

TCSP GUIDELINES

Registration requirement under article 7-2 (1) of the Law of 12 November 2004
on the fight against money laundering and terrorist financing



National Prevention Committee

For professionals under the AML/CFT supervision of
the *Administration de l'enregistrement, des domaines et de la TVA*,
the *Institut des réviseurs d'entreprises*,
the *Ordre des experts-comptables*,
the *Ordres des avocats de Luxembourg*
and the *Ordres des avocats de Diekirch*

GUIDELINES ¹

The activities of a trust and company service provider (hereafter "TCSP") referred to in article 1 (8) of the Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended (hereafter the "2004 AML/CFT Law") may be carried out in Luxembourg by different types of professionals (banks, specialised PFS, investment firms, insurance sector professionals (*professionnels du secteur des assurances*, hereafter "PSA"), statutory auditors, chartered professional accountants, lawyers, etc.). These different types of professionals must all be licensed or registered, as well as supervised, by different AML/CFT supervisors (supervisory authorities or self-regulatory bodies).

The purpose of these guidelines is to clarify certain concepts (section I) in order to harmonise the understanding of professionals required to register with the supervisory authority or self-regulatory body to which they belong pursuant to article 7-2 (1) of the 2004 AML/CFT Law (section II). In addition, the drafting of these guidelines was necessary in light of the number of situations and circumstances in which the service listed in article 1(8), letter b), of the 2004 AML/CFT Law may be provided (Section III).

These guidelines are intended for professionals subject to AML/CFT supervision:

- of the Registration Duties, Estates and VAT Authority (*Administration de l'enregistrement, des domaines et de la TVA*), i.e. business centres and in some cases directors;
- of the Institute of Statutory Auditors (*Institut des réviseurs d'entreprises*);
- of the Order of Chartered Professional Accountants (*Ordre des experts-comptables*);
- of the Luxembourg Bar Association (*Barreau de Luxembourg*) and the Diekirch Bar Association (*Barreau de Diekirch*).

They are not intended for professionals with a licence under the Law of 5 April 1993 on the financial sector or the Law of 7 December 2015 on the insurance sector. These professionals, bound by specific regulations, are supervised by the Financial Supervisory Authority (*Commission de surveillance du secteur financier*) or by the Insurance Supervisory Authority (*Commissariat aux assurances*).

The document was drafted by members of the TCSP Working Group of the National Prevention Committee (hereafter "NPC") based on European and international AML/CFT standards, as well as on publications by and developments at the Financial Action Task Force (hereafter "FATF") level. The working group was composed of representatives of AML/CFT supervisors (supervisory authorities and self-regulatory bodies) of TCSPs, including the Registration Duties, Estates and VAT Authority, the Luxembourg and Diekirch Bar Associations, the Order of Chartered Professional Accountants and Institute of Statutory Auditors, assisted by the Executive Secretariat of the NPC. This cooperation between the supervisory authorities and the self-regulatory bodies also meets the cooperation obligation set out in article 7-2 (3) of the 2004 AML/CFT Law, which is intended to enable a list of TCSPs to be drawn up and kept up to date at national level. Finally, the Luxembourg Institute of Directors (*Institut Luxembourgeois des Administrateurs*, hereafter "ILA") was consulted during the drafting of these guidelines.

¹ The interpretation of relevant laws being the exclusive competence of the courts, these guidelines do not alter the scope or meaning of the provisions of the 2004 AML/CFT Law.

