Schedule – Full Answers

1. Provision of banking services by a foreign bank, without a local licence, on cross border basis

1.1 To what extent can a foreign bank (which is not locally authorised) provide the services listed in 1.3 (on a cross border basis) to local retail customers, commercial clients and wholesale counterparties?

Austria
Conducting banking activities as mentioned in the Austrian Banking Act in Austria is only permitted after obtaining a banking licence under Austrian law or passporting a banking license of a credit institution duly authorised and registered in another EEA Member State. According to Sec 1 of the Austrian Banking Act all of the services mentioned above qualify as banking activities. If these activities of a foreign bank are deemed to be carried out in Austria on a commercial basis, a national license will have to be obtained. For instance, if transactions are executed by way of correspondence (such as by facsimile or postal exchange of confirmations/signature pages), it might be sufficient to qualify as conducting business in Austria if the location of dispatching/posting the offer in order to enter into a transaction or the acceptance thereof takes place in Austria (this should apply to correspondences by means of electronic communications as well). Promotion of services or marketing activities without offering services to customers in Austria is however not restricted.

Belgium
It is not possible for a foreign bank to provide any services under a freedom to provide services basis and no exemptions are provided (reverse solicitation is however admissible). The foreign bank has either to establish a subsidiary or a branch.

Bulgaria
Generally, a foreign bank is not allowed to perform banking activities in the territory of Bulgaria unless it establishes a branch or a subsidiary in Bulgaria and seeks licence from the National Bulgarian Bank (the "BNB").

One-off transactions at the client's initiative however are not prohibited. Deposit taking from more than 30 clients (other than banks and institutional investors) will nonetheless require a licence.
A foreign bank might consider different options. For example, it may decide to establish a local financial institution (FI) which is allowed to lend money to the public from own funds. If that is its main activity the local FI must get registered, though not licenced, with the BNB. If that is not its main activity, the FI will not have to register.

Further, a foreign bank may establish a local payment institution for provision of payment services. However, it will have to obtain a licence from the BNB.

Note that transactions between a local and a foreign entity (including provision of bank accounts or money lending) are notified to the Bulgarian National Bank for statistical purposes.

Czech Republic
A foreign non-EU based bank cannot provide any services in the territory of the Czech Republic without establishing a branch in the Czech Republic and obtaining a relevant license issued by the Czech National Bank (the "CNB").

To avoid the licensing requirements under Czech law, the services shall be provided outside the territory of the Czech Republic (in more detail please see question 2.1 below).

France
Under the French banking monopoly, only French or foreign authorised credit institutions may provide banking services in France. Thus, unless a third-country bank has obtained the French regulators' prior approval, it cannot offer banking services on a habitual basis and in a professional manner in France.

Germany
Pursuant to section 32 paragraph 1 sentence 1 of the German Banking Act ("KWG"), anyone wishing to conduct banking business or to provide financial services in Germany commercially or on a scale that requires a commercially organised business undertaking requires a written licence. Pursuant to the German Federal Financial Supervisory Authority ("BaFin") banking business is conducted or financial services are provided in Germany not only if the provider of the service has its registered office or ordinary residence in Germany but also if the provider of the service has its registered office or ordinary residence outside of Germany and "actively approaches" the German market in order to offer the respective services in a repetitive manner and at a commercial scale to undertakings or persons that have their registered office or residence in Germany ("zielgerichtetes Wenden an den deutschen Markt") irrespective whether they are (i) professional clients or retail clients or (ii) acting as a principal or as agent. The threshold for such an active approach is considered very low by both the BaFin and German courts (for example, a German language website may already be deemed an active approach of the German market).

Thus, if according to the remarks below [question 1.2] the respective services require licensing, this applies to the provision of such services locally through a subsidiary or a branch as well as on a cross-border basis.

Hungary
Foreign banks may provide financial services to Hungarian customers only with a licence to be obtained from the National Bank of Hungary ("NHB") which is the Hungarian financial supervisory authority by way of establishment of:
a) a Hungarian branch office; or
b) a Hungarian subsidiary.

For further details see Section 5 and 6.

Italy
A foreign bank can provide the services indicated below (either through a branch or on a cross-border basis) provided that it has been duly authorized by the Bank of Italy, according to the Italian Consolidated Banking Act (Legislative Decree no. 385 dated 1 September 1993) ("CBA").

Luxembourg
A foreign bank can provide certain services in Luxembourg without a license in accordance with article 32 (5) of the Law of 5 April 1993 on the financial sector (the Law of 5 April 1993).

The provisions of the article 32 (5) are further explained in the CSSF Circular 11/515.

A foreign bank needs a license only if the following 4 (four) conditions are cumulatively fulfilled:

- the entity originates from a third country, i.e. non-EU/EEA member state;
- the entity does not have an establishment in Luxembourg
- the entity performs an activity of bank or professional of the financial sector (PSF) in their home country; and
- the entity has agents travelling occasionally and temporarily to Luxembourg, to provide services covered by the Law of 5 April 1993.

As a consequence, allegedly the provision of certain banking-related services by distance means - e.g. telephone, letter, email, chat on Bloomberg/Reuters, and personal approach at expert meetings/congresses – to clients in Luxembourg does not require a banking license.

In assessing whether or not there is the need to obtain a license, the CSSF will also take into consideration the criteria of "characteristic performance". Carrying out services or undertaking obligations which cannot be considered "characteristic" to the contract, upstream or downstream from the activities referred to in article 32 (5) does not require a license. These services include: publicity prior to rendering banking

services, temporary visits to Luxembourg in order to conclude contracts prior to the exercise of banking activity, courtesy visits to Luxembourg clients, organization of road shows in Luxembourg.

The law does not make a difference in terms of type of clients. Therefore, as long as the 4 (four) conditions above are not meet cumulatively and the services in not considered "characteristic", a foreign bank can provide in the same manner the respective services without a license to any customers, commercial clients and wholesale counterparties.

