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

Luxembourg, 4 May 1993

To all the "other professionals of the financial sector"

Circular IML 93/95

Re: Entry into force for the "other professionals of the financial sector" ("PFS") of the Law of 5 April 1993 on the financial sector

Ladies and Gentlemen,

This Circular aims at describing the major changes introduced for PFS by the Law of 5 April 1993 on the financial sector which repeals the Law of 27 November 1984 on access to and supervision of the financial sector, as amended.

The Law of 5 April 1993 shall apply to all the professionals of the financial sector (banks and other professionals of the financial sector), because it seemed preferable to rewrite the entire Law on the financial sector to maintain its consistency and transparency. The provisions of Chapter 2 are based on those introduced by the Law of 21 September 1990 with minor amendments to keep the parallelism between chapters 1 (applicable to banks) and 2 (applicable to PFS). The complete recast thus allowed harmonising the terms used in connection with all the professionals of the financial sector.

However, the Law of 5 April 1993 includes a new part II, which sets out a certain number of professional obligations to be fulfilled by all the professionals of the financial sector.

In this respect, it includes the previous legal and regulatory provisions and moreover transposes into Luxembourg law the provisions of Council Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering. The principles on the prevention of the abusive use of the financial system for criminal purposes, drawn up by the Basel Committee, the Council of Europe or the FATF, have also been taken into account.

In the same part, the Law sets out, in Article 41, the scope of application and the boundaries of professional secrecy of all the professionals of the financial sector.

The following explanations aim at presenting, in greater detail, the major amendments applicable to the other professionals of the financial sector brought by the Law of 5 April 1993.

I. AUTHORISATION REQUIREMENTS

1. Basic principles

The exercise of a financial sector activity, on a professional basis, in Luxembourg by a natural or legal person established in Luxembourg shall be subject to an authorisation by the Minister responsible for the IML (Art. 13). The same shall apply to the opening by Luxembourg PFS of agencies in Luxembourg and branches or subsidiaries abroad (Art. 15(4)).

A new provision relates to the acquisition of branches which shall henceforth also be subject to the IML's authorisation under the authorisation for qualifying holdings referred to in Article 57.

The establishment of branches in Luxembourg by PFS that are authorised and supervised by the competent authorities of another State (without making a distinction between EU and non-EU Members States) shall remain subject to ministerial authorisation. They shall comply with the same conditions as those applicable to PFS governed by Luxembourg law; these conditions being assessed with respect to the foreign institution. In particular, the provisions relating to the endowment capital shall remain in force for branches. It should also be noted that the local management shall appoint a *réviseur d'entreprises* (statutory auditor) who shall carry out the

audit of the annual accounting documents of the branch. Moreover, the professional standing and experience requirement is extended to the persons responsible for the branch. Moreover, the branch shall, instead of the condition relating to the central administration, produce evidence of an adequate administrative infrastructure in Luxembourg (Art. 35(4)).

2. Central administration and infrastructure

As has been the case under the previous legislation, the central administration of the PFS shall be located in Luxembourg. In addition, this concept shall be understood in a wide sense and broadly encompasses, in particular, the fields of infrastructure and the accounting and IT systems.

What is new is that the PFS shall produce evidence that it has a sound administrative and accounting organisation and adequate internal control procedures (Art. 17(2)).

These concepts shall be specified subsequently in a circular.

3. Shareholding (Art. 18 and 19)

With respect to the previous law, the Law of 5 April 1993 introduces as new requirement the need for a major shareholder to fulfil qualitative criteria. The competent authorities shall be satisfied that the holder of a qualifying holding does not only fulfil the conditions of good repute, but will exercise his/her powers in such a way that the sound and prudent management of the institution is ensured. Qualifying holding means holding in an undertaking, directly or indirectly, at least 10% of the capital or of the voting rights, or having any other possibility to exercise a significant influence over the management of the undertaking in which this holding is held.

Moreover, it is required that the “the structure of the direct and indirect shareholders be transparent and organised in such manner that the authorities responsible for the prudential supervision of the institution and, if appropriate of the group to which it belongs, be clearly identifiable; that this supervision can be exercised without hindrance; and that supervision on a consolidated group basis be ensured.”

