

IT outsourcing in Luxembourg: legal & regulatory aspects

Par Gary Cyswé (cf. portrait) et Catherine Jardin, Noble & Schaeidecker, avocats à la Cour

Following an overview of information technologies outsourcing ("IT outsourcing") in Luxembourg in the first of our four-part series, this second article gives an insight into the main local legal and regulatory aspects, notably the numerous opportunities due to the PFS status, which should be considered by both companies willing to outsource the whole or part of their IT activities and service providers wishing to provide high-quality services to national and international clients.

1. Outline of the applicable laws and sector specific regulations

There are no laws or regulations dealing with the legal requirements of outsourcing in particular. However, some main legal provisions applying to outsourcing, as the case may be, are outlined below.

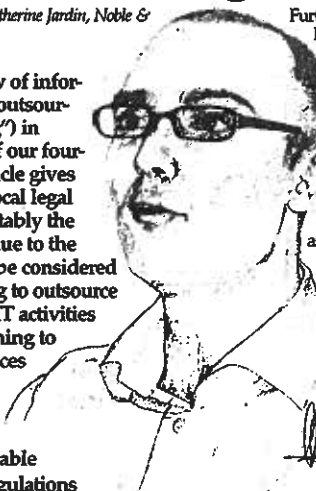
i) Applicable law

The major regulations applicable to outsourcing in general and IT outsourcing in particular consists of the Law of 5 April 1993 on the financial sector, as modified (the "Financial Act"), which defines the concept of professional of the financial sector ("PFS"). The Financial Act has recently been significantly modified by the Law of 13 July 2007 relating to markets in financial instruments (the "MiFID Act") and implementing among others the Directive 2004/39/EC relating to markets in financial instruments (so called "MiFID"). The MiFID Act notably provided for amendments to the Financial Act as to the definition of the PFS.

A significant amendment which is notably important in the frame of IT outsourcing is the creation of the following two new categories of service providers:

- article 29-3 of the Financial Act not only regulates operators of primary IT systems of the financial sector (i.e. those operators who are in charge of running information systems allowing the setting up of accounts and of financial statements). These providers are also able to carry out the activities provided for in the new Article 29-4 of the Financial Act (see below).

- the new Article 29-4 of the Act applies to operators of secondary IT systems and communication networks of the financial sector, those operators who are in charge of information systems not covered by new Article 29-3 of the Financial Act.



Further to the MiFID Act, PFS are no longer required to provide their services exclusively to companies of the financial sector. Moreover, PFS are called support PFS when they have been granted a license by the "Commission de surveillance du secteur financier" (Luxembourg's Commission for the supervision of the financial sector - the "CSSF") for acting as operators of financial sector information technology systems and communication networks for providing IT services to other professionals of the financial sector. For the sake of completeness, it may be noted that following the modification of the Financial Act by the MiFID Act, there now exist the following four support PFS, which have to be legal persons and all render their respective services on behalf of or to credit institutions, PFS, UCIs, pension funds, insurance undertakings or reinsurance undertakings established under Luxembourg law or foreign law (the "Beneficiaries"):

- art. 29-1 of the Financial Act: Client communication agents

Communication agents engage in the provision of services such as the production, in tangible form or in the form of electronic data, of confidential documents intended for the personal attention of clients of the Beneficiaries, the archiving or destruction of documents, the communication of documents to clients of the Beneficiaries, management of mail giving access to confidential data of clients of the Beneficiaries, and so on.

- art. 29-2 of the Financial Act: Financial sector administrative agents

Administrative agents provide administration services which form an integral part of the business activities of the prime contractor pursuant to a sub-contract.

- art. 29-3 of the Financial Act: Primary IT systems operators of the financial sector

These service providers are responsible for the operation of IT systems belonging to the Beneficiaries and allowing for the drawing-up of accounts and financial statements (without these services having an impact on the professional activity of the Beneficiaries).

