

C L I F F O R D
C H A N C E

LUXEMBOURG PERSPECTIVES SERIES | WINTER 2022

IT OUTSOURCING IN THE FINANCIAL SECTOR: NEW CSSF CIRCULAR 22/806 ON
OUTSOURCING ARRANGEMENTS AND NEGOTIATING OUTSOURCING ARRANGEMENTS

1 DECEMBER 2022

AGENDA

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22/806
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1. CIRCULAR CSSF 22/806 – GENERAL OUTSOURCING REQUIREMENTS

GENERAL OUTSOURCING REQUIREMENTS

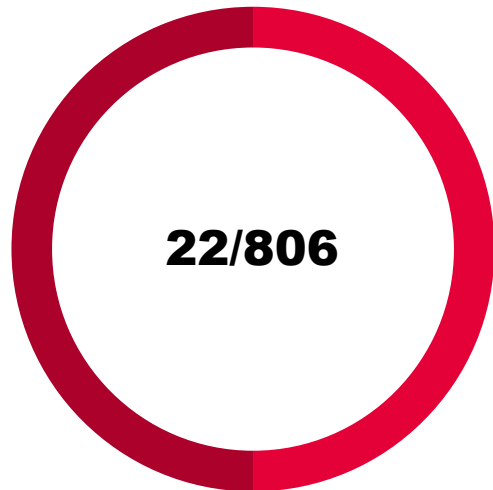
OVERVIEW

Single consolidated set of outsourcing provisions that were previously disseminated in various CSSF circulars

Who	What	How	When
<p>In-Scope Entities:</p> <ul style="list-style-type: none">• credit institutions• investment firms• payment and electronic money institutions• other PFS <p>ICT outsourcing:</p> <ul style="list-style-type: none">• IFMs• UCITs• others (CCPs, APAs, market operators running a trading venue, CSDs, administrators of critical benchmarks)	<ul style="list-style-type: none">• General outsourcing requirements• Prior notification to the CSSF <i>change of supervisory approach</i>• Additional requirements for ICT outsourcing	<ul style="list-style-type: none">• Assessment of the outsourcing• Due diligence and risk assessment• Implementation of sound governance• Reviewing and amending existing outsourcing arrangements	<p>Circular 22/806 repeals Circulars 17/654 (cloud), 17/656 (IT outsourcing), etc.</p> <p>Circular 22/806 amends Circular CSSF 18/698 (which continues to apply to the authorisation and organisation of IFMs)</p> <p>Applies from 30 June 2022</p> <p>Grandfathering period until 31 December 2022</p>

GENERAL OUTSOURCING REQUIREMENTS

GENERAL RULES



22/806

- “Outsourcing” definition
- Assessment of outsourcing arrangements
- Management board remains ultimately responsible
- No empty shell / lack of substance
- Principle of proportionality
- Outsourcing outside the EEA
- Recovery and resolution planning
- Governance requirements
- Access and audit rights
- Contractual requirements
- CSSF prior notification for critical / important functions
- Intra-group outsourcing
- Restrictions applicable to outsourcing of internal audit, internal control functions and financial and accounting functions
- Specific contractual requirements applicable to all outsourcing arrangements



2. CIRCULAR CSSF 22/806 – ICT-RELATED REQUIREMENTS

ICT OUTSOURCING REQUIREMENTS

DEFINITIONS /1

“ICT outsourcing arrangement”*

- an arrangement of any form between an In-Scope Entity and a service provider...
- by which that service provider performs an ICT process...
 - IT system management / operation services (circ. CSSF 06/240)
 - Other services
- that would otherwise be undertaken by the In-Scope Entity itself...
- that either:
 - does not rely on a cloud computing infrastructure.
 - relies on a cloud computing infrastructure

**aligned with EBA Outsourcing Guidelines 2019*

ICT outsourcing arrangements are **pure ICT outsourcing**

ICT outsourcing arrangements are not **business process outsourcing** (i.e. underlying ICT systems form part of this business process outsourcing)

