

CSSF: Clarification of Luxembourg third country regime for investment services

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The Luxembourg Financial Sector Supervisory Authority (the CSSF) issued a regulation and a circular on 1 July 2020 to establish additional clarifications for third country firms providing or aiming to provide investment services in Luxembourg.

Circular 20/743

The CSSF circular 20/743 amends the circular CSSF 19/716 on the provision in Luxembourg of investment services or performance of ancillary services in accordance with Article 32-1 of the Law on the financial sector (the LFS). The purpose of this modification is to include details concerning the location of the services provided, under the principle of territoriality.

Article 32-1 of the LFS establishes specific regimes for third country firms based on whether investment and ancillary services are provided to retail clients, professional clients (*per se* and upon request) or eligible counterparts in Luxembourg, and its application depends on the interpretation of the concept of Luxembourg territory. The CSSF has taken the stand that investment services are deemed to be provided in Luxembourg when one of the following conditions are met:

- the third country firm has an establishment in Luxembourg (eg, a branch);
- the third country firm provides an investment service to a retail client established or located in Luxembourg; or
- the place where the "characteristic performance" of the service is made, that is to say the essential performance for which payment is due, is Luxembourg.

Following the above conditions, the CSSF highlighted that special situations exist in which, although the third country firm provides an investment service to a client established or located in Luxembourg, the service can be regarded as not being supplied in Luxembourg.

In that regard, the CSSF took the opportunity to define the notion of “reverse solicitation” as “the fact a client established or located in Luxembourg triggers on its own initiative the provision of an investment service or the exercise of an investment activity by a company from third countries”. Should the investment service be provided on the basis of reverse solicitation, it would not be viewed as provided in Luxembourg and the requirements for third country firms to establish a branch or apply for authorisation in Luxembourg under article 32-1 would not apply, regardless of the type of client.

It is the responsibility of the firm to carry out the above analysis, on a case-by-case basis before providing each service, and to document and retain the analysis performed.

Regulation No 20-02

Pursuant to Article 32-1 of the LFS, third country firms may perform investment activities or services as well as ancillary services to professional clients and eligible counterparties in Luxembourg on a cross-border basis, with or without establishing a branch provided that, *inter alia*, in their home country they are subject to supervision and approval rules that the CSSF considers equivalent to those laid down by the LFS.

The CSSF Regulation No 20-02 on the equivalence of certain third countries with respect to supervision and authorisation rules for the purpose of providing investment services or performing investment activities and ancillary services by third country firms lists countries that the CSSF shall consider as applying equivalent rules to firms having their central administration or registered office in Luxembourg.

The list features Canada, Switzerland, USA, Japan, Hong Kong and Singapore.

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Meet the Author



Anne-Gaëlle Delabye

Partner

Luxembourg Legal Services

E: anne-gaelle.delabye@ogier.com

T: [+352 2712 2039](tel:+35227122039)

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