Considerations relating to the Belgian law of 8 July 2018 creating a “Central Contact Point” (“CCP”) as amended (“CCP Law”)

April 2022 - Updated version

Association des Banques et Banquiers, Luxembourg
The Luxembourg Bankers' Association
Luxemburger Bankenvereinigung

Purpose and scope

The purpose of the present guidance is to provide ABBL members with clarifications concerning the scope of application of the CCP Law with respect to credit institutions established in Luxembourg, while putting such provisions into perspective with the obligation of professional secrecy to which these credit institutions are bound according to Luxembourg law. The resulting recommendations reflect the findings at the level of the ABBL's Legal Affairs Committee and are based, regarding elements of interpretation under Belgian law, on a memorandum provided by the firm Lallemand Legros & Joyn (Brussels), a copy of which is attached hereto (the "Memorandum").

The present guidance, which was compiled at the request of several members, cannot be construed as an endorsement by the ABBL of the obligations imposed under Belgian law on credit institutions established in Luxembourg. It is the individual responsibility of each member concerned to carry out its own analysis and to take its own decisions accordingly.

Although the ABBL has taken reasonable precautions to ensure that the information contained herein is complete and correct, this note does not constitute legal advice and neither the ABBL nor any of its contributing members can be held responsible for any errors or omissions. In case of doubt, the concerned institutions are invited to seek the advice of a competent professional.

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1 Context and ABBL position

The CCP Law requires credit institutions, payment or electronic money institutions, listed companies and insurance companies to report periodically to the Central Contact Point ("CCP") at the National Bank of Belgium the balance of bank and payment accounts as well as the aggregated amounts of certain financial contracts. The purpose of this system is to facilitate the task of the Belgian tax administration in the context of its tax collection and recovery missions by allowing it to identify the financial institutions (Belgian or foreign) with which the taxpayer holds accounts or with which it has entered into contracts.

Under these provisions, credit institutions established outside Belgium are required to provide the CCP with certain information relating to financial contracts concluded in Belgium with their customers. These contracts are irrefutably deemed to be concluded in Belgium when such contracts are concluded remotely by a Luxembourg bank by way of freedom of services in Belgium with a client having its registered office, domicile or habitual residence in Belgium. The first communication of information to the CCP by the concerned foreign banks should have been made by 31 January 2022 at the latest.

Considering the very short deadline and the legal uncertainties that have been identified under both Belgian and Luxembourg law, the ABBL has requested, in the name and on behalf of its members, an extension of the deadline for the submission of first reports to the National Bank of Belgium. By return of letter dated 18 February 2022, the National Bank of Belgium indicated that it was not competent to grant such an extension. The ABBL remains of the opinion that the timeframe foreseen for the initial reporting obligations under the CCP Law did not allow foreign institutions to comply within a realistic timeframe with the obligations imposed on them under Belgian law. In this respect, the ABBL would like to stress that it was only informally that its members were informed of the existence of this legislation, no prior notification having reportedly been made to the Luxembourg supervisory authority. Secondly, the irrefutable presumption according to which contracts concluded at a distance are deemed to have been concluded in Belgium was only introduced by the law of 2 December 2021 which entered into force only on 24 December 2021, i.e. barely a month before the first reporting deadline on 31 January 2022.

While the ABBL and its members are fully committed to the fight against money laundering and tax evasion, we shall stress that most of the information required from credit institutions established in another Member State of the European Union is already made available to competent Belgian authorities on a periodic basis within the framework of the European directive on administrative cooperation in the field of taxation.

The ABBL further notes that the scheme under review is a source of legal uncertainty for banks established in Luxembourg considering banking confidentiality rules under Luxembourg law coupled with various open points of interpretation identified by members regarding the personal and material

scope of application of the scheme at hand. Finally, the scheme at hand has been identified as a source of significant operational constraints for credit institutions outside Belgium and may thus potentially result in barriers to the free provision of services. Its compatibility with EU law may therefore, to our view, be questioned.

2 Articulation with banking confidentiality rules

The obligation to communicate information to the CCP according to the CCP Law conflicts with the obligation of professional secrecy to which Luxembourg banks[1] are subject and which is lifted only in a certain number of cases limitatively listed, in particular when the disclosure of information is authorized or imposed by or under a Luxembourg legislative provision. In the case hand, the CCP Law is not a Luxembourg legislative provision since it has neither been ratified nor transposed by Luxembourg. As a result, the CCP law cannot constitute a proper legal basis to waive professional secrecy and to allow Luxembourg banks to report personal information to the CCP[2].

In view of this background, and in the absence of directions to the contrary issued by the *Commission de Surveillance du Secteur Financier*, it is therefore important for the banks concerned to obtain the client's consent to the disclosure of relevant information to the CCP. The obtention of such consent would indeed address the risk of breach of professional secrecy in case of reporting of personal information to the CCP under Belgian law.

Recommendation 1: Obtain client consent to provide information to the CCP under the CCP law

3 Criteria for determining whether a bank is active in Belgium by way of free provision of services

The question of whether and how a credit institution is active in Belgium by way of free provision of services is instrumental for determining whether the said credit institution is bound to reporting obligations under CCP law.

[1] Art. 41 of the law of 5 April 1993 on the financial sector as amended

[2] The publication of the Belgian law under review in the Memorial (Mem. A34 of 29 January 2020) by the Ministerial Regulation of 24 January 2020 amending the Ministerial Regulation of 4 October 1977 concerning the coordination of general provisions relating to customs and excise does not, to our view, alter this conclusion. Indeed, subsequent amendments to the Belgian law at hand, from which the reporting obligations are derived, have not been published in the Memorial. Moreover, it appears that the publication of the initial version of the Belgian law under review solely relates to customs and excise matters within the framework of the Belgium-Luxembourg Economic Union.

The ABBL appointed the law firm Lallemand Legros & Joyn (Brussels) to clarify under Belgian law relevant criteria for determining whether a credit institution is active under the freedom of services in Belgium (and therefore falls within the scope of the CCP Law) and, to the extent applicable, the scope of the reportable information to the CCP.

Based on the Memorandum, the table below summarizes a number of cases where the CCP Law may or may not apply.

Financial contract whose elements are physically («face-to-face») negotiated in Luxembourg, and which is physically («face-to-face») concluded in Luxembourg.	CCP Law **not** applicable
A financial contract whose elements are negotiated and/or which is concluded physically («face-to-face») in Belgium.	CCP Law applicable
Financial contract negotiated at a distance and concluded physically («face-to-face ») in Luxembourg, even if there was active FPS (canvassing and/or website directed to Belgium).	CCP Law **not** applicable
Financial contract physically negotiated («face-to-face ») in Luxembourg and concluded at a distance, via «reverse solicitation» (passive FPS, i.e. no canvassing or website directed to Belgium).	CCP Law **not** applicable
Financial contract negotiated at a distance and concluded at a distance via «reverse solicitation» (FPS passive, i.e. no canvassing or website directed towards Belgium).	CCP Law **not** applicable
Financial contract negotiated at a distance and concluded at a distance via active FPS (canvassing or website directed to Belgium).	**CCP Law applicable** - possibility to demonstrate that the customer took the initiative is not allowed.