The aim shall be to avoid that the PFS or groups to which they belong escape the prudential supervision because the structure of the group creates uncertainties as regards the responsible authority or because formal barriers or other exist as a result of which the supervision is impossible or ineffective.

By requiring more specifically that a supervision on a consolidated basis shall be ensured each time a PFS belongs to a group, the law prohibits in particular the authorisation of PFS belonging to a group which is structured so that it is headed by a non-supervised entity on which several PFS would depend, which, as sister institutions, would escape a supervision on a consolidated basis.

Finally, the PFS is required to inform the IML of any changes regarding the holders of a qualifying holding or permitting the exercise of a significant influence, as soon as it has knowledge thereof. It shall, moreover, send, together with the closing tables, a list indicating the identity of the shareholders with qualifying holdings in their capital and the amount of said holdings.

4. Professional good repute and experience

The substantive requirements in this respect do not change, except a new provision applicable to the supervisory body, where appropriate. Indeed, the *commissaire aux comptes* (supervisory auditor) shall now be authorised and prove his/her professional good repute.

As regards the form, it should be noticed that in case of a change affecting the persons required to meet the legal conditions of professional good repute and experience, the IML shall henceforth express its agreement explicitly. The absence of a formal agreement within 3 months shall constitute a refusal in such a way that the previous rule according to which silence shall be considered equivalent to an authorisation is repealed.

5. Capital base

The conditions relating to the minimum capital have not been amended.

6. Credit standing

Authorisation shall now be conditional on the production of evidence showing the existence of sufficient credit standing commensurate with the programme of operations (Art. 21).

This condition distinct from the requirement of sufficient capital base meets the need for a PFS to be able to count on the support of an inter-professional relationship network beyond the support of its shareholders alone, in the case notably of a temporary liquidity stress.

7. External audit

Henceforth, not only institutions managing third-party funds but also brokers and commission agents must entrust the audit of their annual accounting documents to one or more *réviseurs d'entreprises*.

Moreover, it must be stressed that the *réviseur d'entreprises* of any professional of the financial sector must prove that it has adequate professional experience and that any change in this field is henceforth subject to prior authorisation by the IML (Art. 22).

II. PRUDENTIAL SUPERVISORY MEANS

1. Relations between the IML and *réviseurs d'entreprises* (statutory auditors)

As has been the case under the previous legislation, every professional of the financial sector subject to the supervision of the IML, and whose accounts are audited by a *réviseur d'entreprises*, must communicate to the IML the reports, long form reports and written comments issued by the *réviseur d'entreprises* in the framework of its audit of the annual accounting documents. The IML may set rules regarding the scope of the audit mandate and the content of the audit report concerning the annual accounting documents. Article 54 provides that this communication to the IML must be made spontaneously.

2. Authorisation of holdings

Any qualifying holding by a PFS shall henceforth be subject to a formal authorisation of the IML (Art. 57).

3. Customer complaints

Article 58 confers power on the IML to receive complaints from clients of persons subject to its supervision and to approach those persons with a view to achieving an amicable settlement of such complaints. This Article enshrines the role of mediator which the IML has so far assumed with the agreement of the relevant parties, and this essentially in the banking area.

III. PROFESSIONAL OBLIGATIONS IN THE FINANCIAL SECTOR

Part II of the Law lists a certain number of professional obligations in the financial sector. Without going into details, which will be provided by a circular subsequently, the following points are noteworthy, although they are, in practice, nothing new.

1. Obligation to know your customer

Any PFS is obliged to require the identification of its clients by means of supporting evidence when entering into business relations (Art. 39).

2. Obligation to cooperate with the authorities

All the professionals of the financial sector are henceforth required to inform, on their own initiative, the Public Prosecutor at the *Tribunal d'arrondissement de Luxembourg* (Luxembourg District Court) of any fact that could be an indication of money laundering.

They are obliged to establish adequate procedures of internal control and communication in order to forestall and prevent operations related to money laundering (Art. 40).

IV. IMPLEMENTATION

The Law entered into force on 14 April 1993.

Yours sincerely,

INSTITUT MONETAIRE LUXEMBOURGEOIS

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