Poland
A third country foreign bank (the "FB") (contrary to credit institutions and non-EU EAA banks) may not provide banking services on a cross-border basis under Polish law. The FB may operate after establishing a branch or a representative office. For the sake of clarity, there are certain provisions under Polish law which may be interpreted in a way that allows the FB to promote its services on a cross-border basis. However, such promotion has to be objectively considered as "intermittent", and within Polish territory: (i) no negotiations can be carried out, (ii) no contracts can be executed, (iii) no orders or instructions related to the services may be accepted, (iv) and no advisory services may be provided. Notwithstanding these general rules, regulatory risk still cannot be excluded, therefore such activity should be considered as rather incidental.

Portugal
A provision of services in such terms is not permitted, nor do exceptions apply. Only credit institutions and financial companies having their head office in Portugal and branches of financial and credit institutions having their head office abroad are qualified to carry on the activities described below [listed in 1.3].

Romania
If the foreign bank is not locally authorised, the below services can be provided only to the extent that they are purely occasional and isolated activities, the foreign bank does not channel its activity towards the local market, does not advertise in any way products and/or services on the local market and does not try to attract clients or business partners.

Spain
Foreign banks cannot operate without authorisation from the Bank of Spain.

The Netherlands
A bank is defined as the party which business it is to receive repayable funds, outside a restricted circle, from parties other than professional market parties, and to grant credits for its own account.

- Attracting repayable funds (deposits etc.) without licence and offer credit facilities to consumers is only allowed with a license of the Dutch Central Bank (DNB) or the Authority Financial Markets.
- Pursuing the business of a payment service provider is forbidden unless holding an authorisation issued by DNB.
- Lending, factoring, leasing (secured or unsecured) to non-consumers is permitted without licence.

The United Kingdom
Under the Financial Services and Markets Act 2000 ("FSMA"), no person may carry on a regulated activity in the UK unless they are authorised or exempt. It is an offence to carry on regulated activities without being authorised, unless an exemption is available.

The PRA/FCA will look at whether or not a service provided on a cross border basis is carried out in the UK, e.g. considering where the 'essential supply' of the service takes place.

Deposit taking is a regulated activity under Article 5 of the FMSA (Regulated Activities) Order 2001 ("RAO"). This is the case for retail customers, commercial clients and wholesale counterparties, provided the deposits are received in the UK. If the deposits relate to UK clients but are received overseas, this is not considered a regulated activity. Payment services are also regulated, under the Payment Services Regulations 2009, and require authorisation.

Lending and other debt activities are not regulated in the UK, except for lending to retail customers. This is regulated as consumer credit activity, and requires authorisation.

1.2 Where local authorisation or licensing is required, are there any useful exemptions?

Austria
[no answer]

Belgium
No useful exemptions.

Bulgaria
No

Czech Republic
To avoid the licensing requirements under Czech law, the services shall be provided outside the territory of the Czech Republic (in more detail please see question 2.1 below).

France
None except pure reverse solicitation which is delicate to establish given that under French criminal law, any act in relation to the service that is taking place in France (e.g. meeting, receiving the offer for a credit, signing the agreement, etc…) triggers a breach of the monopoly.

Germany
Deposit taking and payment services/provision of bank accounts

- Deposit taking: Without licensing generally only allowed in case of non-commercial deposit taking activities (low threshold; commercial scale is generally already assumed if more than five individual deposits which collectively exceed EUR 12,500 are being held or, irrespective of the value, more than 25 individual deposits are being held; this is only a rough guideline, though and an assessment can only be made on a case-by-case basis)

- Useful exemptions: Repayment obligations in form of bearer bonds or negotiable bonds; deposits for which the depositor has agreed to a "qualified subordination" (i.e. subordination in case of insolvency proceedings; repayment cannot successfully be claimed if this would lead to an insolvency of the deposit taking entity).

- As to payment services: Credit institutions according to Art. 4 of the regulation (EU) no. 575/2013 ("Capital Requirement Regulation" or "CRR") which are entitled to operate in Germany do not require a separate payment services licence in Germany. A payment service provider of an EU or EEA country may passport its licence into Germany according to section 26 of the German Payment Services Regulation Act ("Zahlungsdiensteaufsichtsgesetz" or "ZAG"). Otherwise a licence according to section 8 ZAG is required.

- Provision of bank accounts: In our view, the provision of bank accounts goes hand in hand with deposit taking activities and therefore according to the aforementioned generally requires a licence.

Lending (either secured, e.g. on land/real estate, or unsecured) and other forms of finance such as trade finance

- Any form of lending activities generally requires a licence if done on a commercial scale (low threshold; as a rule, commercial lending can already be assumed in case of more than 100 loans irrespective of the total loan amount or more than 20 loans jointly exceeding EUR 500,000).

- Exemptions: Sales financing, i.e. credit financing of own sales; mere deferral, mere acquisition (which might qualify as regulated factoring, though) and servicing of loans (as long as no credit decisions are made); "qualified subordination" of the lender (see above).

Originating/purchasing/selling debt participations (secured or unsecured), such as syndicated loans or securitised debt obligations

- Syndicated loans fall within the scope of lending as described above (as the case may be, syndicated loans may be subject to a licensing exemption).

  Debt participations:

  - Depending on the individual case, the purchase or sale of debt participations may fulfil the requirements of various financial services which according to the German Banking Act typically require a licence, e.g. deposit business, investment broking, purchase and sale of financial instruments in the name of and for the account of others (contract broking), proprietary trading, portfolio management etc.).

  - Origination of debt participations might fall within the scope of the German Capital Investment Code ("Kapitalanlagegesetzbuch" or "KAGB") and would then generally require a licence. The KAGB generally applies to "investment funds" ("Investmentvermögen") which are legally defined as collective investment undertakings which raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors and which are not operative companies outside of the financial sector. There are exemptions which allow for a "circumnavigation" of the regulation under the KAGB; the topic is very complex though and can only be assessed on a case-by-case basis.