Recommendation 2: Determine whether the bank is bound to reporting obligations under the CCP law by assessing whether and how the bank is active in Belgium by way of free provision of services

For further details: §2.2 et §2.3 of the Memorandum

4 Information to be reported to the CCP

The table below summarizes the scope of the reportable information under the CCP by foreign entities bound to reporting obligations under the CCP law. This summary is based on legal advice received by the ABBL under Belgian law and focuses on financial contracts, bearing in mind that bank or payment accounts maintained by foreign entities are in principle not reportable except in case of branches located in Belgium.

Financial contracts (Article 4 §1 3° CCP Law)	
1. Renting of safes (Article 4 §1, 3° a))	**CCP Law applicable**
2. All credits in any form, including unauthorised overdraft facilities, which are granted to natural or legal persons (Articles 4 §1, 3° d), g), h) i))	**CCP Law applicable**
3. The contract relating to investment and/or related services that relate to the activities listed in Article 1 §3, paragraph 2 of the Law of 25 April 2014 («The Banking Law») (Article 4 §1, 3° c))	
3.1. So-called «principal» investment services (Article 1§3, paragraph 2, of the Banking Law): 3.1.1. underwriting financial instruments and/or placing financial instruments on a firm commitment basis; 3.1.2. the placement of financial instruments without firm commitment; 3.1.3. the operation of a multilateral trading facility; or the operation of an organised trading facility	 **CCP Law applicable** **CCP Law applicable** **CCP Law applicable**
3.2. So-called "ancillary" investment services: 3.2.1. custody and administration of financial instruments on behalf of clients, including custodial and related services, (Article 4 §1, 3° c); • only the contract for opening securities accounts • not RTO, discretionary management, or investment advice contracts 3.2.2. cash accounts pending allocation to the acquisition of financial instruments or	 **CCP Law applicable** CCP Law **not** applicable

restitution (e.g. dividends or sale of securities) (Articles 4 §1, 3° c) CCP Law and 533, § 1 Banking Law).	
• cash accounts which are exclusively linked to securities accounts	CCP Law in principle applicable (to be confirmed)
• cash accounts that are not exclusively allocated to securities accounts	CCP Law **not** applicable
3.2.3. the granting of credit or a loan to an investor to enable him or her to carry out a transaction in one or more financial instruments, in which the firm granting the credit or loan is involved;	**CCP Law applicable**
3.2.4. foreign exchange services where such services are related to the provision of investment services or services related to underwriting	Targeted by the CCP Law but this seems inconsistent to us.

Scope of application in time

Regarding the scope of application in time of the CCP Law, it shall be noted that the CCP Law applies to all current and future contracts, regardless of their date of conclusion.

Clarification about clients concerned - NEW

The CCP Law defines the "Client" as being any natural or legal person (article 2 §1, 11°) while article 4 §1 3° relating to financial contracts refers to the Client who has concluded a financial contract with the person liable some information. Some of the financial contracts listed in Article 4 §1 3° specifically target contracts concluded with consumers (consumer loans, even if loans concluded with non-consumer customers are also then covered), but Article 4 §1 3° c) relating to investment services targets clients in general and not only consumer clients. Similarly, Article 2§1 10° relating to the definition and scope of financial contracts targets the Client, generally defined as including consumer and non-consumer clients.

Recommendation 3: Determine the information reportable to the CCP based on an assessment of relevant products and services offered to Belgian clients

For further details: §3.1 et §3.2 et part IV of the Memorandum

Annexes :

- Memorandum of 25 March 2022 of law firm Lallemand Legros & Join, CCP Law – Obligations for foreign banks;
- ABBL Letter to the National Bank of Belgium dated 31 January 2022 (in French);
- Letter from the National Bank of Belgium to the ABBL dated 18 February 2022 (in French).

Lallemand Legros & Joyn

MEMORANDUM

Date	**25 March 2022**
To	**Luxembourg Bankers' Association (ABBL) / Mr Seillès & Mr Hug**
From	**LLJ - Finance & Tax / Christophe Steyaert & Antoine Dayez**
Subject	**CCP Law - Obligations of foreign banks**

Dear Sirs,

We are following up on our various discussions regarding your request for an interpretation of the CCP Law.

I. CONTEXT

1. The Belgian law of 8 July 2018 creating a "Central Contact Point" ("**CCP**"), as amended by the laws of 20 December 2020, 27 June 2021 and 2 December 2021 (hereinafter the "**CCP Law**"), requires credit institutions, payment or electronic money institutions, listed companies and insurance companies to periodically communicate to the CCP the balance of bank and payment accounts as well as the aggregate amounts of certain financial contracts[1] .

The Luxembourg Banker's Association (hereinafter "**ABBL**") wishes to obtain guidance on the implementation of the CCP Law by Luxembourg credit institutions.

It follows from the territorial scope of application of the law that foreign credit institutions may be subject to the obligation to disclose the aggregate amounts of certain financial contracts "concluded at a distance"[2] .

More specifically, the ABBL would like clarification on the following three points:

[1] Law of 8 July 2018 organising a central contact point for financial accounts and contracts and extending access to the central file of notices of seizure, delegation, assignment, collective debt settlement and protest.

[2] The obligation to disclose the aggregate amounts of financial contracts as at 31 January 2022 was added by the Law of 20 December 2020 (foreign credit institutions are in principle not affected by the obligation relating to bank and payment accounts, see below, point III); this Law is the subject of an annulment appeal currently pending before the Constitutional Court. The appeal appears to be based mainly on grounds relating to the invasion of privacy. Case no. 7612, filed on 30 June 2021 (see M.B. 30 August 2021). The Court's decision is expected towards the end of 2022.

- with regard to financial contracts[3] concluded at a distance, clarification is requested on how to distinguish (1) those that are "*concluded with a party responsible for providing information established abroad and active in Belgium under the freedom to provide services"* ("**FPS**") and that are subject to the CCP Law, (2) from those that are concluded with a party responsible for providing information established abroad who is not active in Belgium under the FPS and that are therefore not subject to the CCP Law.

  This question applies more specifically to the Belgian co-contractors of these financial contracts concluded by your members.

- on how to define the concepts of "bank and payment account" and "financial contract" under the CCP Law;

- on the application of the CCP Law to current financial contracts;

II. FINANCIAL CONTRACTS CONCLUDED AT A DISTANCE AND THE NOTION OF ACTIVE FPS IN BELGIUM

2. The CCP Law does not define the concept of a distance contract.

The Financial Services and Markets Authority ("**FSMA**"), using the definition of distance consumer financial contracts in the Economic Law Code ("ELC")[4], defines a distance contract as one that "*is characterised by the absence at any time of the simultaneous physical presence of the financial undertaking and the consumer up to and including the conclusion of the contract. The entire distribution process (negotiation, offer and conclusion of the contract) involves exclusively one or more remote communication techniques, such as the Internet, e-mail, telephone, SMS, fax, post, etc.*[5]*"*

According to FSMA, "*For example, there is no question of an 'organised system' of distance selling or service provision if a company only occasionally concludes contracts by telephone or e-mail as a result of sporadic contacts from its customers*.[6]"

[3] Related to investment services.
[4] Article I.8, 15° ELC.
[5] FSMA, Covid-19 crisis: distance contracts for investment services and insurance distribution (12 May 2020), page 3.
[6] FSMA, Covid-19 crisis: distance contracts for investment services and insurance distribution (12 May 2020) footnote 11 and footnote 12 which refers to recital 18 of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services: *"By covering a service-provision scheme organised by the financial services provider, this Directive aims to exclude from its scope services provided on a strictly occasional basis and outside a commercial structure dedicated to the conclusion of distance contracts".*

This restrictive definition given by the FSMA is specific to the regulation of financial contracts concluded at a distance with consumers. It is logical in the context of this consumer protection regulation.