ICT OUTSOURCING REQUIREMENTS

DEFINITIONS /2

“Critical or important functions”*

- Outcome of risk assessment
- Factors to be taken into account:
 - connection to core business activities
 - impact of any disruption to the outsourced function or failure of the service provider to provide the service
 - impact on services provided to clients
 - impact of a confidentiality breach or failure to ensure data availability and integrity
 - lock-in risk

**Terminology from MiFID II / PSD2*

aligned with EBA Outsourcing Guidelines 2019

replaces the term ‘material’ that was used in the previous CSSF circulars

ICT OUTSOURCING REQUIREMENTS

OBLIGATION MATRIX

Any type of outsourcing

Internal governance and risk management:

- assessment of the outsourcing and critical and important functions
- sound governance arrangements
- outsourcing policy
- business continuity plan
- internal audit function
- documentation and notification
- pre-outsourcing analyses
- contractual requirements
- oversight
- exit plans
- data protection

ICT outsourcing

- Additional contractual requirements (access to data)
- Group outsourcing (in Lux vs. abroad)
- Type of ICT service
- Specific requirements for support PFS

Cloud outsourcing

- Cloud register
- Cloud officer
- Resource operator obligations (reporting, IT expertise and training)
- Guarantees from CSP (no access to data, no manual involvement)
- Additional contractual requirements (governing law, resiliency)

Outsourcing of C/I functions

- **Update governance documentation** (outsourcing policy, BCP, audit plan and program, outsourcing register)
- **Update processes and procedures** (oversight)
- **Pre-outsourcing analysis** (due diligence, risk assessment)
- **Additional contractual requirements** (access and audit rights, sub-outsourcing)
- **Prior notification** to the CSSF
- Exemptions if non-critical or important outsourcing

ICT OUTSOURCING REQUIREMENTS


NOTIFICATION

Change of supervisory approach

FORM: Notification for outsourcing of material IT activities*

**Published on 14 October 2021*

Not yet updated in light with Circular CSSF 22/806



Notification for outsourcing of material IT activities¹

1. Preliminary remarks and general principles

This template shall be used in case of IT outsourcing² under:

- Circular CSSF 12/552, as amended for credit institutions and professionals performing lending operations for the outsourcing of material IT activities as defined in section 7.4.1. – Point 182;
- Circular CSSF 17/656, as amended for e-money institutions, payment institutions and PFS other than investment firms for the outsourcing of material IT activities as defined in section 1 – Point 182;
- Circular CSSF 18/698, for investment fund managers and entities carrying out the activity of registrar agent for the outsourcing of material IT activities as defined in section 5.1.1. – Point 138;
- Circular CSSF 20/758, for investment firms for the outsourcing of material IT activities as defined in section 7.4.1. – Point 184;
- Circular CSSF 17/654, as amended, for material IT outsourcing relying on a cloud computing infrastructure as defined in sections 26.b - i;

To note that this template is also to be used in case of outsourcing of material IT activities to a support PSF in accordance with article 29-1 to 29-6 of the LFS, contrary to the previous template.

This template shall also be used to submit changes to existing outsourcing arrangements. In this case clearly indicate the reference to the previous notification in point 2.9, and only indicate changes compared to the previous notification throughout the document.

This template shall not be used in the following cases (negative scope)

- Outsourcing of IT activities that are not considered material. Refer to our FAQ on the assessment of IT outsourcing materiality:
<https://www.cssf.lu/en/Document/faq-on-the-assessment-of-it-outsourcing-materiality/>
- Circular CSSF 17/654, as amended, for material IT outsourcing relying on a cloud computing infrastructure as defined in sections 26.1. The existing Form D and Form E remain in place.
- Business Process Outsourcing³

Incomplete forms will be rejected. Should some questions not be applicable to the IT outsourcing project, indicate "not applicable".

The document shall be submitted in two formats, one PDF version duly signed by the authorised management, and one in editable MS Word format, via e-mail or secure communication channel to the CSSF agent in charge of the supervision of the institution.