Hungary
Foreign banks are not entitled to provide financial services to local customers on a cross border basis, except for the following cases:

a) A foreign financial institution established in a Member State of the Organization for Economic Cooperation and Development may provide the below financial services to Hungary on a cross border basis:
   - granting credit facility and loans;
   - financial leasing;
   - financial brokering on the interbank market,

   each provided that such foreign service provider has been authorized to engage in such activities by the supervisory authority competent in such Member State.
b) If a foreign financial institution does not provide financial services to Hungarian customers in a business-like manner, it will not be subject to a licence. This requirement (business-like manner) is to be examined on a case-by-case basis. However, we note that one transaction can also be regarded as a financial service provided in a business-like manner.

Italy
Italian laws and regulatory provisions do not expressly provide for any exemption from the authorization/licence requirement.

Based on general principles, no licence is required in case of the so called "reverse solicitation" or "reverse enquire", i.e. when the client on his own initiative (i.e. without having been previously solicited by the bank, directly or through intermediaries) has requested to the foreign bank the provision of the relevant banking/financial service. Of course, in case of contestations in this case the bank must be in the position to give evidence that the client made the request on his own initiative.

Luxembourg
In terms of exceptions to the need of a banking license, the Law of 5 April 1993, contains an exemption for a foreign bank providing banking services in Luxembourg exclusively to one or more undertakings forming part of the same group as the foreign bank providing the service (art.1-1 (2) c) of the Law of 5 April 1993).

Poland
There are no exceptions from the rules described above under Polish law.

Portugal
The exemptions to local authorisation are reserved to credit and financial institutions authorised in other European Union Member States.

Romania
No.

Spain
There are no exemptions.

The Netherlands

- The prohibition to conduct the business of a bank without authorisation does not apply to a 'group finance company' which attracts repayable funds by issuing securities, holds a guarantee from an authorised bank or its parent company in respect of the full amount of repayable funds and grants at least 95 per cent of its balance sheet total as credit within the group of which it forms part (Section 3:2 of the Financial Supervisions: "FSA"). There is a proposal pending in parliament to change this legislations as per 1.1. 2015 and to add conditions to prevent evasive structures.

- The activities are listed in Section 1:5a(2) of the FSA (or Wft) Also, under certain conditions, payment service providers may be exempted from the authorisation requirement. These conditions, all of which must be satisfied, are enumerated in Section 1a of the Exemption Regulation under the FSA (Vrijstellingsregeling Wft, hereafter 'Exemption Regulation'). The exemption applies only to providers of payment services 1–5 and 7 as listed in the Payment Services Directive. No exemption is possible for payment service 6 (money remittance).

- Originating/purchasing/selling debt participations (secured or unsecured), such as syndicated loans or securitised debt obligations to non-consumers.

- DNB may grant dispensation for acquiring repayable funds 'beyond a restricted circle' and 'from parties other than professional market parties'. DNB will only decide to grant dispensation if the interests which the Part of the FSA on prudential supervision aims to protect – more particularly: the soundness of financial undertakings and the stability of the financial sector is sufficiently safeguarded. Dispensation will be granted only if a written guarantee is produced that warrants fulfilment of all obligations on the part of the applicant and whether the applicant really needs the dispensation.

The United Kingdom

No relevant exemptions.

1.3 To what extent can a foreign bank (which is not locally authorised) promote the services below locally? Where there are restrictions on promotion, are there any useful exemptions?

- **Deposit taking and payment services/provision of bank accounts;**
- **Lending (either secured, e.g. on land/real estate, or unsecured) and other forms of finance such as trade finance**
- **Originating/purchasing/selling debt participations (secured or unsecured), such as syndicated loans or securitised debt obligations.**

Austria
Promotion of services or marketing activities without offering services to customers in Austria is however not restricted.

Belgium
It is not possible for a foreign bank to promote any of the services mentioned above under a freedom to provide services basis.

Bulgaria
A foreign bank is not allowed to promote its services in the territory of Bulgaria unless it get licenced through a branch or a local subsidiary. It is not allowed to have a Bulgarian website or actively target Bulgarian clients. However, one-off promotion at the request of the client should be allowed.

Czech Republic
As a general rule, a foreign non-EU based bank should not promote its services in the territory of the Czech Republic, since any transaction executed with any client based on such a promotion in the Czech Republic will be most probably considered by CNB as executed in the territory of the Czech Republic. As mentioned above, such transaction can be performed by the non-EU bank only through a Czech branch or subsidiary with appropriate CNB license.

In other words, the non-EU bank could promote its services in the Czech Republic, only if its Czech branch or a subsidiary with appropriate Czech license is established before the first service is provided.

Although not addressed by the CNB expressly and thus constituting some legal uncertainty, we are of the view that the non-EU bank could promote its services in the Czech Republic if this is done through its representative office registered with CNB in accordance with Czech law.

France
None except under a pure reverse solicitation and all features taking place outside France.

Germany
[no answer]

Hungary
A foreign bank which is not locally authorised, neither it has established in Hungary a branch office or a subsidiary, may promote its financial services through its local representative office. For further details regarding a representative office, please refer to the following Q&A below in this questionnaire.

A foreign bank may promote financial services in Hungary. However, such promotion/marketing cannot be unfair which among others means that it is expected from such a foreign bank that it carries out the marketing with professional diligence, it does not distort usual behaviour of an average consumer with regard to the financial service and it enables the costumer to make an informed decision.

Italy
No promotional activities in respect of banking/financial services can be carried out in Italy by non-authorized foreign banks, to the extent that such promotional activities entail the invitation to enter into a contract.

