

**COMMISSION de SURVEILLANCE
du SECTEUR FINANCIER**

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

Luxembourg, 23 February 2015

To all investment firms

CIRCULAR CSSF 15/606

Re: Clarifications for investment firms in the framework of the transposition into Luxembourg law of Directive 2013/36/EU¹ (hereinafter "CRD IV") and the entry into force of Regulation (EU) No 575/2013² (hereinafter "CRR")

The legislative amendments referenced below are without prejudice to possible changes that may result from the parliamentary work regarding the transposition of the CRD IV into Luxembourg law.

Ladies and Gentlemen,

1. The purpose of this circular is to provide investment firms with specifications regarding their classification as announced by Circular CSSF 13/575³ following the entry into force of the CRR and the introduction of draft law No 6660 which, among other things, transposes CRD IV into Luxembourg law (the "**Draft Law**").
2. The specifications below shall be read in conjunction with the provisions of Circular CSSF 13/575.
3. One of the innovations of the Draft Law is the introduction of a sub-category of investment firms, the "CRR investment firms", into the law of 5 April 1993 on

¹ Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

² Regulation (EU) No 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

³ Circular CSSF 13/575 on the supervisory reporting requirements applicable to investment firms as from 2014.

the financial sector (the "**LFS**"), which will fall within the scope of the CRR, the ITS on Supervisory Reporting⁴ and will be required to comply, among others, with the new CRD IV requirements on supervision on a consolidated basis, governance and remuneration policy.

This sub-category was created through the addition in the Draft Law of the definition "investment firm within the meaning of Regulation (EU) No 575/2013" (hereafter a "**CRR investment firm**").⁵

This definition shall include all the investment firms within the meaning of point (9) of Article 1 ("Definitions") of the LFS, excluding the investment firms that fulfil certain cumulative criteria set out in point (2) of Article 4(1) of the CRR.

Thus, an investment firm shall be considered as fulfilling these criteria and thereby as being excluded from the scope of the CRR where such investment firm:

- (i) is not authorised to provide the ancillary service referred to in point (1) of Section C of Annex II of the LFS (hereafter "**Ancillary Service 1**")⁶; **and**
- (ii) is only authorised to provide one or several investment services referred to in points 1, 2, 4 and 5 of Section A of Annex II of the LFS⁷, **and**
- (iii) is not authorised to hold funds or securities belonging to its clients (hereafter the "**assets belonging to its clients**") and, for that reason, may not at any time place itself in debit with its clients.

4. Regarding point (iii) of item 3 above, as the Draft Law also provides that only an investment firm authorised to provide Ancillary Service 1 shall be authorised to hold assets belonging to its clients, every investment firm holding assets belonging to its clients must hold an authorisation as provider of Ancillary Service 1 and shall, as a consequence, always be considered as a CRR investment firm (as it does not fulfil all the criteria allowing it to be excluded from the scope of the CRR in accordance with item 3 above).

⁴ Please refer to Circular CSSF 13/575.

⁵ The Draft Law entirely reproduces the definition "investment firm" as provided for in Article 4(1)(2) ("Definitions") of the CRR through the addition of a new item 9a) to Article 1 ("Definitions") of the LFS, worded as follows: "'investment firm within the meaning of Regulation (EU) No 575/2013" means an investment firm within the meaning of point (2) of Article 4(1) of Regulation (EU) No 575/2013, hereafter "CRR investment firm"".

⁶ Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management.

⁷ Reception and transmission of orders in relation to one or more financial instruments, execution of orders on behalf of clients, portfolio management and investment advice.