We will examine the extent to which this definition is compatible with the concept of distance contract under the CCP Law and in particular whether it should not be given a different scope with regard to the reference to the concept of active FPS.

3. In this respect, although your request is more specifically aimed at distance contracts, it is in fact more broadly concerned with determining the scope of application of the CCP Law to foreign credit institutions with regard to «financial contracts».

2.1 Analysis of the CCP Law

4. Before being amended by the laws of 20 December 2020, 27 June 2021 and 2 December 2021, the law of 8 July 2018 defined financial contracts as (see Article 2, 10°):

"any contract referred to in Article 4, 3°, concluded in Belgium by a party responsible for providing information and of which his client is the principal contractor or co-contractor."

Even then, the question arose as to what was meant by «concluded in Belgium». In its information note (version of 25 March 2020), the CCP already gave an extensive interpretation of this notion. It states that it should be understood that a financial contract is concluded in Belgium:

- when it is concluded **physically** («in person») on Belgian territory.

  This excludes, a priori, contracts physically concluded abroad from its scope of application.

  However, the information note specifies that a contract is deemed to have been concluded in Belgium if both parties being physically in Belgium agreed on the substantial elements of the contract (subject matter, price, etc.), irrespective of whether the contract is subsequently signed abroad in person **or** at a distance.

  As a result of this position, if the contract was physically concluded or negotiated in Belgium, even following a solicitation made at the sole initiative of the beneficiary ("*reverse solicitation*"), the CCP Law applies (see also below)[7] .

- in the case of a **distance** contract with a foreign institution, if the latter is **active in Belgium via the FPS**.

[7] This position of the CCP could be challenged under European law.

However, this was only a refutable presumption, i.e. the party responsible for providing information could demonstrate that the fact that it is active in Belgium via the FPS did not lead to the conclusion of the contract.

Conversely, it can be deduced from this information note that:

- in addition to contracts physically negotiated *and* concluded abroad, contracts physically concluded abroad with a foreign institution active in FPS in Belgium, but without negotiating the terms of the contract in Belgium, fall outside the scope of the CCP Law;

- similarly, distance contracts concluded with a foreign institution that is not active in FPS in Belgium are also outside the scope of the CCP Law.

- for contracts negotiated at a distance and physically concluded abroad while the institution is active in Belgium via the FPS, a priori the presumption does not seem to apply and the CCP's note (version of 10 January 2022, see below) generally excludes all contracts physically concluded abroad, but the question nevertheless arises as to whether very extensive remote negotiation could not be assimilated to a «conclusion» by the Belgian authorities. We will challenge the CCP on this point, although in any event it would be difficult for the CCP to prove that the substantive terms of the contract were agreed at a distance.

Moreover, the CCP's information note did not specify what was meant by "being active in Belgium under the FPS" in the context of a distance contract, in particular when the foreign institution acts in the context of a "reverse solicitation" (contact by telephone by the customer followed by sending of the documentation to be signed) or when this foreign institution operates an Internet site.

5. The Law of 2 December 2021 supplemented Article 2, 10° of the CCP Law by adding that: «*it being understood that such a contract,* ***when concluded at a distance*** *by a party responsible for providing information established abroad* ***and active in Belgium under the freedom to provide services, is irrefutably deemed to have been concluded in Belgium*** *when the customer has established his registered office, is domiciled or habitually resident in Belgium".*

The CCP Law has thus on the one hand confirmed the position of the CCP contained in its information note (version of25 March 2020) on distance contracts, subject to the proviso that it now considers that in the event of an institution active in Belgium via the FPS, the financial contract is "irrefutably" considered to have been concluded in Belgium, whereas in its note of 25 March 2020 this was only a refutable presumption.

The preparatory work for the Law of 2 December 2021 justifies this amendment by stating that "*it is, on the other hand, logical to think that the remote conclusion of a contract with a resident by a party responsible for providing information under foreign law and who only carries out activities in Belgium within the framework of the freedom to provide services, is the result of this activity*

in Belgium... There is no reason to treat information providers governed by foreign law differently depending on whether they are active in Belgium through a subsidiary, a branch, a place of business or an agent on the one hand, or under the cover of the freedom to provide financial services on the other."

The CCP has updated its briefing note (version of 10 January 2022) and on the issue of distance contracts has maintained its comments in full, merely deleting the word «rebuttable», as the CCP Law specifically states that the presumption is irrebuttable.

6. The distinction between distance contracts that are irrevocably presumed to be concluded in Belgium and those that are not therefore based solely on the question of determining when a foreign establishment, in this case a Luxembourg establishment, is considered to be "active in Belgium under the FPS".

The addition in the CCP Law of the "irrefutable" character of the presumption, allows the CCP, if it can demonstrate that the foreign institution is "active in Belgium under FPS", to presume that all contracts concluded at a distance with a Belgian resident are deemed to be concluded in Belgium. This is the case even if the foreign institution could rebut the presumption and show, for example, that for a particular financial contract it had not been active in Belgium under FPS and had acted solely on the basis of a "reverse solicitation". This analysis is confirmed by the preparatory work which presumes that the fruit of the conclusion of the financial contract lies in this active FPS (see above)[8] .

It therefore remains to be determined when an institution is "active in Belgium under FPS", regardless of the conclusion of a particular contract.

Neither the CCP Law nor the information note (version of 10 January 2022) provide any elements to clarify this notion.

We therefore propose to examine this concept of the active FPS in the light of, on the one hand, the European regulations from which this concept was borrowed by the CCP Law and, on the other hand, the way in which this concept has been interpreted by the European and Belgian supervisory authorities.

2.2 What criteria should be taken into account to determine whether a company is active in Belgium under FPS?

i. The principles

[8] In our view, it could still be argued that a contract whose essential elements are negotiated in Luxembourg and which is then concluded at a distance should be deemed to have been concluded physically in Luxembourg by taking up and reversing the reasoning of the CCP (see above no. 4 and information note of 10 January 2022). According to this argument, the CCP Law does not apply whether or not there is an active FPS in Belgium. This conclusion, however, clashes with the legal text of Article 2, 10° of the CCP Law, which provides that the (irrefutable) presumption of conclusion in Belgium applies as soon as there is a conclusion "at a distance" by an establishment "active in Belgium as an FPS". Therefore, here too a clarification of the CCP would be welcome.