Luxembourg
A foreign bank (which is not locally authorised) can conduct any type of promotion activity in Luxembourg, including the ones listed above, without the need to obtain an authorization due to the fact that these services are considered preparatory acts to carrying out any banking activity.

The promotion activities can be conducted through: (i) distance means or (ii) local agents travelling to Luxembourg.

In spite the fact that directing banking services to Luxembourg through promotion means does not need require a license, as soon as the provision of banking service through agents travelling to Luxembourg or through other means is being started a banking license in required.

Poland
Subject to the respective comments above, the FB may not locally promote services described above prior to obtaining a licence from the Polish Financial Supervision Authority (the "PFSA") regarding establishing a branch (fully operational capability, including marketing and promotional services) or a representative office (operational capability limited to marketing and promotional services). A licence for establishing such branch or representative office specifies all operational (including marketing and promotional) rules under the scope of its licence granted in its home country, including any potential restrictions imposed by the PFSA.

Portugal
The promotion of the services locally can be achieved through the creation of a local representative office. However, this promotion may only refer to services to be provided in the foreign bank home country.

Romania
A third country bank may not promote services and therefore try to attract clients and channel activity towards the local market if it is not duly authorised locally.

Spain
Those services cannot be promoted without authorisation from the Bank of Spain. There are no exemptions.

The Netherlands
Deposit taking and payment services/provision of bank accounts;

- When deposit taking, payment services agreements have been concluded with residents of the Netherlands; the bank uses the Dutch language; the bank makes it known that its services are aimed at residents of the Netherlands; reference is made to the applicability of Dutch legislation or the Dutch tax system; reference is made to service points located in the Netherlands; advertisements are directly made to residents of the Netherlands, payments are accepted from Dutch payment accounts whether or not in conjunction, this considered indicative for the fact that the services are being provided in the Netherlands.

Lending (either secured, e.g. on land/real estate, or unsecured) and other forms of finance such as trade finance.

- Promotion of services is only permitted when directed at non-consumers. For lending in the form of factoring and leasing for non-consumers no licence is required.

Originating/purchasing/selling debt participations (secured or unsecured), such as syndicated loans or securitised debt obligations.

- Promotion of services is only permitted when directed at non-consumers.

The United Kingdom
[no answer]

1.4 Can a foreign bank establish a local representative office to promote such services where these are to be conducted by the bank on a cross border basis (and not by the local office)?

Austria

Conducting banking activities in Austria is subject to licensing requirements under the regime of the Austrian Banking Act. Those licensing requirements apply if the relevant services are rendered in Austria (through local presence or cross-border). Even if there has been no physical contacts in Austria between the foreign bank and potential customers (and subsequently no offers submitted or accepted in Austria), it may still be argued that transactions fall within the ambit of conducting business in Austria. Advertising activities may be rendered without having a banking license via a local representative office, whereas offering cross-border banking services to customers in Austria would require a banking license.

According to Sec 73 of the Austrian Banking Act, before establishing a representative office, foreign banks have to provide the Austrian Financial Market Authority (Finanzmarktaufsichtsbehörde FMA) with a notice issued by the financial markets authority of their respective state of domicile containing, amongst other information, a statement that there are no objections in relation to the establishment of a representative office of the foreign bank in Austria. Typical functions of a representative office include marketing activities and market research. Representative offices must report the following to the FMA: (i) the planned time of opening; (ii) the actual opening; (iii) the head of the representative office; (iv) the location; (v) any changes in the information and (vi) the closure of the representative office.

In addition foreign banks have to file a notice with the FMA containing information concerning the opening, registered office, current activities of the foreign bank, planned activities in Austria, qualifying holdings in the credit institution and the manager of the representative office. Currently ten foreign banks have registered representative offices in Austria.

Belgium

Pursuant to the Belgian law on credit institutions, a foreign bank can establish a local representative office ("bureau de representation") in order to promote its activities and to collect and distribute information. A registration process has to be followed on beforehand with the Belgian regulator. However, it is expressly forbidden for a foreign bank to exercise any banking activities and in particular intervene in any way in the conclusion or in the processing of financial operations or services, other than those inherent to the administrative management of the office.

Pursuant to parliamentary preparatory papers, the local representative office may only serve for (i) notoriety purposes of the foreign bank, (ii) information purposes and (iii) contact purposes, but has to exclude any banking activities. To the contrary, it would be considered as a branch (which would imply regulatory authorisations).

Pursuant to a circular of the Belgian regulator, it is not allowed for a foreign bank to have simultaneously on the Belgian soil a local representative office and a branch. Moreover, any offer to build a relationship for financial operations or to carry out financial services is prohibited. However, it is possible to establish contacts with a determined potential client, as far as there is no banking activity (e.g. funds dealings, establishing agreements, opening and managing bank accounts (even if the latters are situated in a foreign country)).

Bulgaria

Under the current Bulgarian law it appears that foreign banks may establish local representative offices. They are registered with the Bulgarian Chamber of Commerce and Industry. The BNB is notified after completion of the registration. Representative offices are not allowed to perform commercial activity. Under Bulgarian law advertising activities are generally treated as commercial activities. Therefore, it is arguable whether a representative office can actively promote the activities of the foreign bank. One-off promotions at the client's request are allowed.

Czech Republic
Yes, a foreign bank may establish a local representative office to promote its services, but such services should not be provided on a cross border basis in the Czech Republic, but rather in the home state of the foreign bank (please refer to our answer in par. 2 (a) below). Furthermore, the local representative office may not directly carry out any regulated activity in the territory of the Czech Republic.

France
French law recognises the concept of representative office. However, these representative offices may not, under French law, promote in any way the foreign legal entity but solely assist in the relationships between French clients and the foreign banks. That being said, the French regulators tend to have a very narrow analysis of what these structures may in fact do.

