CHAPTER I

INFORMATION CONCERNING THE LAW OF 2 AUGUST 2003

Information concerning the law of 2 August 2003 amending

- **the law of 5 April 1993 on the financial sector;**
- **the law of 23 December 1998 creating a *commission de surveillance du secteur financier*;**
- **the law of 31 May 1999 governing the domiciliation of companies**

The primary purpose of the aforementioned law, which came into force on 1 October 2003, is to ensure that the entire financial sector is subject to a prudential supervision. It also defines new categories of PFS, notably by bringing under the financial sector a certain number of connected or complementary activities to a financial activity.

The law of 2 August 2003, which provides the required legislative framework to new activities, aims at promoting the development of the Luxembourg financial centre towards a first-rate centre in the fields of specific competence.

In particular, the creation of specific statuses as regards IT and communication proves to be an interesting factor for the development of the financial centre, as submitting these activities to a state supervision is consistent with the wish of the financial players, who consider that the immediate advantages of the creation of such statuses lie in the limitation of emerging risks, as well as in the guarantee of the quality of services provided.

Moreover, this regulation, which makes Luxembourg one of the first countries to grant the status of supervised professional of the financial sector notably to subcontractors in the fields of IT and communication, will allow to promote the provision of these services from Luxembourg to the foreign financial sector.

Given that the law regulates a certain number of activities in Luxembourg, a person performing one of the activities subject to a PFS status does not have the choice to opt for a status, but is obliged to request and obtain the status concerned.
Consequently, it should be pointed out that banks and traditional PFS may not, in principle, delegate tasks that correspond to one of the activities of a PFS status to entities that are not appropriately authorised.
However, the law of 2 August 2003 does not affect the possibility to outsource an IT function to a third party abroad, as the law only concerns operators established in Luxembourg.
Nevertheless, as regards the possibility to delegate the IT function to a third party abroad, it should be referred to the restrictive conditions laid down by the supervisory authority (currently circular IML 96/126).

Where an entity of the financial sector delegates tasks corresponding to activities under a PFS status and where this PFS has been granted the appropriate authorisation, this entity only needs to notify the CSSF of the use of subcontractors. A prior authorisation of the CSSF to delegate these tasks to a duly approved provider of services is not required.

1. Scope of the CSSF's supervision

The law of 2 August 2003 submits the whole financial sector to prudential supervision. Thus, PFS not falling under a specific category and subject to the general provisions of the law of 5 April 1993 on the financial sector as amended providing for their approval, are also submitted to the supervision of the CSSF, as is also the case for professionals collecting debt and those who perform cash-exchange transactions.

The law of 2 August 2003 does not affect the appreciation power of the CSSF to submit an activity falling under the financial sector by nature to the general provisions of the law on the financial sector. However, the law restrictively lists the legal statuses that correspond to connected or complementary activities, so that the CSSF does not have the power to subject other connected or complementary activities to the general provisions of the law on the financial sector.

- **Information concerning the "group exception"**

Like the provision concerning investment services provided within a group, those entities carrying out an activity of the financial sector other than an investment service exclusively for a company of the group to which they belong, are not required to obtain prior authorisation and are consequently not under the supervision of the CSSF.

Indeed, article I paragraph (2) of the law of 2 August 2003 introduces into article 13 paragraph (2) of the law on the financial sector a supplementary indent, which excludes from the application of Chapter 2 relating to the requirement for approval those companies that provide a service within the scope of this Chapter other than an investment service, exclusively to one or more persons belonging to the same group as the company providing that service.

However, the group exception only applies in so far as there are no specific contrary provisions. Indeed, in accordance with the general principles of law, a specific legal rule may derogate from a general legal rule of the same level.
In order to avoid any ambiguity as regards the scope of the new indent of article 13 in relation to the status of company domiciliation agents (article 29 of the law of 5 April 1993 as amended), it must be stressed that notwithstanding article 13 paragraph (2), the companies which accept that one or more companies of the group to which they belong themselves establish a seat with them with a view to carrying out an activity within the scope of their corporate object and which provide any services relating to this activity, are also company domiciliation agents according to article 29 and therefore constrained to obtain prior approval and submitted to the supervision of the CSSF (please refer to the CSSF's interpretation of article 29).