7. First of all, EU law differentiates between passive and active FPS. In the **passive FPS** the company concerned provides services to a person established or resident in another Member State («**MS**»), without carrying out its activities or offering its services in that other MS, whereas in the **active FPS** the company carries out or offers its activities in a MS other than the one in which it is based. The essential difference is that in the passive FPS the company does not have to comply with the rules of general interest that apply in the MS of the beneficiary of the services, whereas in the active FPS it has to comply with them, provided of course that these rules comply with the criteria that have been laid down by the Court of Justice of the European Union («**CJEU**»).

This distinction can be found in MiFID II[9] or in the Banking Directive[10] , which provide that an investment firm or credit institution that wants to start carrying out its activities or offering its services in the territory of another MS (active FPS) must notify its supervisory authority.

The question of what is meant by carrying out or offering an activity in another MS has already been much discussed, particularly in relation to distance contracts.

The European Commission has argued in its *Interpretative Communication on the freedom to provide services and the interest of the general good in the Second Banking Directive* (97/C 209/04) that where the characteristic performance of the service provided does not take place in the MS of the beneficiary, there is no active FPS. The service provider could thus move temporarily to the MS of the beneficiary to carry out preparatory acts without there being an active FPS. Similarly, the Commission considers that the provision of internet banking services should not require prior notification of an active FPS as the service provider cannot be considered as operating in the territory of the MS of the beneficiary.

This thesis was criticised by a certain doctrine (J.F Lerouge, "La libre prestation des services bancaires virtuels"(*"The free provision of virtual banking services"* – free translation), JTDE, 1999, pp.111 to 114) and was not retained by the Banking, Finance and Insurance Commission ("**CBFA**") (which was replaced by the NBB and the FSMA) which adopted a much more interventionist point of view, formalised in its CBFA Circular 2009 of 17 April 2009 on Financial Services via the Internet.

According to the CBFA (page 9), there is an obligation to notify (active FPS) and therefore to comply with the Belgian general interest rules, **(1)** when the characterstic performance has taken place in Belgium, **(2)** but also when the foreign company has solicited investors in Belgium on its regulated services, either by physically moving there, or by using distance selling techniques or advertising processes, even if the characterstic performance does not take place in Belgium. Advertising or promotional activities, which are not aimed at regulated services, are not covered.

[9] Directive 2014/65/EU MiFID II, see Article 34;
[10] Article 39, Directive 2013/36/EU.

The CBFA's position is thus in line with the limits on *reverse solicitation* set out in MiFID II (Article 42) and MiFIR[11] (Article 45 (6)) regarding the non-application of these directive and regulation when the regulated service to be provided has been solicited exclusively on the client's initiative from an investment firm outside the EEA.

MiFID II and MiFIR state that these services *"should not be deemed as a service provided at the own exclusive initiative of the client (...) where a third-country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union"* (recitals 111 Mifid II and 43 MiFIR)[12] .

The EC Regulation 593/2008 on the law applicable to contractual obligations (Rome I) also provides for an exception to the freedom of choice of law in respect of consumer contracts where the service provider **(i) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (ii) by any means, directs such activities to that country or to several countries including that country** (Article 6)

ii. Distance financial services concluded other than via the Internet

8. Thus circumscribed, the provision of financial services at a distance by a Luxembourg institution, outside the Internet, for example by means of a telephone call, post or e-mail, should not be considered as an activity carried out in Belgium under active FPS, **provided that (1)** this service was solicited exclusively on the initiative of the beneficiary and **(2)** the institution did not canvass the customer in Belgium or advertise its financial services by means of promotional campaigns, other than awareness campaigns, conducted in Belgium through all communication channels including the Internet (see below).

iii. Internet financial services

9. With regard to financial services offered via the Internet, which are by nature accessible throughout the EU, the CBFA (NBB/FSMA) has adopted a very broad approach to its supervisory powers. It considers that the offer "*via the Internet of services*

[11] Regulation (EU) No 600/2014.

[12] Q&A ESMA On MiFID II and MiFIR investor protection and intermediaries' topics (19 November 2021, page 116)*: "where a third-country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client". ESMA is of the view that such a solicitation, promotion or advertising should be considered regardless of the person through whom it is issued: the third country firm itself, an entity acting on its behalf or having close links with such third country firm or any other person acting on behalf of such entity. As for the means of such solicitations, ESMA is of the view that every communication means used such as press releases, advertising on internet, brochures, phone calls or face-to-face meetings should be considered to determine if the client or potential client has been subject to any solicitation, promotion or advertising in the Union on the firm's investment services or activities or on financial instruments. Firms are reminded that such clarification is without prejudice to any provisions attached to the marketing of such products. The client's own exclusive initiative shall be assessed in concreto on a case by case basis for each investment service or activity provided, regardless of any contractual clause or disclaimer purporting to state, for example, that the third country firm will be deemed to respond to the exclusive initiative of the client."*

or instruments originating from abroad is deemed to take place in their territory when such offer is addressed or made available to investors in that territory."

The tricky point is to determine the point at which the website can be considered as an offer addressed or made available to investors in Belgium and therefore constitutes an active FPS in Belgium.

For the CBFA (NBB/FSMA), the willingness to direct an offer to another MS should be *examined on a case-by-case basis, in particular with a view to determining whether nationals of the country concerned are specifically targeted (language used, prices in the country's currency, mention of local contact addresses), whether transactions or services are actually carried out via the website, and whether investors are solicited by e-mail or other communication techniques.*

The CBFA (NBB/FSMA)'s communication specifies how to avoid that the website be considered as active FPS in Belgium:

"To avoid misunderstanding in non-target countries, the institution may take one or more of the following precautionary measures:

a) mention on the website that it is aimed at investors in a specific geographical area in which the company operates in accordance with the regulations (mention of notifications, warnings and disclaimers); in order to locate an investor and check whether he or she is part of the target group, the institution may make use of mail, telephone or special location techniques;

b) ensure that the content of the website or any other promotional material (e.g. in the media or press) is not inconsistent with the geographical area of interest (e.g. if the website is not aimed at UK investors, do not mention UK addresses or prices in GBP);

(c) protect and control access to the site by providing passwords for all or part of the site, which are of course only made available to persons within the target group."

10. The question of the direction of business in another MS by a website was also assessed by the CJEU in a judgment of 7 December 2010 (*Pammer and Alpenhof*, case C-585/08 and C-144/09) on the interpretation of Article 6 of the Rome I Regulation in a similar, but less strict, manner.

While the CJEU in its judgment used similar criteria to those used by the FSMA, it specified: *On the other hand, the mere accessibility of the trader's or intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an e-mail address and other contact details, or of use of a language or currency which are the language and/or currency generally used in the Member State in which the trader is established.*

11. It follows from the position of the CBFA (BNB/FSMA) and the CJEU that the operation of a website by a Luxembourg institution may very quickly, if certain precautions have not been taken, be assimilated to the exercise of an active FPS activity in Belgium, in this case relating to investment services. In this respect, the fact that the

contract may or may not be concluded via the internet is only an indication of the direction of activity to be taken into consideration.

