



Outsourcing arrangements – Overview of prior CSSF approval or notification requirements following the 2022 legislative developments

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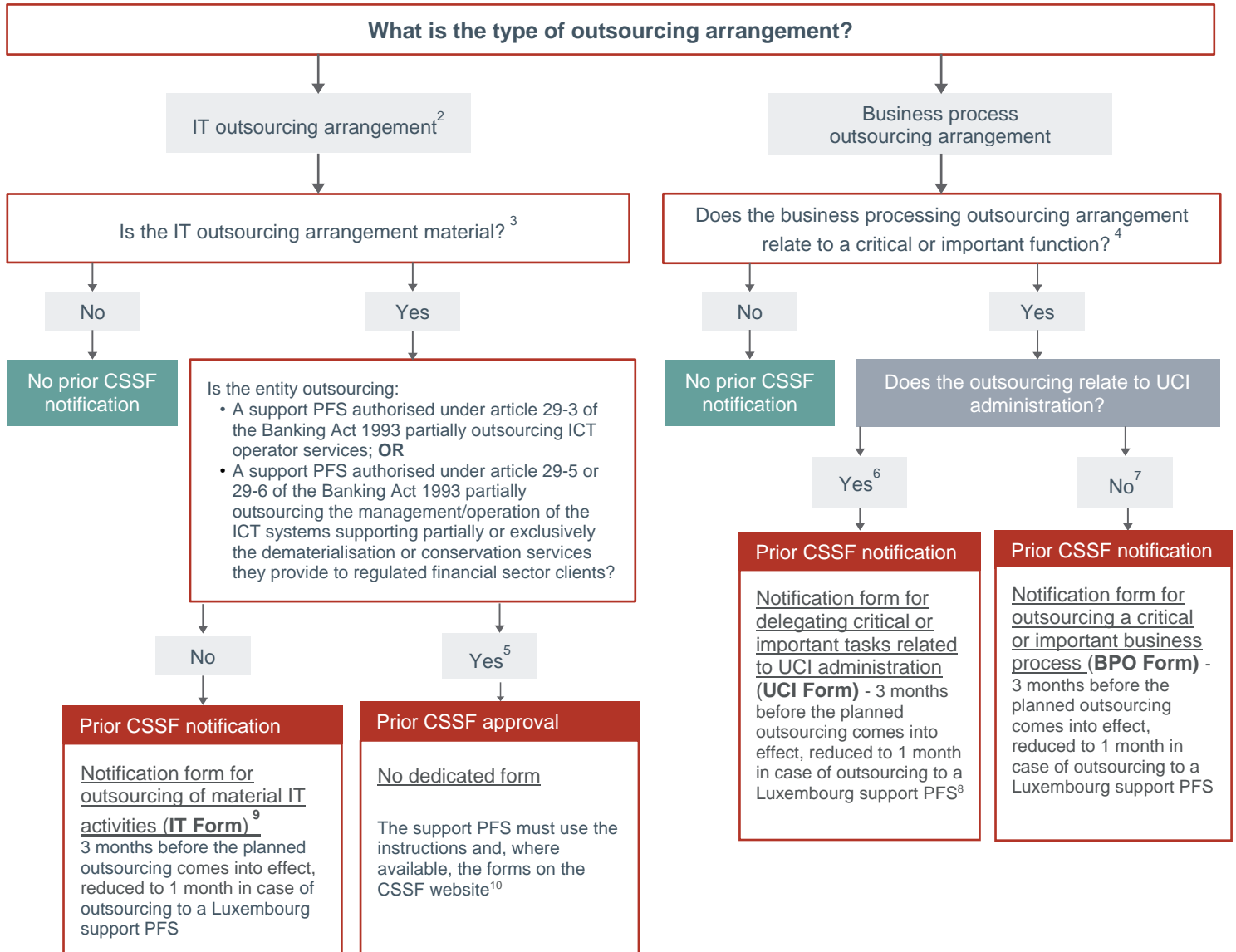
Introduction

Following the publication of various new or revised CSSF Circulars, CSSF FAQs and CSSF notification forms in the course of 2022, we have summarised below the key questions to address in order for a Luxembourg regulated actor of the financial sector¹ to determine whether it must obtain CSSF prior approval in respect of or notify in advance any of the following activities to the CSSF:

- planned, new material/critical or important outsourcing arrangements;
- material changes to existing material/critical or important outsourcing arrangements; or
- changes to outsourcing arrangements that lead to an outsourced function becoming material/critical or important.