As regards factoring, the group exception only applies on the condition that not only the assignee and assignor, but also the debtor of the assigned debts belong to the same group.
On the other hand, where debts are redeemed exclusively from companies belonging to the group, but where the debt is recovered from third-party debtors, the factoring company must be authorised under the status of professional performing credit offering according to article 28-4 of the law on the financial sector.

- **Interpretation of the concept of "group" according to the law of 2 August 2003**

The concept of group is not defined by the law of 2 August 2003. The CSSF considers that a group according to the law of 2 August 2003, can be defined as a group of companies composed of a parent company, its subsidiaries and entities in which the parent company or its subsidiaries hold a participation. This definition is inspired by directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 relating to financial conglomerates.

The CSSF considers that companies held by the same natural persons are not to be considered as a group according to article 13(2), even if these companies are located at the same address, have the same managers or have common interests or common customers.

2. The new PFS categories

As regards the new PFS categories, the law distinguishes those that correspond to financial activities by their nature from those whose activities are connected or complementary to a financial activity.

2.1. The new PFS whose activities are financial by nature

- **Registrar and transfer agents (article 24-G)**

Registrar and transfer agents are considered as investment firms. As far as the field of UCIs in particular is concerned, the tasks of the registrar and transfer agent consist in the receipt and execution of issues and redemptions of UCI securities, as well as the keeping of the register of participants. The registrar and transfer agent receives orders on units/shares of UCIs either directly from investors, or indirectly through distributors. In this context, it needs to be stressed that simply registering orders on units/shares of UCIs does not require an authorisation as distributor of units/shares of investment funds as referred to in article 24D) of the law of 5 April 1993 on the financial sector as amended. Indeed, the status as distributor of units/shares of investment funds exclusively aims at professionals whose activity consists in actively distributing units/shares of UCIs admitted to trading in Luxembourg, which implies that the professional is himself in charge of the placement of the units/shares.

As far as investment funds are concerned, this status allows a provider of services to perform for the account of one or several UCIs all the tasks comprised in the concept of central administration. Indeed, registrar and transfer agents of the financial sector are *ipso jure* empowered to act as an administrative agent of the financial sector (encompassing inter alia NAV calculation) and as a client communication agent for UCIs for which they are keeping a register.

The status as registrar and transfer agent is of course not required for entities, which are authorised as management companies of UCITS, as management companies of non-coordinated UCIs under Luxembourg law or as management companies not having designated a management company, as the activity of collective portfolio management also encompasses, further to the portfolio management and the marketing thereof, the functions of central administration, including the keeping of the register of unit/share holders, as well as the issue and redemption of units/shares.

- **Professionals performing credit offering (article 28-4)**

This status concerns professionals who grant all kinds of loans without calling on public savings to refinance.

This status covers, in particular, consumer credits, including financial leasing operations, except if the credit activity is carried out as non-core activity in the context of an activity governed by the law of 28 December 1988 on the right of establishment. The activity of granting consumer credits carried out by shopkeepers and craftsmen will be subject to the authorisation of the Minister in charge of the CSSF and to the supervision of the CSSF, if the loan portfolio represents more than 50% of the total volume of the sale of goods and services.

- **Professionals performing securities lending (article 28-5)**

This category concerns professionals performing securities lending/borrowing transactions as contracting party, i.e. who act on their own behalf and for their own account. The professional intermediaries active in the field of securities lending who act for the account of third parties must be authorised either as commission agents, if they act in their own name, or as brokers, if their role consists in locating the required securities and bringing the parties together.

- **Professionals performing money transfer services (article 28-6)**

This status concerns professionals whose activity consists in the receipt of funds from a customer and their transfer for the account of such customer to a third entity against book entry, in order to place such funds at the disposal of a beneficiary designated by the customer or to keep the abovementioned funds for disposal and transfer to a beneficiary.

- **Administrators of collective savings funds (article 28-7)**

Administrators of collective savings funds are not allowed to act for their own account, nor are they allowed to receive and keep the assets of savers as deposits.

- **Management companies of non-coordinated UCIs (article 28-8)**

This status concerns entities whose activity is limited to the management of non-coordinated foreign UCIs, i.e. entities, which do not manage a Luxembourg UCI nor a UCITS.