2.3 Application of these principles to the conclusion of distance «financial contracts» with regard to the notion of an active FPS in Belgium

12. Taking into account the CBFA (BNB/FSMA)'s interpretation of the European concept of active FPS, the financial contracts concluded at a distance with a Belgian resident by a Luxembourg institution in scope of the CCP Law are those which were concluded while the Luxembourg insititution took steps in Belgium.

In this respect, the mere fact of having notified the CSSF of its intention to start an activity in Belgium on the basis of the Banking Directive (Articles 39 et seq. Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions), cannot, in our opinion, reasonably be interpreted by the CCP as irrefutable proof that this institution is acting as an active FPS in Belgium, in the absence of the credit institution having already taken any commercial steps in Belgium.

13. Different situations are considered below.

i) Physical bilateral steps taken in Belgium

14. **Situation**: The terms of the financial contract were agreed in Belgium, even if the contract was subsequently concluded at a distance.

According to the CCP the contract is deemed to be physically concluded in Belgium and the CCP Law applies, irrespective of whether the steps taken in Belgium by the Luxembourg company were exclusively solicited by the customer or not.

15. **Situation**: The representative of the Luxembourg institution merely presents financial contracts in Belgium, without negotiating the terms and conditions. These are subsequently negotiated at a distance and the contract is concluded at a distance.

If the meeting between the representative of the Luxembourg institution and the customer in Belgium took place at the exclusive initiative of the customer ("*reverse solicitation*"), without any further commercial steps in Belgium, it could be argued that the institution does not operate as an active FPS in Belgium and therefore the distance contract cannot be presumed to be concluded in Belgium.

In the opposite case, where the Luxembourg company has physically solicited the customer in Belgium, there is an active FPS in Belgium and the financial contract concluded at a distance will be deemed to be concluded in Belgium.

16. In both situations, if the contract is negotiated and physically concluded in Luxembourg, a literal reading of the CCP Law suggests that the contract should not be considered as concluded in Belgium, even if the Luxembourg company is active in Belgium under FPS or has physically met the client in Belgium.

The presumption in Article 2, 10° of the CCP Law only refers to contracts concluded at a distance and not to contracts concluded physically in Luxembourg. As the restrictions to the FPS have to be interpreted restrictively, such an interpretation should be preferred.

ii) Bilateral remote approaches

17. **Situation**: Negotiation of the terms of the contract takes place only at a distance, by telephone and/or e-mail.

If the distance contacts between the Luxembourg company and the customer took place on the sole initiative of the customer, without any further commercial steps being taken, the company does not operate as an active FPS in Belgium and the distance contract should not be presumed to have been concluded in Belgium.

Otherwise, there is an active FPS in Belgium and the financial contract concluded at a distance will be deemed to have been concluded in Belgium except, as indicated above, if the contract is physically negotiated *and* concluded in Luxembourg.

It follows that, even if the financial contract was individually negotiated at a distance, even outside the definition of a distance contract provided for by the ELC (see above, point 2), it will nonetheless be deemed to have been "irrefutably" concluded in Belgium, if the client was approached by the Luxembourg company either individually or through promotional campaigns.

iii) Canvassing and promotion of financial contracts in Belgium

18. There is an active FPS situation when the Luxembourg institution promotes financial contracts on Belgian territory, whatever the method of promotion (radio, press, Internet, social networks, etc.), provided that it is not only a question of awareness promotion that is not specifically aimed at financial contracts.

In this respect, it should also be considered that a website will have to be considered as carrying out an activity in Belgium (active FPS), if it is specifically directed towards Belgium or towards various other MS including Belgium.

19. In the latter case, the CCP will not have to demonstrate the causal link between the remote conclusion of the financial contract and the promotion of the service in Belgium, given the irrebuttable nature of the presumption.

iv) Financial contracts not subject to the CCP Law

20. Therefore, the following are not subject to the information requirement of the CCP Law:

- financial contracts physically negotiated and concluded in Luxembourg, even if it can be shown that the Luxembourg institution is active in Belgium;

- contracts concluded at a distance in the event that the beneficiary has approached the Luxembourg institution exclusively on his own initiative and the Luxembourg company has not undertaken any canvassing in Belgium or promotional campaigns for financial contracts.

v) Summary table

21. The above can be summarised as follows[13] :

Financial contract whose elements are physically («face-to-face») negotiated[14] in Luxembourg and which is physically («face-to-face») concluded in Luxembourg.	CCP Law **not** applicable
A financial contract whose elements are negotiated and/or which is concluded physically («face-to-face») in Belgium.	CCP Law applicable

[13] In a less synthetic way, the different hypotheses can be summarised as follows:

Negotiation	**Conclusion**	**FPS**	**Result**
Physically in Belgium	Physically in Luxembourg	Not relevant	CCP Law applicable
	Physically in Belgium	Not relevant	CCP Law applicable
	Remote	Not relevant	CCP Law applicable
Physically in Luxembourg	Physically in Luxembourg	Not relevant	CCP Law **not** applicable
	Physically in Belgium	Not relevant	CCP Law applicable
	Remote	Active	CCP Law applicable (but see above nr. 8)
		Passive	CCP Law **not** applicable
Remote	Physically in Luxembourg	Not relevant *unless* the negotiation is too extensive (cf. supra n°4)	CCP Law **not** applicable
	Physically in Belgium	Not relevant	CCP Law applicable
	Remote	Active	CCP Law applicable
		Passive	CCP Law **not** applicable

[14] Proof of the customer's physical presence in Luxembourg may be difficult to provide; it is advisable to keep any evidence that may help to establish this (parking or cashier's ticket, video surveillance, proof of scanning in the branch, presence of two simultaneous signatures, indication on the contract itself, etc.).

Financial contract negotiated at a distance and concluded physically («face-to-face ») in Luxembourg, even if there was active FPS (canvassing and/or website directed to Belgium).	CCP Law **not** applicable
Financial contract physically negotiated («face-to-face ») in Luxembourg and concluded at a distance, via «reverse solicitation» (passive FPS, i.e. no canvassing or website directed to Belgium).	CCP Law **not** applicable
Financial contract negotiated at a distance and concluded at a distance via «reverse solicitation» (FPS passive, i.e. no canvassing or website directed towards Belgium).	CCP Law **not** applicable
Financial contract negotiated at a distance and concluded at a distance via FPS active (canvassing or website directed to Belgium).	CCP Law applicable - possibility to show that the customer took the initiative is not allowed.

2.4 Compatibility of the CCP Law with European law

22. The compatibility of the CCP Law with the TFEU rules on FPS (Article 56 and seq. TFEU) could be challenged in view of its restrictive effect on FPS. However, it will have to be demonstrated that the conditions established by the CJEU to justify the restriction in terms of the general interest of the host MS are not fulfilled.

In this case, the purposes of the CCP Law include the proper application of tax measures and the control of money laundering regulations. In view of these purposes, the compatibility of the CCP Law with the TFEU will have to be thoroughly examined. The judgments of the CJEU of 25 April 2013 (*Jyske Bank Gilbratar*, case C-212/11), of 14 November 2006, (*Kerckaert-Morrès*, case C-513/04,) and of 8 September 2005 (*Mobistar*, case C-544/03 and C-545/03), have indeed considered these purposes as being able to justify the restrictions to the FPS.