Germany
An institution domiciled outside Germany may operate representative offices in Germany if it is authorised to conduct banking business or provide financial services in its home state and if it has its head office there. Official notification is necessary with regard to each, the intention and realisation of setting up of a representative office; operation may not be started before confirmation from BaFin has been received. Please note that the threshold for actions which are deemed to exceed mere representative functions is very low.

Hungary
Yes. A foreign bank can establish a permanent representative office to be registered with the Hungarian company register. Notwithstanding that the representative office will be one of the organisational units of the founder foreign bank without any own individual legal capacity or authorisation.

Representative offices cannot operate on their own name but on the name and for the benefit of their founder with the following limited scope of activity:

a) offering contracts on the name of the foreign bank to customers;
b) participating in the process of preparation of contracts; and
c) organising marketing, promotion and advertisement activity.

Licence of the NBH is required to obtain for the establishment and operation of such a representative office.

Please note that representative offices have a sort of diplomatic role to acquire local clients for their foreign founders. However, since the foreign banks may not provide financial services to/in Hungary, such local clients shall contact these foreign banks abroad (either where such banks are registered or where they are permitted to provide financial services) to enter into any agreement with such banks.

Italy
A foreign bank can set-up a representative office (ufficio di rappresentanza) in Italy in order to carry out promotional activity and study of the relevant market. No banking/financial activities can be carried out through the personnel of the representative office.

Luxembourg
A foreign bank might open an information office ("bureau d 'information") in Luxemburg provided that the activity carried out is not in any circumstances commercial. The supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF) prefers using the term information office rather than representative office in order to avoid implying the capacity to conduct commercial transactions.

The information office is supervised by the CSSF and shall have to draft an annual activity report to the CSSF.

Before opening an information office, the foreign bank has to undergo an administrative procedure with the CSSF. During this administrative procedure the regulator will assess the activities to be performed by the information office, which cannot be in any circumstances any banking activity.

Poland
No, please see the answers to other parts of question no. 1 above.

Portugal
The local representative office may only promote services that the foreign bank is allowed to provide. Please refer to previous answers on this point 1.

Romania
A third country bank may establish a local representative office (subject to the notification of the National Bank of Romania – the local credit institutions regulatory authority) which may only conduct market research, representation and promotion activities. However, this may not automatically enable the foreign bank to conduct the services on a cross border basis other than on an occasional and isolated basis, as mentioned above.

Spain
Foreign banks may establish a local representative office, which cannot conduct banking transactions (deposit taking, lending, rendering financial assistance, etc.). Representative offices shall be authorised by the Bank of Spain.

The Netherlands
Within the limitations described above [in previous question].

The United Kingdom
[no answer]

2. Provision of investment services from home country without a local license

2.1 To what extent can a foreign bank or investment firm (which is not locally authorised) provide the services below to local retail customers, commercial clients and wholesale counterparties? Are there any useful exemptions?

Austria
If the investment services are deemed to be carried out in Austria on a commercial basis a national banking or investment license will have to be obtained (depending on whether such an activity qualifies as being carried out in Austria or is only cross-border from outside Austria). As regards online transactions the criteria relating to legal acts would prevail (i.e. the place of submitting an offer and/or the place of acceptance of an offer would be of major importance). As a licensing requirement, the management and seat of the investment companies conducting businesses in Austria have to be located in Austria.

Belgium
It is not possible for a foreign bank/investment firm which is not locally authorised (i.e. no subsidiary / no branch) to provide the services described below to Belgian retail customers.

However, investment services may be provided to the following counterparties:

- Belgian State, Regions and Communities;
- European Central Bank, National Bank of Belgium, Securities Regulation Fund, Protection Fund for Deposits and Financial Instruments, Consignments and Loans Fund;
- Belgian and EEA and non-EEA banks, investment firms, collective investment undertakings, insurance companies established in Belgium;
- Companies which financial instruments are admitted for trading and with an equity capital of at least 25 Mio. EUR;
- Persons established in Belgium, who have the nationality either of the foreign investment firm or of a country in which the investment firm has a branch, provided that the given investment firm is subject in its home country or in the country of the branch to an equivalent control as Belgian investment firms would be.
- A registration process has to be followed on beforehand with the Belgian regulator

Reverse solicitation is admissible.

Bulgaria
Generally, only local banks whose licence covers investment services or local investment intermediaries which are licenced from the Financial Supervision Commission (the "FSC") may provide regulated investment services. A foreign bank or a foreign investment intermediary may establish a local subsidiary or a branch and apply for a licence. One-off transactions at the client's request however should be allowed.

Czech Republic
If the financial services are provided by the foreign non-EU bank or investment firm in their home state to a Czech client, Czech rules will not apply and such a financial institution does not need to establish a branch/subsidiary in the Czech Republic and to obtain the CNB license.

According to the CNB, a financial service is generally provided in the territory where the client receives the performance typical for the financial service. However if the performance is provided on-line (which is a usual way of providing performance in financial services), the home state of the financial institution shall be considered as the place of providing services provided that the client itself has found the financial institution, or the agreement on providing a financial service was executed in the home state of the financial institution and the client knew that the Czech public law would not apply.

If a service is promoted in the Czech Republic in an addressed way (i.e. by direct emails, letters, through local media, etc.), the Czech territory will be considered as the place of providing the service performed

as a result of such promotion, in which case the above Czech licensing rules shall apply. Although not addressed by the CNB expressly and thus constituting some legal uncertainty, we are of the view that an exemption from this rule would be the provision of services from home country of the foreign non-EU bank as a result of marketing activities of the bank performed in the Czech Republic through the bank's representative office.

France
Under the French investment services monopoly, only French or foreign authorised credit institutions may provide investment services in France. Thus, unless a third-country bank has obtained the French regulators' prior approval, it cannot offer investment services on a habitual basis and in a professional manner in France.

[There are no exemptions]… except under a pure reverse solicitation and all features taking place outside France.

Germany
For the general licensing requirement for the conduct of banking business or the provision of financial services in Germany commercially or on a scale that requires a commercially organised business please see the remarks to question 1 above.