Indeed, the management companies under Luxembourg law which manage at least one approved UCITS in accordance with directive 85/611/EC, including their branches, as well as the management companies which manage at least one non-coordinated UCI under Luxembourg law, are governed by the law of 20 December 2002 concerning undertakings for collective investment.

The management activity may include central administration services. The managers of non-coordinated UCIs are allowed to provide these services only for UCIs for which they provide management services as such and to which they are thus closely linked.

2.2. PFS providing a connected or complementary activity to an activity of the financial sector

- **Domiciliation agents of companies (article 29)**

Although this status has not been amended by the law of 2 August 2003, it is nevertheless useful to provide certain explanations concerning the second point of article 29, which qualifies as domiciliation agents of companies those companies, that accept that one or several companies of the group to which they belong themselves establish a registered office with them in order to carry out an activity as part of their corporate object and which render any services connected with said activity.

In view of article 1(4) of the law of 31 May 1999 governing domiciliation of companies as amended, the CSSF considers that this provision must be interpreted in the sense that companies which domicile a company of the same group, without being a member exerting a significant influence on the conduct of business, are domiciliation agents of companies under article 29, but are granted a light regime insofar as the CSSF can relax the conditions for approval compared with the conditions applicable to traditional domiciliation agents. It must be noted that article 13(2) fourth point of the law on the financial sector does not apply to domiciliation agents of companies. A subsidiary that provides domiciliation services exclusively to other companies of the group to which it belongs itself, is thus subject to the requirement of a ministerial authorisation and the supervision of the CSSF according to article 29(1). As professional of the financial sector, it is obliged to comply with all the professional obligations of the financial sector, further to the professional obligations specific to the domiciliation agent of companies applicable pursuant to the law of 31 May 1999 on company domiciliation as amended.

- **Client communication agents (article 29-1)**

Traditional printing services within the financial sector, i.e. the production and printing of non-confidential documents, are not subject to authorisation. Client communication agents may however provide these services as non-core activity.

Archiving of confidential documents for personal use of customers of professionals of the financial sector, such as transaction confirmations, statements of account, tax returns, inter alia, is however subject to authorisation. Nevertheless, where these documents are not accessible to the service providers, for instance where they are stored in safes to which only the client professional of the financial sector has access, the status of client communication agent is not required.

The availability, via Internet, of a platform serving as support for the transmission of financial advice provided by third parties, is not an activity requiring the authorisation as client communication agent. The CSSF however considers that where the financial advice is provided on an individual basis (for instance by means of personalised passwords), the provider of services, who provides the platform, must be approved as financial advisor pursuant to article 25 of the law of 5 April 1993 on the financial sector as amended, if his client who uses the platform to transmit financial advice, has not been granted the required approval for this activity.

- **Administrative agents of the financial sector (article 29-2)**

The activities of these professionals cover back-office services and encompass, *inter alia*, the calculation of the net asset value of units/shares of UCIs. In order to avoid any misunderstanding, it must be stressed that this status does not cover the concept of central administration of UCIs in Luxembourg. Administrative agents may intervene actively in the work processes of their clients (account opening, definition of the software parameterisation, etc.).

The administrative agents of the financial sector are not obliged to exclusively act for the financial sector.

- **IT systems and communication networks operators of the financial sector (article 29-3)**

These professionals cannot intervene in the definition of IT software parameterisation, which remains under the control of the client, but are only allowed to perform the technical system parameterisation. They must exclusively act for the account of credit institutions, PFS, UCIs or pension funds under Luxembourg or foreign law[1].

The exclusive provision to the financial sector imposed by law aims, on the one hand, to preserve a uniform legal framework specific to the financial sector, and, on the other hand, to avoid that external services to the financial sector penalise those provided under the status as PFS. Given the importance of these connected services for financial market participants, the legislator wished to put forward the need for companies, which adopt this status, to exclusively serve clients of the financial sector, allowing thereby the supervisory authority of the financial sector to control all the outsourced activities.

A company, which already offers some of these services to entities outside the financial sector and wishes to extend its services to the financial sector by opting for this status, is compelled to create either a new entity authorised as PFS, or, after having become a PFS, an entity which will take over the services provided to entities outside the financial sector.