Article 1 (8) of the 2004 AML/CFT Law:

"Trust and company service providers shall, in accordance with this law, mean any natural or legal person which by way of business provides any of the following services to third parties:

- (a) forming companies or other legal persons;*
- (b) acting as or arranging for another person to act as a director or secretary of a company, a partner of a partnership, or a similar position in relation to other types of legal persons;*
- (c) providing a registered office, business address, correspondence or administrative address or business premises and other related services for a company, a partnership or any other legal person or arrangement;*
- (d) acting as, or arranging for another person to act as a "fiduciaire" in a "fiducie", a trustee of an express trust or an equivalent function in a similar legal arrangement;*
- (e) acting as, or arranging for another person to act as, a nominee shareholder for another person."*

As a reminder, the FATF publications have, first in French in the glossary of the Recommendations², then in the English version of its guidances dedicated to TCSPs³, given the following definition:

« [...] Les prestataires de services aux trusts et aux sociétés, à savoir les personnes et entreprises qui ne relèvent pas d'autres catégories visées dans les présentes recommandations et qui, **à titre commercial**, fournissent **à des tiers** l'un des services suivants :

- *agir en qualité d'agent pour la constitution de personnes morales ;*
- *agir (ou prendre des mesures afin qu'une autre personne agisse) en qualité de dirigeant ou de secrétaire général (secretary) d'une société de capitaux, d'associé d'une société de personnes ou de titulaire d'une fonction similaire pour d'autres types de personnes morales ;*
- *fournir un siège social, une adresse commerciale ou des locaux, une adresse administrative ou postale à une société de capitaux, une société de personnes ou toute autre personne morale ou construction juridique ;*
- *agir (ou prendre des mesures afin qu'une autre personne agisse) en qualité de trustee d'un trust exprès ou exercer une fonction équivalente pour une autre forme de construction juridique ;*
- *agir (ou prendre des mesures afin qu'une autre personne agisse) en qualité d'actionnaire agissant pour le compte d'une autre personne (nominee shareholder). »*

*"[...] Trust and Company Service Providers refers to all persons or businesses that are not covered elsewhere under the Recommendations, and **which as a business**, provide any of the following services **to third parties**:*

- *Acting as a formation agent of legal persons;*
- *Acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;*
- *Providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;*
- *Acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement;*
- *Acting as (or arranging for another person to act as) a nominee shareholder for another person."*

² 2012 Recommendations, updated October 2018, p. 124

³ FATF Guidance for a risk-based approach, Trust and company service providers (June 2019), Glossary, DNFBPs, p.59

I - Concepts in article 1(8).

Professionals falling under the definition of article 1(8) of the 2004 AML/CFT Law are subject to all the obligations of this law and must, amongst others, identify and verify the identity of the customer and the beneficial owner, conduct ongoing due diligence of the business relationship, cooperate with the supervisory authorities or the self-regulatory bodies to which they are subject and with the Financial Intelligence Unit (*Cellule de renseignement financier*, hereafter "CRF-FIU"), to whom any report of any suspicion of money laundering or terrorist financing should be transmitted.

The aim is to reduce the ML/TF risk through the "gatekeeper" role assigned to professionals carrying out the requisite due diligence, if necessary allowing for the spontaneous exchange of information concerning the customer, the beneficial owner or the business relationship with the CRF-FIU and the investigation and prosecution authorities.

Furthermore, the fact that other professionals subject to the same obligations under the 2004 AML/CFT Law are interacting with the customer, does not exempt the TCSP from applying the AML/CFT obligations incumbent upon it.

What is meant by "by way of business"?

Providing any of the services listed in article 1(8), a) to e), "*by way of business*" means that these services are provided in the context of a "*business relationship*" as defined in article 1(13)⁴ of the 2004 AML/CFT Law.

This implies that the services are provided as part of the professional or commercial activities of the professional, by virtue of a written or oral agreement, notwithstanding the number of business relationships maintained or the number of services provided.

Certain facts, such as the solicitation of potential customers (via a website or by any other means of communication) or the existence of a remuneration, are indications that the service is being provided within the context of professional or commercial activities.

Services that are provided by a professional outside of his or her professional or business activities are not covered. These are for instance activities relating to the professional's private life or services rendered *pro bono*⁵.

What is meant by "to third parties"?

A third party is a natural or legal person or a legal arrangement with which the professional has a business relationship for which the professional provides one or more of the services mentioned in article 1 (8) a) to e).

The notion of third party therefore excludes the professional as a person, who cannot be the beneficiary of the service.

What is meant by "legal persons"?