A definitive conclusion on this issue would need to be further investigated.

III. DISTINCTIONS BETWEEN THE CONCEPTS OF "BANK ACCOUNTS" AND "FINANCIAL CONTRACTS" UNDER THE CCP LAW

23. You have asked us to define the concepts of bank accounts and financial contracts as they are defined in the CCP Law, and more particularly from the point of view of the information obligations that your members, credit institutions established in Luxembourg, may have with regard to this law.

3.1 The notion of "bank or payment account"

24. The bank or payment accounts which are subject to an obligation to provide information on the part of the party responsible for providing information are defined in Article 2, 7° of the CCP Law as follows

- for **bank accounts,** *"any specific subdivision in the chart of accounts of a credit institution,* ***created in Belgium*** *following the conclusion of a banking or financial contract with its client, alone or jointly with others****, and allowing the recording and monitoring in an individualised manner of the flows and balances of monetary assets held by the credit institution concerned on behalf of that client*** *on an individual basis or jointly with other persons, or made available by the credit institution concerned to that customer, alone or jointly with other persons, in so* ***far as that account permits the receipt of income, the making of cash withdrawals or payments, the making of payments to third parties or the receipt of payments from third parties****".*

  For your information, the CCP considers in its information note (version of 10 January 2022) as bank accounts in particular accounts that manage the liquidity of a securities account, term accounts, pension savings accounts, etc.

- for **payment accounts**, those defined in Article 2, 18° of the law of 11 March 2018 on the status and supervision of payment institutions[15] , - i.e. only current accounts or similar accounts - when **this payment account** "**is held in Belgium**".

25. From the perspective of credit institutions established in Luxembourg, it is necessary to determine which bank or payment accounts they would open for Belgian residents could fall under this definition.

In order to answer this question, it is necessary to determine what is meant by a bank account «created» in Belgium or a payment account "held" in Belgium.

This question only arises for Luxembourg credit institutions that have a branch in Belgium or for Belgian credit institutions that have a branch in Luxembourg.

For Luxembourg credit institutions that do not have a branch in Belgium, bank or payment accounts are clearly created or held in Luxembourg even if the banking contract is concluded in Belgium. They are therefore not subject to the obligation to inform the CCP[16] .

[15] *18° "payment account" means an account which is held in the name of one or more payment service users and which is used for the purpose of executing payment transactions;*

[16] In accordance with Article 322, §3 of the Income Tax Code 1992 ("ITC92"), Belgian resident customers who have a "bank or payment account" within the meaning of the CCP Law with a foreign financial institution that does not have a presence in Belgium are required to report the existence of this account to the CCP themselves. Natural persons are not covered by the CCP Law of 8 July 2018, but they do not have to inform the CCP of the balances of the accounts in question.

26. With regard to payment accounts:

- those opened by the Belgian branch of the Luxembourg institution, which are clearly "held" in Belgium with an IBAN number beginning with BE. These payment accounts are subject to the CCP Law;

- those opened by the Luxembourg "parent company", these are clearly held in Luxembourg with an IBAN number starting with LU. These payment accounts are not subject to the CCP Law.

The CCP information note (version of 10 January 2022, page 8), however, specifies in an incomprehensible manner that payment accounts opened at a distance (via internet-mail) are deemed to be opened in Belgium when the customer has established his registered office or is resident in Belgium. This is a strange statement as the law does not specify this. The information note (version of 10 January 2022) does not specify either, as for financial contracts, that this presumption would apply only if the person responsible for the information acts as an FPS active in Belgium. We also ask the CCP this question.

27. With regard to bank accounts, the requirement of the Belgian place of "creation" of the account, could suggest that the CCP Law refers to the «physical» place where the account would be constituted and which could, regardless of where the account is held, be the Luxembourg place of location of the Luxembourg "parent company".

However, the CCP information note (version of 10 January 2022) clarifies the notion of creation, referring exclusively to the way the bank account has been identified with its IBAN. Only accounts created with an IBAN beginning with BE should be reported.

3.2 The notion of a "financial contract"

i. Definition

28. Financial contracts are defined in Article 2, 10° of the CCP Law, which refers to Article 4, 3°, which lists a series of transactions, of which we will retain only those relevant to Luxembourg credit institutions[17] :

1) The rental of a safe (Article 4 §1, 3° a)). This financial contract does not call for any particular remark;

2) The contract relating to investment and/or related services that are related to the activities listed in Article 1er §3, paragraph 2 of the Law of 25 April 2014 on the supervision and status of credit institutions, including the holding of term,

[17] For example, we did not include life insurance, instalment sales or leasing contracts.

current or revolving deposits intended for the acquisition of financial instruments or for repayment, pursuant to Article 533, §1, of the same law (Article 4 §1, 3° c)).

This category of financial contract is discussed in more detail below.

3) All credits in any form, including unauthorised overdraft facilities, which are granted to natural or legal persons (Articles 4 §1, 3° d), g), h) i)).

This category of financial contracts also covers the case where the party responsible for providing information "undertakes to make funds available to a company on the condition of repayment in the future", or "guarantees a company".

As such, this category does not seem to us to pose any particular question so we will not elaborate on it, but we are at your disposal to clarify any questions you may have.

ii. Investment services

29. As indicated below, the investment services that must be reported are those referred to in Article 1er, §3, al. 2 of the law of 25 April 2014 on the status and supervision of credit institutions (the "**Banking Law**").

This provision aims to:

a) investment services consisting of:
   - Dealing on own account;
   - underwriting financial instruments and/or placing financial instruments on a firm commitment basis;
   - the placement of financial instruments without firm commitment;
   - the operation of a multilateral trading facility; or
   - the operation of an organised trading system; and/or

(b) ancillary services consisting of:
   - custody and administration of financial instruments on behalf of clients, including custodial and related services, such as cash/collateral management, and excluding centralised maintenance of securities accounts at the highest level;
   - the granting of credit or a loan to an investor to enable him or her to carry out a transaction in one or more financial instruments, in which the firm granting the credit or loan is involved;
   - foreign exchange services where such services are related to the provision of investment services; or
   - services related to underwriting.

30. With regard to investment services, unless we are mistaken, your members are only concerned with underwriting/uncommitted financial instrument placement services. The CCP's information note (version of 10 January 2022) does not provide any details on these services. However, a simple reading of the provisions leads to the conclusion that if your members were to enter into such a contract with a company established in Belgium, deemed to be concluded in Belgium, then they would be subject to the CCP Law.

31. The auxiliary services are certainly the ones of most interest to your members, especially the first three auxiliary services.

It follows from the interaction of Article 4 §1, 3° c) of the CCP Law and Article 1 §3, al. 2 of the Banking Law, that the following investment services are considered as financial contracts that must be declared, if they are deemed to have been concluded in Belgium

- opening a securities account.

  In this respect, investment services consisting of the acquisition of financial instruments (RTO), discretionary management of investment instruments or the provision of investment advice are not covered, so that the latter contracts do not have to be reported.