Except for buying investments, the named services will likely be deemed financial services. Thus, if such services are provided commercially or on a scale that requires a commercially organised business undertaking, they usually require a licence and thus cannot be provided by a foreign entity without such a licence.

Buying investments is per se not a regulated activity, provided that it is not carried out as a service for third parties which then might qualify as prop-trading. However, buying investments may be part of a regulated activity such as discretionary management. In this case, the service rendered, e.g. the discretionary management, requires a licence.

- BaFin release: Foreign entities may be eligible for exemption from the licensing requirements pursuant to section 32 paragraph 1 of the KWG if the entity does not require supervision, given the nature of the business it conducts (see section 2 paragraph 4 of the KWG). However, such exemption is hardly ever given by BaFin.

Distribution of (non) EU funds:

A non EU asset management company may market units or shares in non EU collective investment schemes or EU collective investment schemes managed by it in Germany after having notified BaFin. Different rules apply to the non EU asset management company depending on the type of investor marketing at (professional or semi-professional investor). However, the non EU asset management company will not require a particular licence; the product must go through a notification procedure.

Hungary
Investment firms that are not locally authorised may not provide investment services to local retail customers, commercial clients and wholesale counterparties, except for the following cases:

a) An investment firm registered in another EEA Member State may provide investment service on a cross-border basis to Hungary, provided that it is authorized to provide such services by its competent supervisory authority in its home state. A notification process is also required by which each of the competent supervisory authority in the home state and the NBH can become aware of providing cross-border investment services by such foreign investment firm;
b) If a foreign investment firm does not provide its service in a business-like manner to the Hungarian customers, it will not be subject to a licence.

Otherwise, an investment firm established in a third country may only provide services in Hungary through the establishment of a branch office.

Italy
According to the Italian Consolidated Financial Act (Italian Legislative Decree no. 58 of 24 February 1998) ("CFA"), non-EU investment firms can provide the investment services indicated below in Italy (i) through a branch or (ii) on a cross-border basis provided that they have been duly authorised by CONSOB (Commissione Nazionale per le Società e la Borsa), the Italian securities market Supervisory Authority, in case of investment companies, or the Bank of Italy, in case of foreign banks.

Italian laws and regulatory provisions do not expressly provide for any exemption from the above authorization/licence requirement.

Based on general principles, no licence is required in case of the so called "reverse solicitation" or "reverse enquire", i.e. when the client on his own initiative (i.e. without having been previously solicited by the bank, directly or through intermediaries) has requested to the bank/investment firm the provision of the relevant investment service. Of course in case of dispute the bank/investment firm must be in the position to give evidence that the client made the request on his own initiative.

Luxembourg
Dealing in/buying/selling investments (as principal or as agent), investment advice and discretionary portfolio management are services covered by Annex II of the Law of 5 April 1993.

A foreign bank or investment firm (which is not locally authorized) can provide these services in Luxembourg under the same conditions presented in article 32 (5) above.

A foreign bank or an investment firm (which is not locally authorised) can conduct any type of promotion activity in Luxembourg without the need to obtain an authorization due to the fact that these services are considered preparatory acts to the financial and investment activity.

Poland
Subject to the comments regarding the FB promotion in answer to question no. 1 above, a third country investment firm ("IF") may not provide investment services (including activities described below) on a cross-border basis under Polish law. An IF incorporated outside EU but within an OECD or WTO member state may provide its services in Poland through a branch or a representative office. A branch of the IF may be established under licence from the PFSA, which may be granted after consultation with the home country supervisor under the relevant arrangement on exchange of information for supervisory purposes. No licence can be granted if: (i) information for supervisory purposes is limited or may not be collected by the PFSA, and/or (ii) capital requirements provided by Polish law are not met by the branch and/or by the parent in the home country. A representative office of the IF may be established under the relevant provisions of the act on trading in financial instruments and in accordance with the relevant provisions under the Polish act on freedom of business activity in Poland. The relevant notification has to be submitted to the PFSA. There are no exceptions from the rules described above under Polish law.

Portugal
Credit institutions and investment firms can only provide the services mentioned below professionally if they are considered authorised financial intermediaries to perform financial intermediation in Portugal by the Bank of Portugal ("BoP"), and after prior registration with the Comissão de Mercado de Valores Mobiliários ("CMVM").
The authorisation can only be granted to credit institutions and financial companies having their head office in Portugal and Portuguese branches of financial and credit institutions having their head office abroad. The exemptions to local authorisation are reserved to credit and financial institutions authorised in other European Union Member States.

Romania
The same rules as for the banking activity would generally apply. The services could be provided only on occasional and isolated basis, without an aim to channel activity towards the local market or promote such activities on the local market.

Spain
To no extent if the foreign bank or investment firm is not locally authorized. As regards investment firms, please note that article 64.7 of Act 24/1988 on Securities Market ("Securities Market Act") sets out that no entity may professionally or regularly carry out the activities reserved to investment services companies (among others, the services below) without having obtained a previous authorisation and without being registered in the Spanish National Securities Market Commission (Comisión Nacional del Mercado de Valores, the "CNMV"). Foreign (non-EU) investment firms need to be expressly authorized by CNMV to operate in Spain according to the Securities Market Act and the regulations implementing this Act.

As regards credit entities which are authorised to operate in Spain, they may also provide the investment services, if their legal status, by-laws and specific authorization enable them to provide the relevant services. In this regard please note that a foreign (non-EU) credit entity, in order to operate in Spain, needs to be expressly authorized by the Bank of Spain. Moreover, in case the foreign entity intends to provide investment services, the binding report of the CNMV will be a necessary requirement within the process of authorization by the Bank of Spain.

There are no exemptions.