The concept of "legal persons" covers all types of legal persons referred to in the Law of 10 August 1915 on commercial companies, *associations sans but lucratif* and *fondations* within the meaning of the Law of 21 April 1928 on non-profit associations and foundations, as well as legal persons under foreign law.

⁴ Article 1(13) of the 2004 AML/CFT Law: "A business, professional or commercial relationship which is related to the professional activities of institutions and persons subject to the 2004 AML/CFT Law and which, at the time the contact is established, is expected to last for a certain period of time."

⁵ Services rendered free of charge for a good cause.

What is meant by "legal arrangement"?

It deals with a *fiducie* within the meaning of the Law of 27 July 2003⁶, a trust within the meaning of the Convention on the Law Applicable to Trusts and on their Recognition, signed at The Hague on 1 July 1985 and approved by the Law of 27 July 2003, as amended, or a legal arrangement which has a similar structure or similar functions to those of a *fiducie* and a trust, as defined in article 1(2) of the Law of 10 July 2020 transposing article 31 of Directive (EU) 2015/849 :

"A legal arrangement is considered to have a structure or functions similar to those of a trust and a trust when it enables a person to create legal relationships that place property under the control of a third party in the interest of a beneficiary or for a specified purpose and when it has the following characteristics :

1. the property placed under the control of the third party constitutes a separate estate and does not form part of the estate of the third party ;
2. the title to the property placed under the control of the third party is established in the name of the third party or of another person on behalf of the third party ;
3. the third party is vested with the power and charged with the obligation, for which he or she is accountable, to administer, manage or dispose of the property placed under his or her control in accordance with the terms of the legal arrangement and the special rules imposed on the third party by law."

What is meant by "director" in the context of Luxembourg legal persons?

The term "director" refers to any member of the management body⁷, such as *gérants, administrateurs or membre du directoire* of a company.

II - Who must register as a TCSP under article 7-2 (1) of the 2004 AML/CFT Law?

A natural or legal person must register as a TCSP with its supervisory authority or self-regulatory body under article 7-2 (1) of the 2004 AML/CFT Law when it⁸:

- provides one or more of the services listed in letters a) to e),
- for another natural person, legal person or legal arrangement,
- in the course of a business relationship, by written or oral agreement.

Exceptions:

Natural persons need not register where the services listed in letters a) to e) are:

- carried out in the context of that person's private life and not in the context of a business relationship;
- rendered as an employee of a TCSP and on behalf of that TCSP;

⁶ Law of 27 July 2003

- approving the Hague Convention of 1 July 1985 on the law applicable to trusts and on their recognition;
- on the new regulation of fiduciary contracts, and
- amending the Law of 25 September 1905 on the transcription of rights in immovable property

⁷ The audit committee, whether or not constituted pursuant to article 52 of the Law of 23 July 2016 on the audit profession, is not to be understood as a management body. It follows from the above that a member of the audit committee is not considered to be a TCSP.

⁸ Cumulative conditions

- rendered on behalf of a public authority.

Furthermore, staff representatives who are members of the administrative body of the company in which they represent the staff are not subject to the registration requirement.

III - Practical examples concerning article 1(8) letter b.

In light of the explanations given in this document and in order to achieve the objectives set by the law, in accordance with international standards, the following table lists the most typical cases found in the Luxembourg market, without being exhaustive or covering all the cases that may arise. These examples do not concern services rendered to companies subject to the supervision of the CSSF or the CAA for which specific rules are provided by the legislator or the supervisory authority.