- The situation is less clear with regard to bank accounts (current or term accounts) on which cash linked to securities accounts is recorded pending allocation, even though these are bank accounts with a Luxembourg IBAN (Article 4 §1, 3° c) of the CCP Law).

  First of all, it is certain that bank or payment accounts that are not exclusively reserved for cash linked to a securities account do not have to be declared. They do not, in fact, meet the definition of a cash account under Article 533 §1 of the Banking Law.

  Secondly, with regard to cash accounts exclusively linked to a securities account, Article 533 § 1 relates to accounts opened by «brokerage companies» to receive cash pending the acquisition of financial instruments, investment in structured deposits or pending restitution.

  Our first understanding is that this type of cash account opened by foreign credit institutions is covered by the notion of a financial contract.

  We have asked the CCP for their position on this. We will keep you informed of their position.

- the granting of credit to an investor who holds a securities account in the books of a Luxembourg institution to enable that investor to acquire financial instruments.

  The granting of such a credit is already covered by the CCP Law as a financial contract (see Article 4 §1, 3° d), g), h) i) CCP Law). The question could then arise whether such credit agreements have to be reported, even if they are not deemed to be concluded in Belgium, only because the initial securities account is deemed to be concluded in Belgium. Given the highly theoretical nature of the question and the fact that it is almost certain that if the initial securities account is deemed to have been concluded in Belgium that the credit is also deemed to have been concluded in Belgium, we are of the opinion that the answer to this question is yes.

- underwriting services. The CCP information note (version of 10 January 2022) does not specify these services either. Should it include the sale of financial instruments that are the subject of the firm commitment (RTO)? A priori we do not think so, as there is no such obligation relating to the purchase and sale of financial instruments;

  foreign exchange services where these services are related to the provision of investment services. We believe that it would be inconsistent to include such services in financial contracts as this would make the application of the CCP Law impractical. We seek confirmation of this from the CCP.

iii. Summary table

32. As a result of the above, the following contracts are to be considered as financial contracts:

Financial contracts (Article 4 §1 3° CCP Law)	CCP Law
1. Renting of safes (Article 4 §1, 3° a))	CCP Law applicable
2. All credits in any form, including unauthorised overdraft facilities, which are granted to natural or legal persons (Articles 4 §1, 3° d), g), h) i))	CCP Law applicable
3. The contract relating to **investment** and/or related **services** that relate to the activities listed in Article 1 §3, paragraph 2 of the Law of 25 April 2014 («The Banking Law») (Article 4 §1, 3° c))	
3.1 So-called «principal» investment services (Article 1§3, paragraph 2, of the Banking Law):	
3.1.1 underwriting financial instruments and/or placing financial instruments on a firm commitment basis;	
3.1.2 the placement of financial instruments without firm commitment;	CCP Law applicable

3.1.3 the operation of a multilateral trading facility; or the operation of an organised trading facility	CCP Law applicable CCP Law applicable
3.2 So-called "ancillary" investment services :	
3.2.1 custody and administration of financial instruments on behalf of clients, including custodial and related services, (Article 4 §1, 3° c);	
→ only the contract for opening securities accounts	CCP Law applicable
→ not RTO, discretionary management or investment advice contracts	CCP Law not applicable
3.2.2 cash accounts pending allocation to the acquisition of financial instruments or restitution (e.g. dividends or sale of securities) (Articles 4 §1, 3° c) CCP Law and 533, § 1 Banking Law).	
→ cash accounts which are exclusively linked to securities accounts	CCP Law in principle applicable (to be confirmed)
→ cash accounts that are not exclusively allocated to securities accounts	CCP Law not applicable
3.2.3 the granting of credit or a loan to an investor to enable him or her to carry out a transaction in one or more financial instruments, in which the firm granting the credit or loan is involved;	CCP Law applicable
3.2.4 foreign exchange services where such services are related to the provision of investment services or services related to underwriting	Targeted by the CCP Law but this seems inconsistent to us.

IV. ON THE APPLICATION OF THE CCP LAW TO CURRENT FINANCIAL CONTRACTS

33. Under the CCP Law, the party responsible for providing information must, with regard to financial contracts (see above) (Article 4 §1, 3°) which are deemed to have been concluded in Belgium (Article 2, 10°):

- communicate to the CCP the existence and termination of the contractual relationship, and

- from 1 January 2022, for financial contracts relating to investment/auxiliary services referred to in Article 4 §1, 3° c) (mainly securities accounts - see above), communicate, on a half-yearly basis and within one month of the end of the half-year concerned, the «periodic aggregate amount» of such contracts.

34. It follows from the above that the obligations of the CCP Law apply to all current and future contracts, regardless of when they were concluded. There is no so-called "grandfather clause" for contracts predating the law of 8 July 2018.

These obligations may even, where applicable, apply to financial contracts that no longer exist. Indeed, as regards the existence or termination of financial contracts that existed before the entry into force of the law of 8 July 2018, Article 30 of the Royal Decree of 7 April 2019, provides **that before 29 May 2020,** the party responsible for providing information had to communicate to the CCP, for financial contracts existing on 1 January 2020:

- the existence of contracts relating to the rental of a safe (Article 4, 3°, a) of the CCP Law);
- the existence of financial contracts that should have been notified to the "former" CCP pursuant to Article 1er, 5° of the Royal Decree of 17 July 2013 (in particular credit agreements and investment services), and which were "unfairly" not notified, by including the information provided for in Articles 6 to 8 (in particular the start and, where applicable, the end of the contractual relationship).

Article 29 §2 of the Royal Decree of 7 April 2019, on the other hand, provides for the obligation to communicate to the CCP information on the beginning and end of all financial contracts that ended in 2019. A priori the CCP Law does not provide for an obligation to correct the failure to communicate to the CCP information on financial contracts that should have been communicated under the former CCP Law (Royal Decree of 17 July 2013) and that ended before 1er January 2019. We request confirmation of this from the CCP.

35. With regard to the communication of the aggregate amount of ongoing financial contracts relating to investment/auxiliary services, Article 31 §1, 2° of the Royal Decree of 7 April 2019), provides for the obligation to communicate by 31 January 2022 at the latest, the periodic aggregate amounts of the various financial contracts concluded as from 31 December 2020, until 30 June 2021 (CCP information note - version of 10 January 2022)

36. As a result of this provision, by 31 January 2022, the party responsible for providing information had to provide the CCP with aggregated information as at 31 December 2020, 30 June 2021 and 31 December 2021 for current contracts for investment/auxiliary services (Article 4(2)(b) RD of 7 April 2019).

In view of these delays, and subject to the outcome of a collective action vis-à-vis the Belgian authorities and/or a further study of the compatibility of these obligations with EU internal market rules, we can only recommend that the necessary steps to provide the requested information be taken quickly.

*

* *

We hope we have answered your request.

We are of course at your disposal to discuss any of these points further.