The Netherlands
Section 2:96 of the FSA (Wft) provides that no entity may provide investment services in the Netherlands without an authorisation granted by the Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten / AFM)

Investment firms having their registered office in the designate states the United States, Switzerland or Australia are conditionally exempted from the authorisation requirement referred to in Section 2:96 of the FSA. The exemption from prudential supervision applies only to investment firms that focus exclusively on professional investors. The exemption does not apply to investment firms from these states that focus (or also focus) on retail or non-professional investors.

Investment firms from non-designated states and investment firms not covered by the Exemption Regulation must meet the prudential requirements set out in the AFS regarding solvency, minimum own funds, submission of statements, and conducting controlled and ethical operations.

Investment firms from non-designated states and investment firms not covered by the Exemption Regulation may apply for dispensation from submitting statements. DNB will grant the requested dispensation provided that the applicable statutory requirements have been met. In doing so, DNB will attach amongst others the following stipulations to the dispensation:

- the applicant's provision of investment services in the Netherlands must be targeted exclusively at professional investors;
- the investment services that the applicant provides in the Netherlands must be subject to supervision by the supervisory authority/authorities of the country of origin for the full term of the relevant dispensation;
- the applicant must notify DNB without delay if at any time it is no longer subject to supervision by one or more supervisory authorities in the country of origin or no longer meets the requirements of the relevant supervisory authority/authorities;
- the applicant must furnish a recent statement regarding its assets under management in the Netherlands, etc.

The United Kingdom
All of these activities are regulated activities under FSMA and so authorisation will be needed.

Specifically, the essential supply of a service may be considered to take place within the UK in the following circumstances:

- Sale of UK investment or insurance products or investment advice given in the UK;
- Portfolio management where investment decisions and management activities are carried out in the UK; and
- Dealing in investments as agents and executing orders on behalf of clients where transactions are carried out on UK exchanges or otherwise in the UK, regardless of whether orders are received from overseas.

There is an exemption available, under Article 72 of FSMA RAO, for certain regulated activities carried out by an "overseas person". This exemption allows a foreign bank or investment firm to carry out any of the above activities except for investment management in the UK without requiring authorisation, provided it does not carry out the activities from a permanent place of business maintained by it in the UK. Certain conditions must be satisfied in order to qualify for the exemption (e.g. compliance with the UK financial promotion regime).

2.2 To what extent can a foreign bank or investment firm (which is not locally authorised) promote the services below locally? Are there any useful exemptions?

- **Dealing in/buying/selling investments (as principal or as agent)**
- **Investment advice**
- **Discretionary management**

Austria
Promoting the services mentioned above would not require an investment license. When addressing (potential) Austrian counterparties, foreign banks or investment firms must bear in mind that marketing, advertising materials or activities which are accompanied by recommendations on the suitability of a particular investment for a particular Austrian counterparty may constitute investment advice. Investment advice related to financial instruments as defined in the Austrian Securities Supervision Act 2007 constitutes a licensed activity under the Austrian Securities Supervision Act 2007. Dealing in investments and discretionary management are principally licensed activities under Austrian law and can only be provided to Austrian customers by non-locally authorised companies if the place of conducting business is outside of Austria.

Recognised third-country investment firms pursuant Article 4 Sec 1 No 25 of Regulation (EU) No 575/2013 are permitted without obtaining a licence to trade for one's own account or on behalf of others: a) Money-market instruments, b) Financial futures contracts, c) Interest-rate futures contracts, forward rate agreements, interest-rate and currency swaps, d) Transferable securities, e) Derivative instruments; unless these instruments are traded for private assets, as long as they limit their activities in Austria exclusively to the commercial execution of transactions covered by their licences as members of an exchange.

Belgium
See answer to previous question.

Bulgaria
Generally, they should be licenced. One-off promotions at the client's request seem permitted.

Czech Republic
Same as answer to question 1.3.

France
None except under a pure reverse solicitation and all features taking place outside France.

Germany
[No answer]

Hungary
The same rules apply to investment firms/investment services with that set out in relation to the financial services above.

Italy
A foreign bank or investment firm (which is not authorised in Italy) cannot promote in Italy the above services if it is not authorized to provide investment services in Italy.

In this respect CONSOB stated that the qualifying criteria for determining whether an investment service is deemed to be provided in Italy – so triggering the relevant authorisation requirements – lies in the identification of the place where the investment firm targets its potential clients (i.e. if the activity is addressed to investors having their legal seat/residence in Italy), rather than the place where it gives execution to the contract with same.

Luxembourg
See previous answer

Poland
No, please see the answers to [previous] question… above.

Portugal
Only authorised financial intermediaries and tied agents of such authorised financial intermediaries can promote the services above locally.

Romania
A third country investment firm may not promote services and therefore try to attract clients and channel activity towards the local market if it is not duly authorised locally.

Spain
To no extent if the foreign bank or investment firm is not locally authorized.

There are no exemptions.

The Netherlands
When an investment firm from a non-designated states limits its service to non-resident clients it is not required to have a licence. With respect to service to Dutch clients by a non-designated firm can be noticed that the AFM also uses the restriction that if cross-border provision of services (not by means of a branch office) to Dutch customers only occurs on the initiative of those clients and takes not place in the Netherlands (the so-called services. ' initiative test '). As a consequence foreign investment firm cannot promote its services actively in Netherland. The use of the Dutch language; or when the investment firm makes it known that its services are aimed at residents of the Netherlands or reference is made to the applicability of Dutch legislation or the Dutch tax system; reference is made to service points located in the Netherlands; advertisements are directly made to residents of the Netherlands, payments are accepted from Dutch payment accounts whether or not in conjunction, this considered indicative for the fact that the services are being provided in the Netherlands.

The United Kingdom
A foreign bank/investment firm must comply with the UK financial promotion regime if making a promotion to engage in investment activity that will have an effect in the UK (i.e. is made to any UK person). Certain exemptions available, e.g. promotions made to high net worth individuals/companies, sophisticated investors, investment professionals etc.

