

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

Luxembourg, 21 December 2001

To all credit institutions and other  
professionals of the financial sector

**CIRCULAR CSSF 01/47**

**Re: Professional obligations of domiciliation agents of companies and  
general recommendations**  
**Amendment to Circular CSSF 01/28**

Ladies and Gentlemen,

We are pleased to bring to your attention that this circular refers to the law of 31 May 1999 governing the domiciliation of companies. The purpose of this circular is to determine the professional obligations arising prior and after the conclusion of a domiciliation agreement for the domiciliation agents of companies subject to the supervision by the CSSF. It also aims to provide general recommendations to domiciliation agents of companies which are in a conflict of interest situation. (Part I: Professional obligations of domiciliation agents of companies and general recommendations)

Another purpose of this circular is to amend the provisions of Circular CSSF 01/28 regarding information to be communicated to the CSSF in case of an unauthorised domiciliation agent. (Part II: Amendment to Circular CSSF 01/28)

## **Part I: Professional obligations of domiciliation agents of companies and general recommendations**

### **I. Scope**

This circular applies to all credit institutions and other professionals of the financial sector established in Luxembourg and subject to the supervision by the CSSF.

### **II. Professional obligations of domiciliation agents of companies before entering into a domiciliation agreement**

- Obligation to verify that the company complies with the provisions governing domicile

Article 2(1)(a) of the law of 31 May 1999 provides that the domiciliation agent must, before entering into a domiciliation agreement, verify that the company complies with the provisions governing domicile of Article 2, paragraph 2, of the law of 10 August 1915 concerning commercial companies as amended.

This article sets out that “the domicile of a commercial company is located at the seat of its head office. The main seat is supposed to be the registered office of the company unless otherwise proved.”

This circular does not intend to analyse the concept of domicile or other concepts referred to in the law of 31 May 1999 such as “other seat of the company”, “main seat” or “secondary domicile”.

However, in compliance with this provision, the domiciliation agent must, before entering into a domiciliation agreement, ascertain the exact location of the company’s main seat.

Before signing any domiciliation agreement and thus entering into a business relationship, the domiciliation agent must carry out due diligence on the company to be domiciled, on the activities envisaged, on the locations where these activities are to be performed, on the services to be provided in connection with these activities and on the purpose of the business relationship which is generally sought by the company applying for domiciliation.

It should be noted that the law of 31 May 1999 is also applicable to foreign companies when they effectively operate in Luxembourg from a secondary seat.

It is recommended that the domiciliation agent verifies the actual existence of a secondary seat in Luxembourg before entering into a domiciliation agreement with a foreign company and agreeing to the provision of services for this company.

- Obligation to know the real identity of the members of the domiciled company's bodies

The domiciliation agent with whom a company wishes to establish a registered office must know the real identity of the members of the domiciled company's bodies.

Article 2(1)b) provides that “in the event of there being doubt as to whether such persons, in their capacity as members of the said bodies, are acting for their own account, or in the event of it being certain that they are not acting for their own account, the domiciliation agent of companies shall take reasonable measures to obtain information concerning the real identity of the persons on behalf of whom the said persons are acting.”

This identification must be performed in accordance with the principles stated in Circular IML 94/112<sup>1</sup> on combating money laundering and preventing the use of the financial sector for the purpose of money laundering. This identification is performed with the passport or identity card for natural persons and with an extract from the trade register or recent articles of incorporation for legal persons. The domiciliation agent must also request an official identification document for each natural person representing a direction being a legal person.

The domiciliation agent must also know the identity of the shareholders and/or beneficial owners, originators and promoters. It is recommended that the domiciliation agent knows them personally.

This identification must be performed before the domiciliation agent agrees to the establishment of the registered office.

In order to carry out this obligation, the professional must develop and set up an acceptance procedure for new companies. As part of this procedure, it is advised that the domiciliation agent create a business committee in charge of the acceptance of new files. This committee which comprises a member of the executive board and a manager in charge of the pending agreement file, would be responsible for the authorisation or refusal of the domiciliation of the new companies. Such an acceptance procedure may, where applicable, also be intended for the promoters.

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<sup>1</sup> Amended by Circular CSSF 08/387

It is also recommended that the domiciliation agent receives a written confirmation of the acceptance of their mandate by the members of the domiciled company's bodies and, where applicable, the external auditor.

In case of a domiciliation transfer, it is prudent to receive or try to receive information on the reasons for the transfer of the company as well as the corporate documents relating to the company to be domiciled. The domiciliation agent must verify this documentation and complete it, where applicable, before entering into a domiciliation agreement.

### **III. Professional obligations of the domiciliation agent after entering into a domiciliation agreement**

- Obligation to supervise the real identity of the members of the domiciled company's bodies and the activity of this company

The obligation to know the identity of the members of the domiciled company's bodies, of its shareholders and/or beneficial owners is not only valid before or at the moment of entering into a domiciliation agreement. Compliance with this obligation implies that the domiciliation agent is required to continually update the documentation relating to the identity of these persons.

Thus, the domiciliation agent must foresee appropriate internal control measures allowing an update of these files.

Moreover, the domiciliation agent must be able to constantly follow the activity exercised by the domiciled company. For this purpose, the domiciliation agent must for the Luxembourg incorporated companies:

- receive and take knowledge of all the mail addressed to the domiciled company which allows the domiciliation agent to assess and follow the activity of the former; it should be noted that if the company has a branch abroad, the domiciliation agent has no obligation to centralise all the mail including the mail addressed to the branch, but it is sufficient that it has the necessary information in relation with the activity of the branch;
- maintain accounting records of domiciled companies or at least have free access to them.