¹ Material activities are to be seen as "Critical or important functions" in the sense of the EBA Guidelines on outsourcing arrangements (EBA/GL/2019/02).

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

³ A Business Process Outsourcing is an outsourcing that is not purely IT in nature, i.e. at least some of the outsourced services are business related.

NOTIFICATION FOR OUTSOURCING OF MATERIAL IT ACTIVITIES

Unrestricted



CLOUD OUTSOURCING REQUIREMENTS

DEFINITION

5 essential characteristics:

On-demand self service

- PSF must be able to provision and allocate computing power without human intervention of the Service Provider

Broad network access

- The infrastructure is accessible via the internet

Resource pooling

- The infrastructure is shared between multiple users (tenants)
- The client must be able to know the location of the data center

Rapid elasticity

- Computing power can more or less be provided to the client easily (the infrastructure must be 'elastic')

Measured service

- The Service Provider is at all times able to monitor and access data related to its resources (storage, processing power, etc.)

2 specific requirements:

No access to data by staff of Service Provider

- Except for in exceptional circumstances, access of the Service Provider must be restricted and subject to preventive measures
- These practices must be audited at least annually

No human intervention of Service Provider

- The client (or a resource operator on its behalf) shall manage its IT environment hosted on the cloud computing infrastructure alone

An internal service must be outsourced

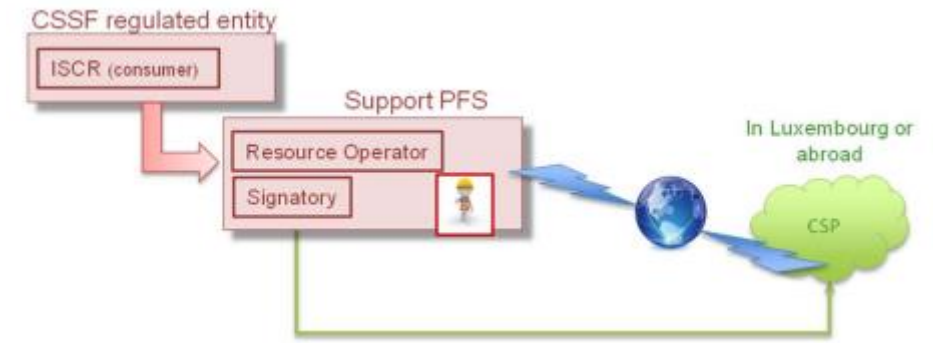
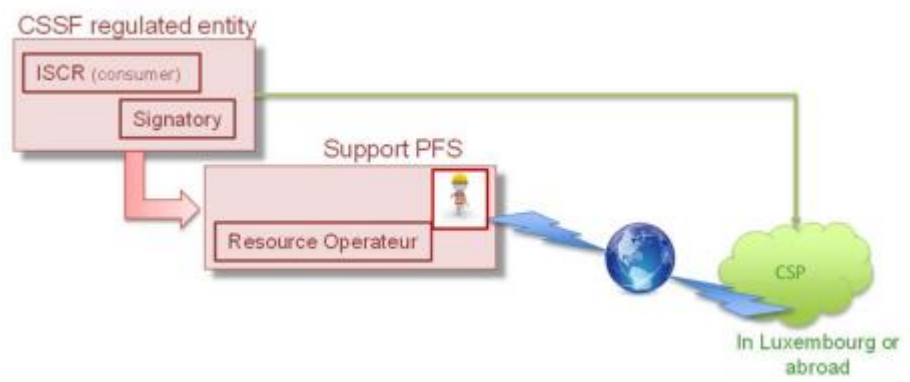
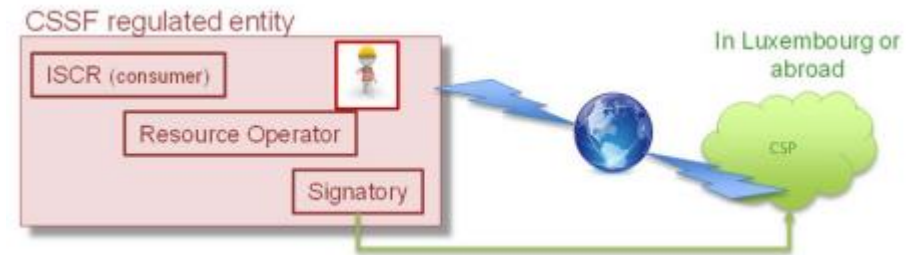
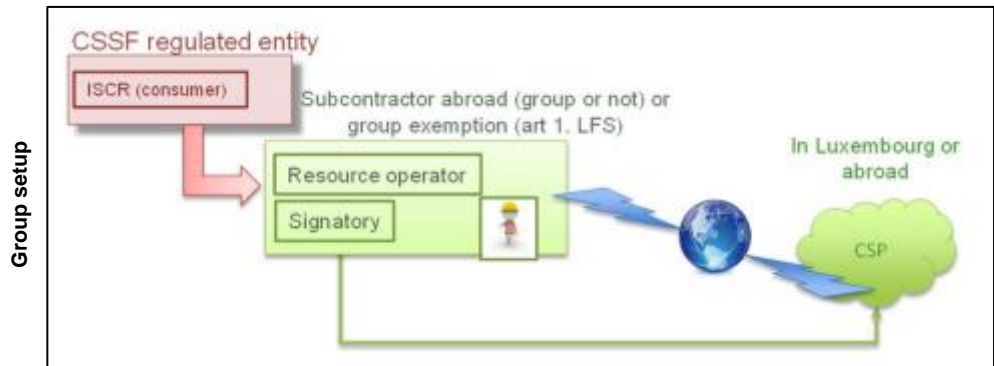
- If the cloud service is used for activities that cannot be internalised, then its use is not considered as outsourcing