Natural persons sitting on the Board⁹ of a company¹⁰

Typical case	Description	Explanation of additional practices	Is he or she a TCSP?
1	A natural person who sits on the Board of a company in his or her own name and on his or her own behalf.	<i>The natural person does not sit on the Board of the company by virtue of a written or oral agreement with a third party.</i>	The natural person is not a TCSP. > He or she is not performing the service for another person.
2	A natural person who sits on the Board of a company in his or her own name on behalf of a customer.	<i>The natural person sits on the Board of the company by virtue of a written or oral service agreement with his or her customer who has the power of instruction.</i>	The natural person is a TCSP. > He or she is providing a service for another person.
3	A natural person representing the Luxembourg State on the Board of a company.	<i>Reference is made to the Law of 25 July 1990 concerning the status of directors representing the State or a legal person governed by public law in a société anonyme, as amended.</i>	The natural person is not a TCSP.
4	A natural person representing staff on the Board of a company.	<i>Reference is made to articles 426-1 et seq. of the Labour Code.</i>	The natural person is not a TCSP.

Typical cases 1 and 2 apply in the same way when the natural person sitting in his or her own name on the Board of a company has set up a one-person company to receive remuneration when he or she (1) holds 100% of its capital, (2) manages it alone, and (3) is the sole beneficial owner thereof.

⁹ The term "Board" refers to the legal administrative body, such as the *conseil d'administration* or *directoire* of a *société anonyme* or the *gérants* or *conseil de gérance* of a *société à responsabilité limitée*, or any equivalent body in other types of companies.

¹⁰ The term "company" refers to the company on whose board the director sits. This table does not specifically address asbls and *fondations*, but the principles that emerge from this table should apply *mutatis mutandis*.

Natural persons made available through a legal person to serve on the Board of a company

Typical case	Description	Explanation of additional practices	Is it a TCSP?
5	A legal person that offers to make one or more of its employees available to a customer company to serve on the Board of that customer company.	<i>Directors¹¹ provided by the legal person to a customer company are employees of the legal person. It is possible that the agreement between the legal person and the company for which the service is provided stipulates that in the event of the termination of a director's mandate, another director is/can be offered by the legal person. The director may receive remuneration directly from the customer company or via the legal person.</i>	In light of the services offered, the legal person is a TCSP. > Employees of the legal person who are made available to serve on the Board of the customer company provide a service for another person under a written or oral agreement. Employees of the legal person are not TCSPs themselves.
6	A legal person whose business is to provide assistance to directors, such as acting as an intermediary between directors (who are not employees of that legal person) and companies that intend to appoint a director to their Board.	<i>The directors brought in by the legal person are not employees of the legal person. There may be various other contractual arrangements (e.g. a business introducer contract). It is conceivable that the contract between the legal person and the company for which the service is provided stipulates that in the event of the termination of a director's mandate, another director is/can be offered by the legal person. The director may receive remuneration directly from the customer company or via the legal person.</i>	In light of the services offered, the legal person is a TCSP. > It facilitates the provision of directors and may receive remuneration from the customer company or the directors. Directors who are connected by the legal person to the customer company where they serve on the Board are TCSPs. They provide a service for another person under a written or oral agreement.

¹¹ The term "director" is explained on the previous page of this document.

Legal persons sitting on the Board of a company

Typical case	Description	Explanation of additional practices	Is it a TCSP?
7	A legal person sitting on the Board of a customer company. The legal person must appoint a permanent representative who is a natural person and acts on behalf of the legal person. In this example, the permanent representative is an employee of the legal person.	<i>The permanent representative of the legal person is an employee of the legal person. In the event that the permanent representative ceases to hold office, another permanent representative is appointed by the legal person.</i>	The legal person is a TCSP. > It provides a service for another person under a written or oral agreement. The permanent representative, an employee of the legal person, is not a TCSP.
8	A legal person sitting on the Board of a customer company. The legal person must appoint a permanent representative who is a natural person who acts for and on behalf of the legal person. In this example, the permanent representative is not an employee of the legal person, but is bound by another arrangement to represent the legal person.	<i>The permanent representative of the legal person is not an employee of the legal person but is bound by another contractual arrangement with the legal person. In the event of the permanent representative ceasing to hold office, another permanent representative shall be appointed by the legal person.</i>	The legal person is a TCSP. > It provides a service for another person under a written or oral agreement. The permanent representative, who is not an employee of the legal person, is a TCSP. > He or she provides the service for another person under a written or oral agreement.