

New Luxembourg Licence Requirement for Non-EU/EEA Finance Professionals

Introduction

The Luxembourg legislator has introduced a new license requirement for banks, investment firms and other professionals which are incorporated in a non-EU/EEA country and which are not established in Luxembourg, but which come occasionally and temporarily to Luxembourg, notably to collect deposits or other repayable funds from the public and to provide any other services within the scope of the Financial Sector Law¹ in Luxembourg. The new licence requirement for non-EU/EEA professionals was introduced by a law dated 28 April 2011 that has come into force on 9 May 2011. This change in legislation should be considered by non-EU/EEA banks and other professionals of the financial sector with Luxembourg domiciled clients. The new licence requirement is further explained by the recent CSSF² Circular 11/515 dated 14 June 2011.

Which Activities or Services Are Concerned?

The scope of the Financial Sector Law encompasses a wide range of banking and other financial sector activities, such as in particular the taking of deposits or other repayable funds from the public and investment services or activities regulated on EU level by the Banking Directive³ and the MIFID⁴ (e.g. investment advice, broking) as well as generally any activity of the financial sector.

It should however be noted that certain types of activity or professionals are explicitly exempted from the scope of the Financial Sector Law. For instance, there is an exemption from the scope of the Financial Sector Law for services provided exclusively on an intra-group basis. Such exemptions may also, depending on circumstances, be relevant in the context of the new licence requirement.

What is the Trigger for the New Licence Requirement?

The new law raises the questions of the meaning of "coming to Luxembourg", the determination of when an activity within the scope of the Financial Sector Law is carried out in Luxembourg and which activities carried out in Luxembourg would be permitted without being in possession of such a licence.

The CSSF's recent Circular 11/515 clarifies that the requirement of 'coming to Luxembourg' requires that one or more agents of the non-EU/EEA entity move in person to Luxembourg. CSSF Circular 11/515 also clarifies that non-EU/EEA professionals who have clients in Luxembourg do not *ipso facto* carry out their activities on the territory of Luxembourg. Accordingly, pure cross-border activities exclusively through distance communication means (telephone, fax, email etc.) from outside Luxembourg would not trigger this new licence requirement.

Key Issues

Activities or Services Concerned

Trigger for the New Licence Requirement

Licensing Conditions and Procedure

Action Points

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¹ Law dated 5 April 1993 on the financial sector, as amended.

² The Luxembourg financial sector regulator *Commission de Surveillance du Secteur Financier*.

³ Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions.

⁴ Directive 2004/39/EC on markets in financial instruments.

The CSSF also refers to the European Commission's interpretative communication on the "Freedom to provide services and the interest of the general good in the second Banking Directive" of 20 June 1997 applying a characteristic performance test to determine the location where a service is provided. The CSSF takes hence the position that activities preceding (*en amont*) or following (*en aval*) the provision of the service within the scope of the Financial Sector Law do not trigger the new licence requirement. Accordingly, for example courtesy visits to clients, information of the public on activities of the non-EU/EEA professional, making publicity (*publicité de notoriété*), simple solicitation of clients (*simple prospection de clientèle*) or the organisation of a road show on Luxembourg territory are not a trigger for this new licence requirement, as long as the agents of the professionals do not provide the licensable service during such visits in Luxembourg or come to Luxembourg with a view to provide the licensable service here.

The CSSF concludes in its Circular 11/515 that if non-EU/EEA professionals limit themselves in Luxembourg to providing general information on their activities and if the potential Luxembourg clients then have to approach them in their country of origin to enter into a contract with them, a licence is not required under this new licence requirement.

How to Obtain the New Licence?

The new licence for non-EU/EEA professionals is delivered by the Luxembourg Minister of Finance, upon advice by the CSSF. The granting of the licence is subject to the condition that the relevant non-EU/EEA professional is in its country of origin subject to licensing and supervision rules equivalent to the Financial Sector Law rules.

The CSSF has clarified that these non-Luxembourg rules need to be equivalent to the Luxembourg rules notably in the following areas: the requirement to hold a licence delivered by a public authority, the professional honorability of the managers, the internal organisation (organisational requirements; existence of human and technical resources; setting-up systems, resources and internal procedures), the existence of conduct of business rules as well as

requirements concerning own funds and participation in a deposit guarantee system.

The CSSF has further clarified that credit institutions whose country of origin is represented in the Basel Committee on Banking Supervision (including, amongst others, Argentina, Australia, Brazil, Canada, China, Hong Kong SAR, India, Indonesia, Japan, Korea, Mexico, Russia, Saudi Arabia, Singapore, South Africa, Switzerland, Turkey and the United States) are presumed to be subject to equivalent licensing and supervision rules and hence to fulfil the licence condition. The CSSF may request from other credit institutions or other persons exercising an activity of the financial sector to provide the CSSF with an independent legal opinion on the equivalence of the country of origin licensing and supervision rules with those under the Financial Sector Law.

The CSSF asks non-EU/EEA professionals, before filing a licence request with the Luxembourg Minister of Finance, to contact the CSSF and to submit a file containing at least a detailed description of the activities exercised in the country of origin and those envisaged or exercised in Luxembourg, as well as any other useful information and supporting evidence. The CSSF will then assess whether the activities come within the scope of the new licence requirement and whether the conditions to obtain the licence are met.

The CSSF draws the attention of non-EU/EEA professionals concerned by the new licence requirement to the fact that they will have to comply with certain Luxembourg rules of territorial application, such as for example the Luxembourg legislation on the fight against money laundering and terrorism financing or consumer protection rules.

Action Points

In light of the legislative change and recent CSSF guidance on the application of the new licence requirement, non-EU/EEA professionals active in the financial sector who do not have a branch in Luxembourg should assess their activities carried out during visits to Luxembourg and, if necessary, adapt their internal compliance guidelines and procedures. If required, they should apply for a licence with the CSSF.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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