CLOUD OUTSOURCING REQUIREMENTS SET-UPS

ICT Outsourcings

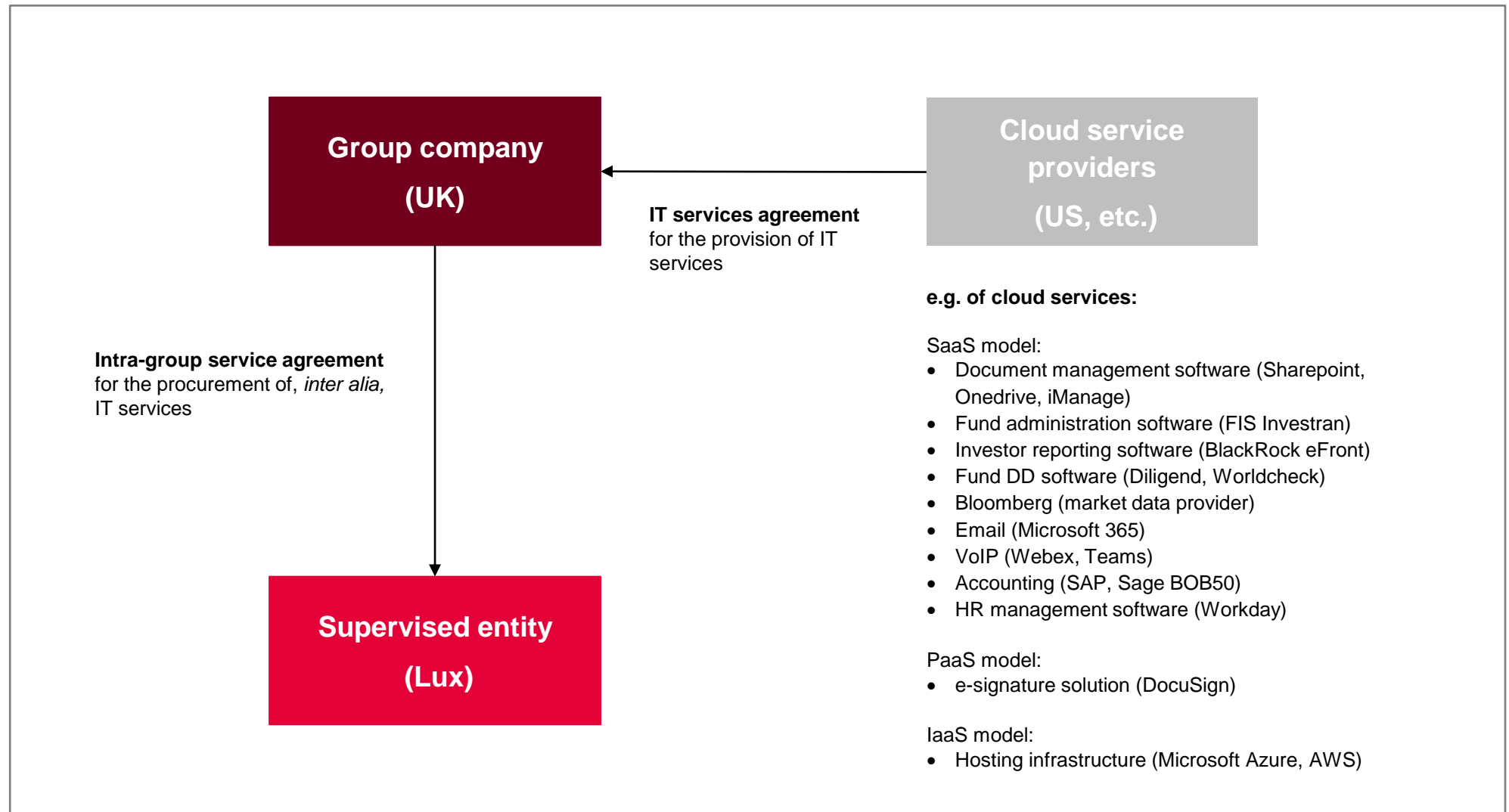


Cloud Outsourcings (see CSSF FAQ)



CLOUD OUTSOURCING REQUIREMENTS

TYPICAL EXAMPLES





3. NEGOTIATING OUTSOURCING ARRANGEMENTS

NEGOTIATING OUTSOURCING ARRANGEMENTS

NEGOTIATING REGULATED OUTSOURCING ARRANGEMENTS

Will you know it when you see it?

- Definition of “outsourcing”
- Who decides?

Battle stations! We have a regulated outsourcing!

- Pre-contract requirements
- Contract requirements
- Post-contract requirements

Using regulatory arguments to secure concessions in negotiations

NEGOTIATING OUTSOURCING ARRANGEMENTS

CONTRACTUAL ARRANGEMENTS WITH THIRD PARTIES

The outsourcing agreement shall set out:

General contractual requirements

a clear description of the outsourced function to be provided	start date and end date, and the notice periods	governing law of the agreement (EU State or third country)	the parties' financial obligations
whether the service provider shall take mandatory insurance against certain risks	termination rights	agreed service levels, which shall include precise quantitative and qualitative performance targets and audit right	whether material outsourcing is permitted and sub-outsourcing requirements
service and data storage locations (including notification to the In-Scope entity in case of changes)	unrestricted right of In-Scope Entities and competent authorities to inspect and audit the service provider	reporting obligations of the service provider to the In-Scope Entity	obligation of the service provider to co-operate with the competent authorities
provisions regarding the accessibility, availability, integrity, privacy and safety of relevant data	requirements to implement and test BCP	ensure that the data are owned by the In-Scope Entity	data accessibility in the case of the insolvency, resolution or discontinuation of business operations of the service provider

