

LUXEMBOURG – Full Answers

1. Provision of banking services by a foreign bank, without a local licence, on cross border basis

1.1 To what extent can a foreign bank (which is not locally authorised) provide the services listed in 1.3 (on a cross border basis) to local retail customers, commercial clients and wholesale counterparties?

A foreign bank can provide certain services in Luxembourg without a license in accordance with article 32 (5) of the Law of 5 April 1993 on the financial sector (the Law of 5 April 1993).

The provisions of the article 32 (5) are further explained in the CSSF Circular 11/515.

A foreign bank needs a license only if the following 4 (four) conditions are cumulatively fulfilled:

- the entity originates from a third country, i.e. non-EU/EEA member state;
- the entity does not have an establishment in Luxembourg
- the entity performs an activity of bank or professional of the financial sector (PSF) in their home country; and
- the entity has agents travelling occasionally and temporarily to Luxembourg, to provide services covered by the Law of 5 April 1993.

As a consequence, allegedly the provision of certain banking-related services by distance means - e.g. telephone, letter, email, chat on Bloomberg/Reuters, and personal approach at expert meetings/congresses – to clients in Luxembourg does not require a banking license.

In assessing whether or not there is the need to obtain a license, the CSSF will also take into consideration the criteria of “characteristic performance”. Carrying out services or undertaking obligations which cannot be considered “characteristic” to the contract, upstream or downstream from the activities referred to in article 32 (5) does not require a license. These services include: publicity prior to rendering banking services, temporary visits to Luxembourg in order to conclude contracts prior to the exercise of banking activity, courtesy visits to Luxembourg clients, organization of road shows in Luxembourg.

The law does not make a difference in terms of type of clients. Therefore, as long as the 4 (four) conditions above are not met cumulatively and the services are not considered “characteristic”, a foreign bank can provide in the same manner the respective services without a license to any customers, commercial clients and wholesale counterparties.

1.2 Where local authorisation or licensing is required, are there any useful exemptions?

In terms of exceptions to the need of a banking license, the Law of 5 April 1993, contains an exemption for a foreign bank providing banking services in Luxembourg exclusively to one or more undertakings forming part of the same group as the foreign bank providing the service (art.1-1 (2) c) of the Law of 5 April 1993).

1.3 To what extent can a foreign bank (which is not locally authorised) promote the services below locally? Where there are restrictions on promotion, are there any useful exemptions?

- **Deposit taking and payment services/provision of bank accounts;**
- **Lending (either secured, e.g. on land/real estate, or unsecured) and other forms of finance such as trade finance;**
- **Originating/purchasing/selling debt participations (secured or unsecured), such as syndicated loans or securitised debt obligations.**

A foreign bank (which is not locally authorised) can conduct any type of promotion activity in Luxembourg, including the ones listed above, without the need to obtain an authorization due to the fact that these services are considered preparatory acts to carrying out any banking activity.

The promotion activities can be conducted through: (i) distance means or (ii) local agents travelling to Luxembourg.

In spite the fact that directing banking services to Luxembourg through promotion means does not need require a license, as soon as the provision of banking service through agents travelling to Luxembourg or through other means is being started a banking license is required.

1.4 Can a foreign bank establish a local representative office to promote such services where these are to be conducted by the bank on a cross border basis (and not by the local office)?

A foreign bank might open an information office (“bureau d’information”) in Luxembourg provided that the activity carried out is not in any circumstances commercial. The supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF) prefers using the term information office rather than representative office in order to avoid implying the capacity to conduct commercial transactions.

The information office is supervised by the CSSF and shall have to draft an annual activity report to the CSSF.

Before opening an information office, the foreign bank has to undergo an administrative procedure with the CSSF. During this administrative procedure the regulator will assess the activities to be performed by the information office, which cannot be in any circumstances any banking activity.

2. Provision of investment services from home country without a local license

2.1 To what extent can a foreign bank or investment firm (which is not locally authorised) provide the services below to local retail customers, commercial clients and wholesale counterparties? Are there any useful exemptions?

Dealing in/buying/selling investments (as principal or as agent), investment advice and discretionary portfolio management are services covered by Annex II of the Law of 5 April 1993.

A foreign bank or investment firm (which is not locally authorized) can provide these services in Luxembourg under the same conditions presented in article 32 (5) above.

A foreign bank or an investment firm (which is not locally authorised) can conduct any type of promotion activity in Luxembourg without the need to obtain an authorization due to the fact that these services are considered preparatory acts to the financial and investment activity.

2.2 To what extent can a foreign bank or investment firm (which is not locally authorised) promote the services below locally? Are there any useful exemptions?

- **Dealing in/buying/selling investments (as principal or as agent)**
- **Investment advice**
- **Discretionary management**

See previous answer.

3. Local rules

3.1 When a foreign bank/investment firm enters into an agreement with a local customer, are there any restrictions on the contract being governed by foreign law and the courts of the foreign country having exclusive jurisdiction (i.e. is the contract required to be governed by local law and/or must the local courts have jurisdiction)?