This note also provides summary indications on the notification forms to be used and the notification deadlines to be complied with.

Key questions to assess CSSF prior approval or notification requirements



Comments

¹ This note covers the requirements applicable to credit institutions and professionals of the financial sector (**PFS**) within the meaning of the act of 5 April 1993 on the financial sector, as amended (the **Banking Act 1993**), payment institutions and electronic money institutions within the meaning of the act of 10 November 2009 on payment services, as amended (the **PSA 2009**). In relation to IT outsourcing, it also applies to, investment fund managers subject to CSSF Circular 18/698 and in relation to UCI administration outsourcing, to UCITS management companies, authorised AIFMs, Luxembourg regulated UCIs acting as UCI administrator for themselves and foreign investment fund managers authorised to act as UCI administrator of Luxembourg UCIs and in relation to investment fund managers subject to CSSF Circular 18/698 and UCITS which designate a UCITS management companies.

² IT outsourcing means an arrangement of any form between the institution and a service provider (including of the same group) by which that service provider performs an IT process, an IT service or an IT activity that would otherwise be undertaken by the institution itself (CSSF FAQ).

³ A material activity is any activity that, when it is not carried out in accordance with the rules, reduces the institution's ability to meet the regulatory requirements or to continue its operations as well as any activity necessary for sound and prudent risk management shall be deemed to be "material" (CSSF FAQ). Assessment of (non) materiality should be formalised.

⁴ Critical or important function means any function that is considered critical or important as set out in points 18 to 20 of CSSF Circular 22/806. The concept of critical or important function is also defined under article 30 of the MiFID II delegated regulation. Articles 11 (4) and 24-7 (4) of the act of the PSA 2009 refer to the concept of important operational functions. Assessment of (non) criticality or importance should be formalised.

⁵ For outsourcing by support PFS within the Banking Act 1993, prior CSSF approval may be required under certain circumstances as set out in points 123 to 132 of CSSF Circular 22/806.

⁶ For these specific tasks, the actors in scope of the notification requirement include:

- a. PFS authorised to provide transfer agency, administrative or client communication services or credit institutions with an additional UCI administrator licence; and
- b. UCITS management companies, authorised AIFMs, Luxembourg-regulated UCIs acting as UCI administrator for themselves and foreign investment fund managers authorised to act as UCI administrator of Luxembourg UCIs (together **IFMs**).

The entities listed under a. above must complete the UCI Form in full in case of delegation of critical or important UCI administration operational tasks. On the contrary, IFMs do not need to complete all the fields in the notification form. In particular, IFMs do not need to answer questions 4.5 to 4.9 (risks listed under CSSF Circular 22/806 and their risk assessment), nor questions 6.5 and 6.6 (compliance of the delegation agreement with certain security requirements and the persons to which an unrestricted right to inspect, audit and obtain information from, the delegate has been granted in the delegation agreement), nor section 10 (exit plan and termination rights). IFMs must nonetheless comply with relevant requirements under CSSF Circular 18/698, which include *inter alia* mandatory provisions in the delegation agreement, implementing a specific delegation framework and initial and ongoing due diligence requirements.

Both for the entities listed under a. above and those listed under b. above, question 11 should be filled out only in case of outsourced AML/CFT related functions.

In case of an hybrid outsourcing (ie an outsourcing of a business process with an IT component where the main purpose is the delegation of a business process), only the UCI Form should be filled out.

⁷ In case of an hybrid outsourcing, only the BPO Form should be filled out.

⁸ Notwithstanding the reference in the UCI Form (footnote 1 therein) to support PFS within the meaning of articles 29-1 to 29-6 of the Banking Act 1993, tasks related to UCI administration can only be outsourced to a PFS categorised as a client communication agent or an administrative agent in light of paragraph 100 of CSSF Circular 22/811.

⁹ In case of ICT outsourcing, IFMs must comply with the requirements of part I (to the extent relevant) and part II of CSSF Circular 22/806 together with the relevant requirements of CSSF Circular 18/698. The articulation between the various requirements is clarified in the CSSF FAQ.

¹⁰ The information contained in the IT Form could, in our view, serve as a basis to prepare the authorisation request.

For further information on the topic, please reach out to your usual A&O contact, or any of the below relevant contacts.



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