- art. 29-4 of the Financial Act: Secondary IT systems and communication networks operators of the financial sector

These service providers are responsible for the operation of IT systems other than those belonging to the

Beneficiaries and allowing for the drawing-up of accounts and financial statements and for the operation of communication networks. Moreover, the provisions of the act of 14 August 2000 on electronic commerce, the act of 27 July 1991 on electronic media and the act of 2 August 2002 on the protection of individuals with regard to the processing of personal data, as well as several legislation on competition may also apply to IT outsourcing projects. In addition to the laws referred to above, the common rules applicable to any contractual relationship will still be applicable for all aspects not specifically regulated elsewhere, notably the provisions of the Civil Code (e.g. in relation the contractual rules to be respected). The common rules will also apply to any IT outsourcing that does not fall within the scope of the Financial Act.

ii) Applicable regulations

The main CSSF's circulars regarding IT outsourcing in the financial sector are the following:

- Circular IML 96/126 of 11 April 1996 on administrative and accounting organization ("Circular 96/126");
- Circular CSSF 05/178 of 11 April 2005 on administrative and accounting organization; outsourcing of IT services; and abrogation of point 4.5.2. of circular IML 96/126 and replacement by point 4.5.2. of this circular ("Circular 05/178");
- Circular CSSF 06/240 of 22 March 2006 on administrative and accounting organization; IT outsourcing and details regarding services provided under the status of support PFS, articles 29-1, 29-2 and 29-3 of the law of 5 April 1993 on the financial sector as amended; and modification of IT outsourcing conditions for branches located abroad.

- Circular CSSF 08/350 Details relating to the amendments introduced by the Law of 13 July 2007 on markets in financial instruments to the PFS statuses referred to in articles 29-1, 29-2, 29-3 or 29-4 and designated as "support PFS"; Amendment to the prudential supervisory procedures for support PFS.

2. Regulator's position insight

The question of whether a support PFS status is required mainly depends on the possibility of the service provider being able to regularly access confidential data. In other words, the main principle is that the service provider, not having support PFS status, may not have access to confidential data. This requirement is important as the Beneficiaries of the services and support PFS are subject to the same professional secrecy. Circular 96/126 (as modified by Circular 05/178) of the CSSF sets out the rules governing the outsourcing of services to third parties not having a support PFS status. - Certain circumstances may be raised as to know whether the outsourcing has to be undertaken by a support PFS or not, e.g. will the service provider have regular access to confidential data, will there be unaccompanied access to the beneficiaries' premises, work in a production environment (as opposed to development or test environments), etc.

3. Corporate legal aspects

Both an entity interested in outsourcing its IT services and an entity wishing to provide IT services, should consider the following corporate legal aspects.

i) General corporate legal aspects

Under Luxembourg corporate law, no particular restrictions apply to the outsourcing of services to a specific company. However, outsourcing of services by a Luxembourg company to a service provider is only possible to the extent that it does not entail the transfer of the effective place of management to another country, as this would engender the change of the nationality of the company. Indeed, Luxembourg Company Law states that the domicile of a company is determined by the location of its principal establishment (which is, unless the contrary is proven, deemed to be its registered office). A company that is domiciled in Luxembourg has hence Luxembourg nationality and shall be governed by Luxembourg law. In this context, the activity of domiciliation of companies could be considered as a form of outsourcing and the particular restrictions of the act of 31 May 1999 regarding the domiciliation of companies should be respected.

ii) For an entity envisaging to become a PSF

Regarding the outsourcing of activities governed by the Financial Act, an entity that envisages becoming a PSF within the meaning of sections 29-1 to 29-4 of the Financial Act shall, in order to be able to provide regulated services to clients wishing to outsource their activity, be a Luxembourg-based company under the corporate form of a Société anonyme (S.A.), a Société à responsabilité limitée (Sàrl), a Société en commandite par actions (SCA), a Société en nom collectif (SNC), a Société en commandite simple (SCS), or a Société coopérative. Normal market practice is for a Support PFS to take one of the following corporate forms: a public company limited by shares (S.A.), a private limited company (Sàrl) or a limited corporate partnership (S.C.A.). Moreover, some particular requirements (to be reflected in the articles of association of the company) must be satisfied on the incorporation of a PFS as well as in the case where an existing company is transformed into a PFS: (i) the corporate object of the company shall reflect the services that the Support PSF will render, (ii) the company's capital must amount to the capital required for the relevant PFS status and (iii) the compulsory auditing of the PFS annual accounts by one or more external auditors ("réviseur d'entreprise").

4. Outlook

Following the above legal and regulatory aspects as regards IT outsourcing in Luxembourg, the next article will outline the impact of outsourcing in practice with a focus on technologies and IP related aspects.