5. In short,
- a) the investment firms which are only authorised to provide one or several of the investment services 1, 2, 4 and 5 without being authorised to provide Ancillary Service 1, shall not be subject to the scope of the CRR; and
 - b) the investment firms which are authorised to provide one or more of the investment services 3, 6, 7 and 8, as well as all the investment firms which are authorised to provide Ancillary Service 1, shall be subject to the scope of the CRR and shall be deemed CRR investment firms.
6. For the purposes of point (iii) of item 3 above, the CSSF specifies how an investment firm should understand "holding" assets belonging to its clients. The CSSF thus considers that an investment firm "holds" assets belonging to its clients where:
- a) it receives in deposit by its clients and keeps itself physical custody (e.g. in a safe) of assets belonging to its clients in the form of financial instruments and other securities, or entrusts physical custody to a third party through a sub-deposit in the investment firm's own name of the assets belonging to its clients (e.g. in a safe opened with the third party in the name of the investment firm);
 - b) the assets belonging to its clients are deposited on accounts opened in the name of the investment firm with a third party.⁸ Conversely, where the clients' assets are deposited with a third party on accounts opened in the name of the clients, the investment firm shall not be considered as "holding" assets belonging to its clients;
 - c) as regards registered securities, the investment firm is listed in the issuer's register (e.g. shareholders' or bondholders' register) in its own name, as the holder of the securities concerned (including where the register indicates that the investment firm acts on behalf of clients).

The CSSF specifies that the explanations above are without prejudice to the rules of Article 37(2) of the LFS, which require, among others, investment firms that manage third-party funds to deposit the clients' funds with certain entities listed exhaustively in Article 37(2) of the LFS.

7. The CSSF reminds all the investment firms of their client asset protection obligations and in particular compliance with the rules laid down in Article 37-1(7)

⁸ This approach complies with the preparatory documents of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC. See, for example, the document CESR/05-024c "CESR's Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments - 1st Set of Mandates (January 2005)", page 7, point 8: "*references to client assets "held" by an investment firm (and similar expressions) include client assets held by a third party on behalf of that investment firm, but exclude client assets held by a third party that has been directly appointed by the client;*".

and (8) of the LFS and in Articles 18, 19 and 20 of the Grand-ducal Regulation of 13 July 2007 relating to organisational requirements and rules of conduct in the financial sector (hereafter the "**MiFID Regulation**"). The CSSF also reminds all the investment firms that use accounts opened in their own name with a third party on behalf of their clients (whether these accounts are omnibus accounts or individual accounts), of the particular precautions they must take. Among other things, they shall have in place efficient processes to detect, manage, control and report risks, as well as adequate internal control mechanisms including sound administrative, accounting and IT procedures allowing an accurate and permanent separation of client assets, in accordance with the MiFID Regulation, given the increased operational risks associated with these practices.

8. Lastly, in order to enable the CSSF to classify the investment firms according to whether they hold client assets or not, and thus to determine the need to obtain or maintain an authorisation as provider of Ancillary Service 1, the CSSF needs to be provided with the duly filled in questionnaire annexed to this circular, for every new application file for authorisation as investment firm, and, if deemed useful, for a request for an extension of an existing authorisation.
9. The CSSF stresses that, in relation with points 4 and 8 above, an investment firm which does not currently hold assets belonging to its clients (within the meaning of point 6 above) may choose to keep, in the list of services authorised by its authorisation, the provision of Ancillary Service 1. It should be noted that if that choice is made, the investment firm shall also be considered as CRR investment firm and be subject to the CRR requirements.

Yours faithfully,

COMMISSION de SURVEILLANCE du SECTEUR FINANCIER

Claude SIMON
Director

Andrée BILLON
Director

Simone DELCOURT
Director

Jean GUILL
Director General

Annex

Annex 1

Questionnaire to be filled in by every investment firm, and by every investment firm applicant (hereinafter "IF") and to be submitted to the CSSF.

Questionnaire

(current and future situation)

Company name: _____

Are IF clients' assets being held:

Yes
(where a Third Party is involved, please indicate the name of the Third Party concerned and its court of origin)

No

on omnibus accounts opened with third parties (hereinafter the "**Third Party**") in the name of the IF on behalf of its clients

on individual accounts opened with a Third Party in the name of the IF on behalf of its clients

on individual accounts opened with a Third Party in the name of the client

<p>physically with the IF (e.g. in a safe) which ensures custody and safe-keeping thereof</p>		
<p>physically with a Third Party which ensures custody and safe-keeping thereof <u>on behalf of the IF</u> (e.g. in safe opened in the name of the IF with the Third Party)</p>		
<p>by the IF registered <u>in its own name</u> in the issuer's register as holder of registered securities</p>		
<p>Others? please specify: _____</p>		
<p><u>Additional comments:</u></p>		

Signature of two members of the authorised management: _____

Date: _____