Regulatory related requirements



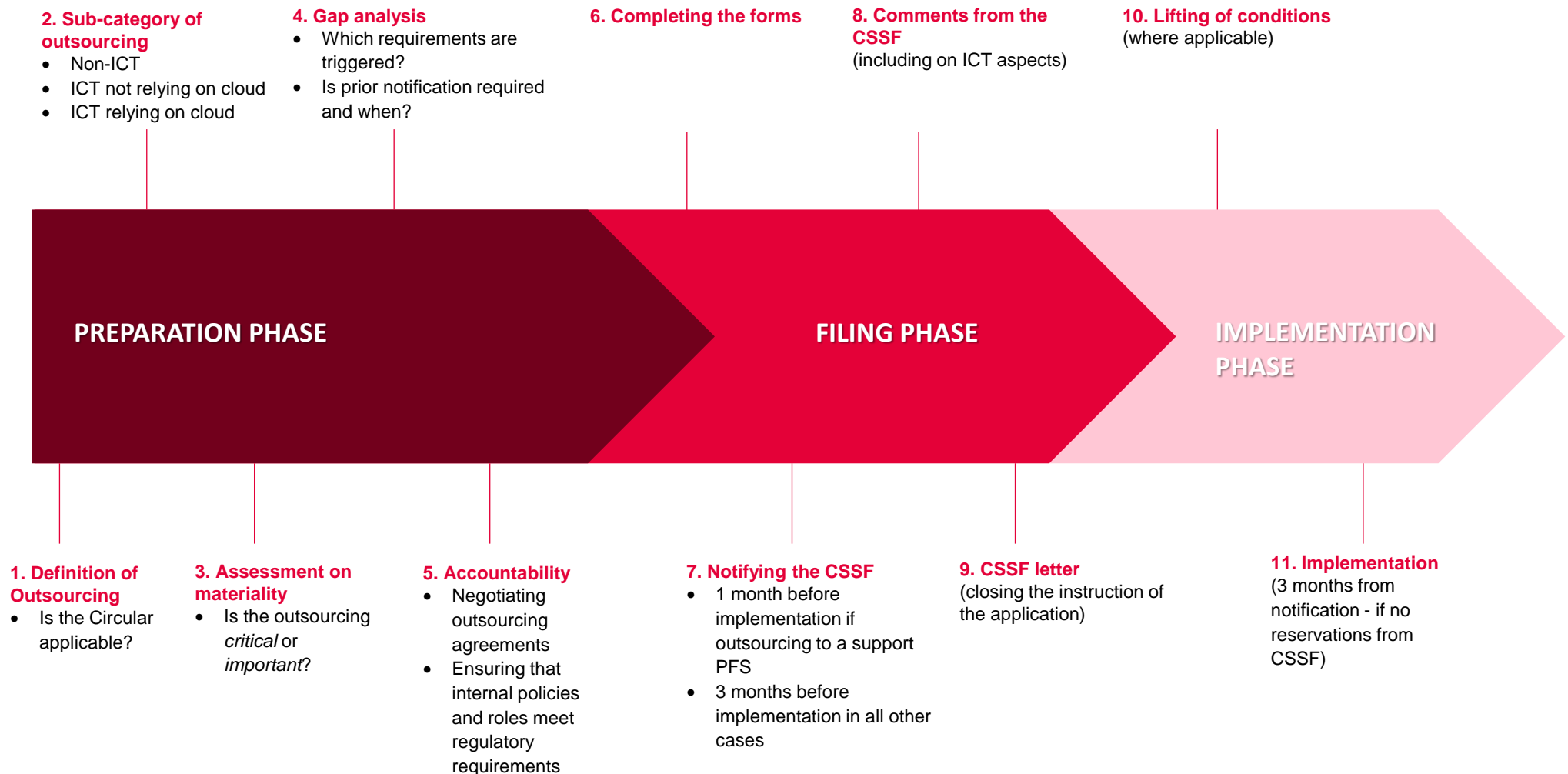
4. MARKET INSIGHTS



MARKET INSIGHTS

OVERVIEW OF FILING PROCESS

The process of identifying the relevant requirements under the Circular in relation to a given outsourcing arrangement can be summarised as follows:





Q&A

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