The PFS can thus provide certain services the CSSF will define on an individual basis (for instance: non-core activity, advice, monitoring of events, provision of IT premises for exclusive use) to clients outside the financial sector through a subsidiary or parent company, by complying with two principles:

- There must be no contract binding the final client outside the financial sector to the PFS and contracts between the customer and the subsidiary or the parent company must not mention services provided by the PFS, in order to avoid any legal proceedings of the client against the PFS.
- The contract binding the subsidiary or the parent company to the PFS concerning services authorised by the CSSF must contain two clauses, namely:
  - The subsidiary or parent company can, in no case, take legal and financial action against the PFS in a way that could jeopardise the perenniality of the PFS or of the services provided to customers of the financial sector.
  - It must be allowed to break off the contract, without damages for the PFS, in particular where the CSSF considers that the services provided outside the financial sector are not compatible with the quality or nature of the services provided within the financial sector (for instance: decrease in the quality of service, conflicts of interest, etc.).

Furthermore, an IT systems and communication networks operator of the financial sector cannot outsource its activity to another provider of services. The PFS cannot make use of the resources of the entity it belongs to or of its subsidiary, which implies extra skilled personnel and technical infrastructures. In order not to economically penalise the implementation of this new status, the PFS could use the staff and infrastructure needed for its activity and insource the activity of the entity it belongs to or of its subsidiary, i.e. provide for the company of origin (the group) the services initially provided for entities outside the financial sector. Legally, this implies that in order to provide existing services to entities outside the financial sector, the PFS signs a single contract with the entity to which it belongs or the group to which it belongs, which in turn is under contract with the clients outside the financial sector.

In order to clarify for which activities a status as IT systems and communication networks operator of the financial sector is required, respectively which services can be provided without being authorised as PFS, the principles which allow to assess which services require a PFS status, article 29-3 are set forth below. There are two situations conditioning the need for a service provider to obtain a PFS status, article 29-3.

[1] *Insurance undertakings, as they are not governed by the law of 5 April 1993 on the financial sector as amended, cannot, in this context, be considered as being part of the financial sector. However, foreign insurance undertakings can, depending on the countries, be considered as being part of the financial sector.*

First situation: the nature itself of the service

The provider of services has access rights as administrator of a production system, i.e. a system used for the recurrent and core activity of the professional of the financial sector, irrespective of the fact that this system contains confidential data, not only relating to the identification of customers, but also to the accounting or transactional nature (purchase and sale of securities, for instance). Due to the extent of his rights, he is considered as "operator" of the system, as he is able to modify or to create other access rights and can *a priori* execute production programs. The same is the case where he detains rights to administer data bases, which is a crucial sub-system of the production systems.

The service provider is also considered as "operator", even without full access rights, as soon as he is in charge of operating the production system. Thus, launching batch programs at the end of the day, even without full access rights, is considered as an operator activity and requires therefore an authorisation as PFS. On the other hand, a passive supervisory activity (monitoring) does not require a status, on the condition that the system generates the information to be used for supervision and that the provider does not intervene on the system and only informs a person in charge of the financial professional. This situation is acceptable without being granted an authorisation as PFS, as the provider does not manage the system.

Second situation: the professional of the financial sector is unable to comply with the provisions of circular IML 96/126

The recurrent services allow the provider to have access to confidential information and, in particular, to nominative data or data allowing to identify customers. Circular IML 96/126 provides that the financial professional must limit the occurrences where the provider has access to confidential data ("Where, in the case of a significant systems breakdown which requires repair on the premises, access to such information cannot be avoided, the institution must ensure that the third party responsible for the repairs is accompanied throughout his intervention by an employee of the institution responsible for IT matters"). Paragraphs e), f) and h) of point 4.5.2.1. of the circular clearly explain this matter.
There is no requirement for the provider to be authorised as PFS if the services he provides are not operating services. However, a PFS is not allowed, in principle, to delegate his work to a non-PFS provider who has recurring access to a system containing confidential information.
The law of 2 August 2003 specifies that the confidentiality requirement is not applicable to the professionals mentioned in articles 29-1, 29-2 and 29-3, insofar as the extent to which the information transmitted to such professionals is transmitted under a service agreement pertaining to an activity regulated by the aforementioned legal provisions and provided that such information is necessary for the execution of the said agreement.

