which are no longer "other" PFS) are subdivided into three categories: investment firms, specialised PFS and support PFS.

Furthermore, it must also be stressed that the authorisation as client communication agent or administrative agent is now required where activities under this status are provided for specialised investment funds (SIF), investment companies in risk capital (SICAR) or authorised securitisation undertakings.

## **3. Obligation for the PFS to exercise the granted authorisation**

In principle, the duration of a PFS authorisation is unlimited, as long as the authorised entity continues to comply with the legal requirements. The new Article 23(1) addresses the problems of the so-called "dormant" authorisations, i.e. authorisations the PFS does not use.

Save for the cases where the PFS does not use the authorisation within 12 months from its granting or expressly renounces it, it is now specified that an authorisation may only be withdrawn if the PFS has not exercised, within a continuous period of six months, any, and not just some, activities for which the authorisation had been granted.

It should be noted that the withdrawal only concerns the authorisation granted under the LFS and not the authorisation issued under other laws. Thus, support PFS that perform activities other than those covered by their withdrawn PFS authorisation may continue to perform the other activities.

## **4. Introduction of a paragraph 5 into Article 32 of the LFS**

The new paragraph 5 added to Article 32 of the LFS includes a provision laid down in the right of establishment in general and fills a gap that temporarily existed in the financial sector legislation.

### **a. Persons concerned by the new provision**

The new provision concerns "credit institutions and other persons from a third country, carrying on activities of the financial sector, 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 this law".

The requirement to have an authorisation granted by the Minister responsible for the CSSF only exists where the following requirements are cumulatively fulfilled by the following persons:

1. the persons are originating from a third country, i.e. a non-EU/EEA Member State, and
2. the persons do not have an establishment in Luxembourg, and
3. the persons perform an activity of bank or PFS in their home country, and
4. one or more of their agents travel occasionally and temporarily to Luxembourg, notably to collect deposits or other repayable funds from the public and to provide any other service covered by the LFS. It is not sufficient that the persons concerned direct their activities to Luxembourg from their home country.

The CSSF considers that these notions must be read and interpreted in the light of the Luxembourg legislation, and in particular the definitions contained in the LFS.

Having customers domiciled in Luxembourg does not mean that the aforementioned persons perform *ipso facto* their activities on the Luxembourg territory.

The CSSF considers therefore that coming on the Luxembourg territory temporarily in order to carry out an activity upstream or downstream from the activities referred to in Article 32(5) is not subject to authorisation<sup>6</sup>. Thus, the preparatory acts to the performance of such activities are not concerned. The same applies to introductory visits made by the persons concerned to their Luxembourg-based customers, on the condition of course that these visits are not accompanied by the exercise of activities falling within the scope of the new provision.

As Article 32(5) of the LFS only covers the physical travel of agents to Luxembourg and, moreover, only to carry out activities covered by the LFS, it does not prevent the persons concerned from informing the Luxembourg public on their activities and to make brand advertising on the Luxembourg territory. Activities such as the simple canvassing of customers or more generally the advertising and organisation of a "road show" are thus excluded from the scope.

With this in mind, the CSSF concludes that if persons originating from third-countries only provide general information on their activities and if the potential Luxembourg clients must approach these persons themselves in their home country in order to enter into a contract with them, an authorisation as referred to in the new Article 32(5) of the LFS is not required.

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<sup>6</sup> In its interpretative communication of 20 June 1997, the European Commission does the same to identify the activities subject to prior notification in relation with the freedom to provide services.

## **b. Authorisation procedure and prerequisites**

It is now provided that in order to perform the activities referred to in the LFS, the aforementioned persons must have a specific authorisation. The authorisation shall be granted by the Minister responsible for the CSSF on the latter's advice.

The issue of an authorisation is subject to the condition that the persons concerned be submitted to LFS-equivalent authorisation and supervisory rules in their home State. These rules notably include the requirement to have an authorisation granted by a public authority, the reputation of the directors, the internal administrative organisation (organisational requirements, existence of human and technical resources, establishment of internal systems, resources and procedures), the existence of rules of conduct, as well as requirements relating to financial bases and the membership of a deposit-guarantee scheme.

Before filing an authorisation request with the Minister, the person concerned shall contact the CSSF and submit a file including at least a detailed description of the activities carried out in its home country and those contemplated or carried out in Luxembourg, as well as any relevant information and supporting documents allowing the CSSF to ensure that the activities are covered by the scope of Article 32(5) of the LFS, and that the prerequisites for the authorisation are fulfilled.