Best regards,

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Antoine DAYEZ
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Association des Banques et Banquiers, Luxembourg
The Luxembourg Bankers' Association
Luxemburger Bankenvereinigung

Banque Nationale de Belgique
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Luxembourg, le 31 janvier 2022

Objet : Application de la loi du 8 juillet 2018 relative au Point de Contact Central telle qu'amendée aux banques établies en dehors de Belgique

Monsieur le Vice-Gouverneur,
Monsieur, Madame,

Nous prenons contact avec vous dans le cadre de la loi du 8 juillet 2018 relative au Point de Contact Central (PCC) telle qu'amendée et de son application aux banques établies en dehors de Belgique et exerçant dans ce pays certaines activités dans le cadre de la libre prestation de services.

Selon notre compréhension du dispositif en question, les banques établies en dehors de Belgique, en ce comprises celles établies au Luxembourg, sont dans l'obligation de fournir au PCC un certain nombre d'informations relatives à des contrats financiers conclus en Belgique avec leurs clients tels que définis dans ladite loi. Nous comprenons en outre que ces contrats sont irréfragablement réputés être conclus en Belgique (et devront par-delà même être communiqués au PCC) dès lors que ces contrats sont conclus à distance par la banque étrangère usant de la libre prestation de services en Belgique avec un client ayant son siège social, son domicile ou sa résidence habituelle en Belgique.

Ce rattachement des contrats financiers conclus à distance opéré par la législation belge qui s'accompagne d'une obligation déclarative au PCC est source de difficultés pour nos membres qui voudraient se conformer à de telles exigences. En effet, la loi luxembourgeoise du 5 avril 1993 relative au secteur financier telle qu'amendée comporte en son article 41 une obligation au secret professionnel que les banques luxembourgeoises se doivent de respecter sous peine de sanctions pénales. Cette obligation au secret professionnel n'est pas opposable dans un certain nombre de cas limitativement énumérés, notamment lorsque la révélation d'un renseignement est autorisée ou imposée par ou en vertu d'une disposition législative luxembourgeoise. En l'espèce, la loi belge relative au PCC ne peut être constitutive d'une disposition législative luxembourgeoise car elle n'a été

ni ratifiée ni transposée par le législateur luxembourgeois et ne peut donc constituer une base légale permettant aux banques luxembourgeoises d'opérer une levée du secret professionnel quant aux informations à communiquer au PCC.

Face à ce conflit de lois applicables, la situation des banques luxembourgeoises voulant se conformer aux exigences de ces deux législations respectives est pour le moins délicate dans la mesure où elle peut appeler des sanctions d'un côté ou de l'autre de la frontière dépendant du non-respect de la norme en question. Si nos membres comprennent l'objectif de la législation belge sous revue, une mise en conformité avec celle-ci dans les délais actuellement impartis nous paraît, au regard des contraintes précédemment évoquées, difficilement envisageable. Nous rappelons à cet égard d'une part que c'est de façon informelle seulement que nos membres ont été informés de l'existence de cette législation, aucune notification préalable n'ayant apparemment été faite aux autorités de contrôle luxembourgeoises et d'autre part que la présomption irréfragable selon laquelle les contrats conclus à distance sont réputés conclus en Belgique n'a été introduite que par la loi du 2 décembre 2021 entrée en vigueur que le 24 décembre 2021, soit un mois à peine avant la première échéance de communication applicable, fixée le 31 janvier 2022. Un tel calendrier ne laisse qu'un délai extrêmement réduit aux banques concernées en vue de se conformer aux nouvelles obligations imposées par la loi. Le champ matériel d'application du dispositif nous paraît par ailleurs rester ouvert à interprétation et fait actuellement l'objet d'une revue par un conseil juridique en Belgique mandaté par nos soins.

Nos membres doivent, afin de se mettre en conformité avec le dispositif sous revue, non seulement analyser les dispositions en question de manière à appréhender correctement le champ de leurs obligations sous une législation étrangère, mais doivent veiller en parallèle au respect de leur obligation au secret professionnel sous le droit luxembourgeois. A cette fin, et sauf dispositions contraires introduites par notre régulateur, il importe de recueillir le consentement du client à la divulgation des informations pertinentes au PCC, un exercice qui, compte tenu des contraintes légales, réglementaires et opérationnelles auxquelles nos membres font face, nécessitera un délai minimum de quelques mois. En effet, si le consentement du client quant à la communication d'informations au PCC est obtenu par la banque luxembourgeoise concernée afin de se conformer aux exigences de la loi belge, le client n'est plus à même d'alléguer une violation du secret professionnel à l'encontre de la banque procédant à ladite communication. Ce travail d'analyse juridique et de collecte des consentements des clients ne pourra cependant être effectué qu'au bout d'une certaine période à l'issue de laquelle les banques luxembourgeoises seront à même de procéder à la communication des informations au PCC.

Dans ce contexte, nous nous permettons de solliciter, pour le compte de nos membres, un délai additionnel pour la remise des premières déclarations suivant les obligations prévues pour les établissements financiers établis en dehors de Belgique.

Une telle extension, outre qu'elle permettrait aux établissements concernés de déterminer la portée de leurs obligations découlant du dispositif sous revue et de concilier, en temps utile, ces obligations avec celles découlant de leur droit national, ne nous paraît pas remettre en cause les objectifs légitimes de lutte contre le blanchiment d'argent et l'évasion fiscale, auxquels nous souscrivons pleinement, alors que l'essentiel des informations requises fait déjà l'objet d'un échange périodique entre le Luxembourg et la Belgique dans le cadre de la directive européenne relative à la coopération administrative dans le domaine fiscal.

Restant bien volontiers à disposition de votre administration pour évoquer plus avant ces questions, nous vous prions d'agréer, Monsieur le Vice-Gouverneur, Monsieur, Madame, l'expression de nos salutations les plus respectueuses.

Yves MAAS
CEO
Head of the Management Board

Guy HOFFMANN
Président

Copie pour information :

- Madame Yuriko Backes, Ministre des Finances, Grand-Duché de Luxembourg
- Monsieur Claude Marx, Directeur Général, Commission de Surveillance du Secteur Financier, Grand-Duché de Luxembourg

LE VICE-GOUVERNEUR

Confidentiel

Monsieur Guy Hoffmann
Monsieur Yves Maas
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GRAND-DUCHÉ DU LUXEMBOURG

Bruxelles, le 18 février 2022

Monsieur Hoffmann,
Monsieur Maas,

J'ai pris avec intérêt connaissance de votre courrier du 31 janvier 2022. Veuillez cependant noter qu'en tant qu'opératrice du point de contact central des comptes et contrats financiers, la Banque nationale de Belgique n'a pas été habilitée par le législateur à interpréter la loi du 18 juillet 2018 organique de ce dernier, ni à en préciser le champ d'application.

Elle n'a pas davantage été habilitée à octroyer des termes et délais pour s'y conformer, l'autorité chargée du contrôle du respect de cette loi et de l'imposition de sanctions étant en l'occurrence l'Administration de la Trésorerie du Service public fédéral Finances. Nous vous invitons dès lors à adresser votre lettre à cette dernière Administration.

Je vous prie d'agréer, Messieurs, l'assurance de ma considération la plus distinguée.

Steven Vanackere

vos références
2022-01-31

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