The CSSF's experience shows that in borderline cases, where a professional of the financial sector argues that he supervises the recurrent access of his provider, this control becomes theoretical. Certain procedural provisions, which should ensure perfect control by a PFS, proved not very perennial and led to a substantial increase in the risks of disclosure. The CSSF is therefore not favourable to procedural solutions, which do not offer any guarantees as to access control to confidential information.

Consequently, the professionals of the financial sector can entrust the provider, who opts for one of the above-mentioned statuses, with tasks requiring access to confidential data. The provider must of course provide, within the scope of his global activity, the services foreseen by the agreement. The provider cannot be granted an authorisation beyond twelve months if he does not provide any service in relation to his status (art. 23(1)). As an example, he cannot keep an authorisation as system operator (art. 29-3) for an activity of IT development, even though he does not operate any system, irrespective of his customers.

Specific explanations to help-desk services

Help desk functions illustrate the preceding explanations. These functions consist of tasks concerning administration and operating systems, in particular, where a provider remotely accesses the workstation. Moreover, as the latter may be led to see confidential information during these interventions, he must be adequately authorised as PFS, so that the financial professional can entrust him with these services. The financial professional must prove to the CSSF that the tasks he performs within his help-desk activities are not such as to be considered as "system or network operator" and that he is not able to access confidential data. This might be the case where the assistance takes place over the phone and the service provider asks the user to execute the tasks in his place. Confidentiality therefore only depends on the user.

General considerations

The preceding situations are *a priori* applicable irrespective of the equipment in use, be they computers, network or telecommunication equipment, including, to a certain extent, telephony, if the operator is not subject to the laws governing the professional secrecy of communications.
As a consequence and in response to recurrent questions on recovery centres, the availability of such centres does not require an authorisation as PFS insomuch as the provider does not intervene on the production equipments or stand-by equipments (technical DRP term) containing production data. This situation originates in the impossibility of the financial undertaking to outsource these functions to a provider not authorised as PFS in accordance with articles 29-2 or 29-3 of the law, as the conditions listed under point 4.5.2.1. of circular IML 96/126 could not be complied with.

- **Professionals performing services of setting up and of management of companies (article 29-4)**

This article is directed at natural and legal persons whose professional activity consists in offering services connected with the setting up and management of companies to third parties.
First of all, it must be pointed out that the application of article 29-4 requires that the activity concerned be performed in a professional capacity, which implies that it has to be performed in a recurrent manner.
Moreover, article 29-4 exclusively concerns entities which act for the account of third parties that are customers of the professional concerned. The relationship professional-customer is therefore decisive as regards the application of this article.
The services connected with the setting up of companies consist in providing, for the account of the client, any type of service necessary to set up the type of company envisaged by the latter.
As regards the services related to the management of companies, article 29-4 is directed at entities that provide administrators, directors or managers to third-party companies. These entities can act either as intermediary charged with providing representatives, or by intervening actively in the management of the client company.
However, the administrators, directors or managers that are employees of a company whose professional activity consists in providing services connected to the setting up or management of companies, are not subject to the requirements of article 29-4, as the employer company is to be considered as professional. The persons who take on a post of administrator, director or manager for their own account and irrespective of any request of a third party based on a professional-client relationship, as described above, are thus not subject to this article.

Moreover, all the professionals allowed to perform domiciliation services of companies, i.e. the domiciliation agents of companies under article 29 of the law of 5 April 1993 on the financial sector as amended, as well as notaries and the registered members of other regulated professions listed in paragraph (1) of article 1 of the law of 31 May 1999 governing the domiciliation of companies as amended, are *ipso jure* authorised to perform services of setting up and management of companies. This list also includes lawyers, external auditors (*réviseurs d'entreprises*) and chartered accountants (*experts-comptables*). These persons are thus not obliged to obtain the authorisation of the Minister having the CSSF in his remit, nor are they

subject to the prudential supervision of the CSSF. Indeed, these professionals have the required skills by virtue of their education and qualifications and are therefore subject to the supervision of the supervisory bodies of their respective professions.

3. Conditions of approval

In principle, the new PFS are subject to the same conditions of approval as traditional PFS, except for contrary specific legal provisions. However, the CSSF can adapt and adjust certain conditions, such as notably the credit requirement, according to the activity performed. Thus, the notion "credit standing" can be interpreted as acknowledgement of the experience acquired in this field as regards certain categories.