In case of investment services and ancillary services, a contract concluded between an foreign bank/investment firm and a consumer, the applicable law is the law of the country in which the consumer has his/her habitual residence provided that: (a) the professional pursues his professional activity in the country where the consumer has his habitual residence (b) the professional directs such activities to the country of the consumer; and (c) the contract falls within the scope of the activities. (article 6.1 and recital (26) of Regulation 593/2008 'Rome I Regulation').

Regarding contracts concluded between two professionals the applicable law can be freely chosen by the parties (principle of freedom to contract – article 1101 Luxembourg civil code). In the absence of choice in an international contract, the applicable law is the law of the country where the contract was concluded.

In conclusion, in case of a consumer contracts, in which a “weaker party” is present, the applicable law is Luxembourg law, while for peer-to-peer contracts the governing law can be freely chosen by the parties.

There is no exclusive jurisdiction clause as regards to the agreement between a foreign bank/ investment bank.

The general principle, concerning legal proceedings is that they can be started at the seat or habitual residence of the defendant, as set out in Regulation 44/2001 'Regulation Brussels I'. In case of a consumer contract, the latter may bring proceedings against the other party to the contract either in the courts of the member state in which that party is domiciled or in the courts for the place where the consumer is domiciled.

4. Regulatory appetite for foreign banks

4.1 What is the attitude of your national regulatory authority to cross border business and the presence of foreign banks?

Luxembourg is known as a preferred hub for foreign banks in establishing branches and subsidiaries with the aim of reaching EU clients. The reasons for coming to Luxembourg are numerous: favourable regulatory

framework, political stability, a multi-lingual workforce, and the agglomeration of specialized skills in accounting and legal services.

In December 2013 more than 20 % out of the total 148 credit institutions come from non-EU countries.

Cross-border services of non-EU banks are conducted through setting up of a branch or subsidiary in Luxembourg. The possibility to provide services without an establishments (freedom to provide services) is not available to non-EU banks.

Subsidiaries or branches need to obtain a banking license from the Ministry of Finance, which takes a decision based on the advice of the CSSF.

Generally, it can be observed a tendency to open more subsidiaries in Luxembourg (75 %) rather than branches (25 %). There were 9 branches of non-EU banks last December 2013 in Luxembourg, representing 23 % of the total number of branches.

It can be observed that branches are largely used for interbank lending and became recently have become specialized in interbank deposits, while subsidiaries are focused on all the rest of the activities.

In terms of customer loans there is no clear divergence/convergence between branches and subsidiaries, while for customer deposits it seems that subsidiaries have developed a specialization.

4.2 Is it generally more common for foreign banks to operate locally through a branch or a subsidiary, or both (and does this depend on the activities the bank carries out)?

See previous question.

4.3 Is it mandatory, in any situation, to operate through a branch or subsidiary?

See question 4.1

4.4 What are the benefits/disadvantages of operating through a branch or subsidiary?

See question 4.1

5. Establishing a branch

5.1 Does a branch have rights/recognition to trade in other countries

The Luxembourg branch of a non-EU bank does not have recognition or cannot provide services in other EU countries (article 34 of the Law of 5 April 1993)

In order to legally operate in Luxembourg through the branch of a non-EU Bank head-office, the non-EU bank has to file a dossier for obtaining a banking license in accordance with article 3 of the Law of 5 April 1993.

The information to be provided to the CSSF (in accordance with the Circular CSSF 09/392) are the following:

- Presentation of the applicant with audited financial statements for the last 3 years
- Rationale for establishing in Luxembourg together with a list of proposed activities
- Details on the shareholders and beneficial owners
- Description of the administrative and accounting structure
- Three years business plan
- Draft articles of incorporation\

- Curriculum vitae and declaration of honor of the members of the board
- Identification of the external auditor

5.2 How is a branch regulated?

See previous question.

6. Establishing a subsidiary

A subsidiary of a non-EU bank has to apply for a banking licence in Luxembourg.

The requirements at point 6 above apply.

7. Supervision

7.1 Which national regulatory authority authorises, regulates and supervises foreign banks/investment firms/subsidiaries in your jurisdiction?

CSSF is the supervisory authority for foreign banks/investment firms/subsidiaries.

7.2 Is there any split in supervision between the local regulator and the foreign/home regulator – e.g. in the case of locally authorised branch?

Exchange of information between the CSSF and the local foreign regulator can occur.

8. Individuals

8.1 Where a local branch or subsidiary is established and (if applicable) authorised, are individuals personally regulated and/or liable to fines?

Directors of the subsidiary have to be approved by the CSSF and have to be in the possession of good repute (proved by extract from criminal records or affidavit). In case of breach of company law or articles of incorporation, directors can be criminally liable and may incur fines and prison punishments (article 163, to article 166, article 167, article 169, article 171-1 of the law of 10 August 1915).

The provisions apply equally to resident or non-resident directors and even to “shadow directors”.

8.2 Does this extend to individuals overseas/in the home country?

[No answer]

8.3 Which officers and employees are subject to local vetting, and are the owners/controllers subject to local vetting?

[No answer]

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