A permanent supervision of the Luxembourg incorporated companies' activities requires in particular the receipt of the following documents: all documents relating to general meetings, the minutes of the board of directors' meetings, the documents performing the delegation of powers, the authorisations to exercise an activity, the annual accounts and inventories, the tax returns, the register of the registered shares, extracts from the trade and companies register and the publications in the *Mémorial*.

During this supervision, it is recommended that the domiciliation agent take into consideration the compatibility of the volume, the nature and frequency of treasury movements with the information received on the domiciled company at the moment of the entry into business relationship.

The domiciliation agent must receive similar documents from the foreign law companies operating in Luxembourg *via* a secondary seat.

Concerning the nature of the information which may be confidential, it should be noted that in accordance with Article 41 of the law of 5 April 1993 on the financial sector, as amended, each domiciliation agent is subject to professional secrecy.

- Conservation obligation of the documentation allowing identification

The law of 31 May 1999 provides that the documentation relating to the identification of the members of domiciled company's bodies, of its shareholders and/or beneficial owners must be held by the domiciliation agent.

In case the relations between the domiciled company and the aforementioned persons end, the domiciliation agent has the obligation to keep the documentation relating to their identity for a minimum period of 5 years, without prejudice to longer conservation deadlines prescribed by other laws.

The domiciliation agent ought to ensure that the documentation for the identification of said persons be kept separate from all other document relating to the company in a secure place.

- Obligation to supervise compliance with the law

The law of 31 May 1999 authorises domiciliation agents to terminate the domiciliation agreement with immediate effect, in the event of breaches of the legal provisions governing commercial companies and the right of establishment by the statutory bodies

and the representatives of the domiciled company. The termination must be served by registered letter with an indication of the legal provisions which were not observed.

Thus, the domiciliation agent is responsible to check if the domiciled company has the administrative authorisations imposed by the law of 28 December 1988 regulating the access conditions to commercial professions in a broad sense.

The domiciliation agent is also responsible to verify if the domiciled company observes the provisions of the law of 10 August 1915 concerning commercial companies, which relate in particular to the publishing of financial statements and the convening and holding of general meetings.

It should be noted that Article 40(1) and (2)<sup>2</sup> of the law of 5 April 1993 on the financial sector, as amended, requires domiciliation agents to provide the fullest possible response to, and cooperation with, any lawful demand which may be made to them by the authorities responsible for applying the law in the exercise by those authorities of their powers. They are also obliged to fully co-operate with the Luxembourg authorities responsible for the fight against money laundering by providing at these authorities' request all the necessary information in accordance with the procedures foreseen by the applicable law and by informing, at their own initiative, the State Prosecutor of the Luxembourg district court of any indication of money laundering.

- Obligation to file and to publish

The law of 31 May 1999 governing the domiciliation of companies provides that any termination of the domiciliation agreement with a notice period or with immediate effect will only take effect as from the date of its filing by the domiciliation agent with the trade and companies register.

It is important to note that until said date the agreement remains into force and the domiciliation agent must fulfil its obligations.

Moreover, the domiciliation agent must publish this termination in *Mémorial C*.

#### **IV. General recommendations**

Domiciliation agents may accept mandates as direction, manager or auditor in the domiciled company based on the instructions they receive from shareholder(s), and/or beneficial owner(s) respectively from authorised representative(s). The acceptance of said mandates may also be part of the basic service provisions that the domiciliation

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<sup>2</sup> Amended by the law of 12 November 2004

agent offers to the domiciled company. Another form of service provisions offered by the domiciliation agent may consist in making available one or more persons acting as shareholder(s) or founder(s) of the domiciled company.

It should be noted that this accumulation of functions by the domiciliation agent is likely to create conflicts of interest. Moreover, it is important to note that the domiciliation agent acting as a member of a body and/or as a shareholder or founder of the domiciled company is held liable as such, besides the liability held as domiciliation agent. As this situation may entail a reputational risk for the domiciliation agent, it is advised that the domiciliation agent, who makes available one or more members of the domiciled company's bodies, enters into an agreement with the shareholders and/or beneficial owners in which the scope of the mandate is regulated in a detailed manner.

## **Part II: Amendment to Circular CSSF 01/28**

### **Amendment to Circular CSSF 01/28**

On the first page, 2<sup>nd</sup> paragraph, second hyphen, the reference to “directors of reinsurance undertakings” is amended as follows: “directors of reinsurance undertakings which domicile reinsurance companies”

A new hyphen is added with the following content: “directors of reinsurance undertakings authorised to carry out the domiciliation of companies other than reinsurance companies pursuant to Article 97-1 of the law of 6 December 1991 on the insurance sector as amended”

On page 2, the 3<sup>rd</sup> paragraph is changed as follows:

“In the light of the above-mentioned statements, you are requested to review your relations with the companies domiciled in Luxembourg and which are your clients. In the event you notice that a company is not domiciled with an authorised person, as mentioned above, you are also requested to communicate to us the name and the address of the unauthorised domiciliation agent.”

Yours faithfully,

COMMISSION DE SURVEILLANCE DU SECTEUR FINANCIER

Charles KIEFFER  
Director

Arthur PHILIPPE  
Director

Jean-Nicolas SCHAUS  
Director General