4. Wording of the authorisation of PFS

The CSSF considers that only the activities actually performed by a PFS must be mentioned in the given authorisation. The activities that the professional is *ipso jure* empowered to carry on in accordance with the law of 5 April 1993 on the financial sector as amended will therefore not be mentioned in the authorisation, unless they are actually carried on.
Where a PFS wishes at a later stage to perform one of these activities, this activity must be added to the authorisation by way of notification.
There is no objection however as to the fact that the corporate purpose of the PFS lists all the activities he can carry out *ipso jure* in accordance with the law.

5. Purpose of the prudential supervision

Within the scope of its supervisory mission, the CSSF will verify, inter alia, the technical qualification of the entity concerned allowing it to perform the envisaged activity according to the rule book. The CSSF will thus attach particular attention to the verification of the means implemented to ensure data confidentiality, such as verifying access to premises, authentication procedures of persons and protective measures and data segregation.

6. Information concerning the legal exception of the professional secrecy

Article 41(5) establishes a legal exception to the professional secrecy with regard to a financial professional (bank or PFS), in order to enable him to outsource certain tasks allowing access to confidential information concerning his clients. Even if these tasks are entrusted to subcontractors which are themselves authorised as PFS or bank, the professional who delegates the tasks must be authorised by law to transmit data concerning his clients.

In this respect, the CSSF was confronted with the following hypothesis.
A bank intends to perform subcontracting services regarding administrative tasks exclusively for its subsidiary which is itself authorised as PFS. The activity concerned is thus provided exclusively for the account of the group, so that the bank is therefore not required to obtain a ministerial authorisation as PFS.
However, the subsidiary, which is a PFS itself, is subject to the obligation of professional secrecy in accordance with article 41. The subsidiary can therefore not disclose any information on its clients to a third party, and in particular, to the subcontracting bank, unless a legal exception to the banking secrecy exists.

Such an exception has been introduced by the law of 2 August 2003. In accordance with the latter, the financial professionals subject to article 41(1) can delegate some of their activities giving access to information governed by professional secrecy within the scope of an outsourcing agreement, to third-party service providers specifically appointed by law, in compliance with the legal provisions. They are client communication agents, administrative agents of the financial sector and IT systems and communication networks operators of the financial sector (articles 29-1, 29-2 and 29-3).

As a result, the subsidiary cannot outsource the tasks regarding client communication, administrative or back-office tasks or tasks relating to the functioning of its IT system and communication networks to the parent company which is authorised as credit institution, unless the latter is authorised as client communication agent, administrative agent of the financial sector or IT systems and communication networks operator of the financial sector, respectively.

7. Multiple functions of the same entity

The PFS can hold several statuses concurrently. An entity that holds several statuses foreseen by the law of 5 April 1993 on the financial sector as amended is subject to proof of the highest capital or credit standing of the statuses concerned.

The status of universal bank allows credit institutions to perform any type of activities of the financial sector, as well as one or several connected or complementary activities, provided that they fall within the scope of its usual activity.
In particular, a credit institution can act as central administration for the account of UCIs without being subject to the requirement of a specific agreement as registrar and transfer agent.

8. Cascade outsourcing

A PFS is not allowed to outsource the core activity for which it has obtained authorisation. Nothing however prevents it from delegating a secondary activity to a third-party service provider, in compliance with the legal provisions.
For instance, a registrar and transfer agent is not allowed to delegate the keeping of the register of the unit holders or the issues and redemptions of units/shares of UCIs to credit institutions.

9. Obligations as regards the fight against money laundering

The new PFS must comply with all the professional obligations of the financial sector and in particular with the obligation to know their clients and to co-operate with the authorities.
In accordance with paragraph (5) of article 39 of the law of 5 April 1993 as amended, the financial professional is exempt from the obligation to know his clients and the beneficial owners, if the client is a credit institution or a PFS subject to an equivalent identification requirement.
As regards the outsourcing statuses (articles 29-1, 29-2 and 29-3), the clients of these new PFS categories are by definition credit institutions, PFS, UCIs or pension funds, so that the exemption from the identification requirement provided in article 39(5) is always applicable to their Luxembourg clients.
The same applies for foreign clients, which are subject to an equivalent identification requirement, which is notably the case of the financial professionals established in FATF countries.