In this context, the CSSF considers that credit institutions whose home country is represented in the Basel Committee are presumed to be subject to authorisation and supervisory rules equivalent to the LFS. The CSSF may request the other credit institutions and the other persons carrying out activities of the financial sector to have established an independent legal advice on the LFS-equivalence of the home country authorisation and supervisory rules.

As any persons providing financial services on the Luxembourg territory, the persons concerned will be required to comply with certain Luxembourg territorial rules, such as the legislation relating to the fight against money laundering and terrorist financing or to consumer protection.

## **5. Amendment to Article 41 on professional secrecy**

The Law extends and specifies the scope of the professional secrecy obligation laid down in Article 41 of the LFS. On the one hand, the persons referred to in the aforementioned article continue to be bound to professional secrecy after the termination of their contract or their relationship that gave rise to this obligation. The customer is therefore expressly protected, even after the termination of his/her contractual relationship with the Luxembourg-incorporated credit institution or PFS.

On the other hand, the professional secrecy obligation is extended to persons that are aware of confidential information after the withdrawal of the authorisation and to the persons designated after the withdrawal of the authorisation. Thus, the secrecy obligation is now expressly extended to liquidators as well as to the persons appointed by the liquidator and who therefore have access to confidential information.

It should be noted that the Law introduces, *mutatis mutandis*, the same amendments into the law of 13 July 2007 on markets in financial instruments<sup>7</sup>.

### **III. Other relevant legislative changes**

The law of 17 June 1992 on the accounts of credit institutions is amended so that parent banks that only have subsidiaries which are not material, both individually and as a whole, are no longer required to draw up consolidated accounts<sup>8</sup>. This amendment stems from the transposition of a provision of the CRDs, in particular from Article 2 of Directive 2009/49/EC.

The Law also amends the law of 23 December 1998 establishing a financial sector supervisory commission ("Commission de surveillance du secteur financier")<sup>9</sup>. In addition to giving a legal basis to the CSSF's designation as competent authority for the registration and supervision of rating agencies for which Luxembourg is the home country, Article IV(a) of the Law reiterates the principle of cooperation between the CSSF and the other Member States and the Committee of European Securities Regulators. Along the same lines, the Law introduces certain principles relating to the mission, role and action field of the CSSF at a national, EU and international level, and notably the principle according to which the CSSF must, in the course of its duties, take duly into account the potential impact of its decision on the stability of the financial systems at a national, EU and international level.

The law of 31 May 1999 governing the domiciliation is supplemented by a provision<sup>10</sup> specifying that a domiciliation agreement signed with a domiciled person supervised by the CSSF is only validly terminated if the termination has been notified to the CSSF. This notification must be made at least one month before the termination takes effect, otherwise the obligation of the depositary and its responsibility remain intact. The purpose of this amendment is to allow the CSSF to have up-to-date information and to be informed when a supervised person no longer has its domicile with the domiciliation agent indicated to the CSSF.

Finally, the Law amends the law of 11 January 2008 on transparency requirements for issuers of securities by introducing a new situation that could entail an administrative

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<sup>7</sup> Art. VI of the Law amending Article 29 of the law of 13 July 2007 on markets in financial instruments.

<sup>8</sup> Art. III of the Law introducing paragraph 2a into Article 83 of the law of 17 June 1992 on the annual accounts of credit institutions.

<sup>9</sup> Art. IV of the Law.

<sup>10</sup> Art. V of the Law completing Article 3 of the law of 31 May 1999 by adding a paragraph 3.

sanction<sup>11</sup>: the person that does not notify its major shareholdings within the legal deadlines, may now be sanctioned. The lawmaker explains the purpose of this amendment by the fact that, as time passes, a person may influence an issuer without informing the latter nor the market<sup>12</sup>.

Yours faithfully,

COMMISSION DE SURVEILLANCE DU SECTEUR FINANCIER

Claude SIMON  
Director

Andrée BILLON  
Director

Simone DELCOURT  
Director

Jean GUILL  
Director General

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<sup>11</sup> Art. VII of the Law completing Article 25 (1) through the addition of a letter (d).

<sup>12</sup> Draft law No. 6165(3), report of the "Commission des finances et du budget", p.15