3. Local rules

3.1 When a foreign bank/investment firm enters into an agreement with a local customer, are there any restrictions on the contract being governed by foreign law and the courts of the foreign country having exclusive jurisdiction (i.e. is the contract required to be governed by local law and/or must the local courts have jurisdiction)?

Austria
The choice of a law, other than Austrian law would be recognised by Austrian courts as the law governing a contract/agreement. Under Austrian law, notwithstanding the recognition of foreign law as the governing law of the documents:

(i) effect may be given to the law of another jurisdiction, with which the matter has a close connection insofar as, under the law of that jurisdiction, that law is mandatory irrespective of the governing law of the contract;
(ii) Austrian courts will apply Austrian law insofar as it is mandatory irrespective of the law governing the contract;
(iii) the application of foreign law may be refused if it is incompatible with public policy (*ordre public*) in Austria; and
(iv) regard will be given to the law of the jurisdiction where the performance takes place in relation to the manner of performance and the steps to be taken in the event of a defective performance.

As a general rule parties may agree on a choice of law clause except in those cases where jurisdiction over consumer contracts are necessarily falls under Austrian law or there is another reason for a compulsory place of jurisdiction. Foreign court decisions will be recognised and enforced by the Austrian courts provided that reciprocity as to the recognition and enforceability of judicial decisions exists. If a judicial decision is rendered by a court of a Member State of the European Union and is enforceable in that country, Austrian courts generally have to enforce such decisions.

Belgium
Belgian international private law rules would normally refer to EU rules such as Brussels Ibis regulation and Rome I regulation, which generally provides the consumer with a local protection (Belgian jurisdictions and public order provisions). The choice of the parties is generally enforceable when the customer is a person other than a consumer.

Bulgaria
Generally, the parties are free to choose the governing law and jurisdiction. However, the rules of public policy and the overriding mandatory rules of Bulgarian law would still apply. Further, persons that are considered consumers under Bulgarian law may not be deprived of rights available to them pursuant to Bulgarian or European law.

Czech Republic
If the local customer is a consumer, (i) the choice of law governing the agreement shall be made in accordance with Article 6 of the EU Regulation No 593/2008 on the law applicable to contractual obligations (Rome I), as amended, and (ii) the jurisdiction of the courts shall be governed by EU Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), as amended.

A branch of a foreign non-EU bank must keep the clients' files and agreements with the clients in a way that enables the branch to provide the CNB with a certified Czech translation of the client's file on the CNB's request.

France

A French judge and French regulators would expect French consumers to benefit from French consumer law protection when they are considered as more protective than the law of a foreign country.
In that respect, the following legislation is intended to protect consumers:-

- the French consumer code which implements (i) the EU Consumer Credit Directive 2008/48/EC; (ii) the EU Unfair Commercial Practices Directive 2005/29/EC; and (iii) the EU unfair terms in consumer contracts Directive 93/13/EEC;
- the French consumer code and the French monetary and financial code which implement the EU Distance Marketing Directive 2002/65/EC; and
- the French monetary and financial code, which implements the EU Payment Services Directive 2007/64/EC.

Under French law, consumers are individuals who enter into credit facilities (or benefit from an investment service) for a purpose which is outside their trade or business.
Consumers can only be natural persons and small businesses are not consumers. Although these rules are quite detailed, one must note in particular that:

- with respect to Banking Services, the main purpose of consumer laws is to protect consumers by regulating lenders' conduct.
- advertisements must, when communicating an interest rates or credit costs, include a numerical example of the proposed credit and/or insurance, and the words "a credit is a commitment and it must be repaid. Check your repayment capacity before you commit yourself".
- a standard form document containing certain information must be provided to the consumer to allow the consumer to compare offers before entering into a credit agreement.

Germany
Especially with regard to consumer protection there are various regulations applicable:

Regarding the place of jurisdiction:

With regard to especially Switzerland the Lugano Convention applies which is largely similar to the regulation (EC) no. 44/2001. As consequence a consumer may bring proceedings against the other party to a contract either in the courts of the state in which that party is domiciled or in the courts for the place where the consumer is domiciled and proceedings may be brought against a consumer by the other party to the contract only in the courts of the state in which the consumer is domiciled. According to Art. 17 Lugano Convention these provisions may be departed from only in very limited cases.

Besides of this, this question depends on whether there is an international treaty with priority or not. Otherwise German local rules of jurisdiction do apply.

Regarding the applicable law:

The regulation (EC) no. 593/2008 ("Rome I") is applicable in Germany even when the involved countries are both not member states, Art. 2 Rome I. According to Art. 6 (2) Rome I parties may choose the applicable law. However, this choice may not have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by virtue of the law which, in the absence of choice, would have been applicable (e.g. section 134 and 138 of the German Civil Code ("Bürgerliches Gesetzbuch" or "BGB") regarding statutory prohibitions, violation of moral principles and profiteering; section 305 et seqq. BGB regarding general terms and conditions; warning and information obligations with regard to investors; section 312 et seq. BGB revocation right regarding doorstep selling).

Hungary
Foreign banks/investment firms are free to enter into an agreement with a local customer/client under foreign governing law with the below main exceptions:

- mortgage over a real estate located in Hungary;
- charge/ over any movable asset located in Hungary and/or registered with a Hungarian register (e.g. business quotas, trademarks, ships, aircrafts).

In addition to that, no agreement with a consumer in the jurisdiction may result in having the consumer exposed to being sued in courts other than the courts of the state in which his domicile or residence is located; or may exclude the opportunity for the consumer to file a lawsuit in the courts of the state in which his domicile or residence is located or in which the place of regular employment is located. These provisions shall not apply if the agreement is made after the parties have realised that such a legal dispute is necessary.

A Hungarian court shall have exclusive jurisdiction in the following cases relating to a financial transaction:

a) in a dispute regarding real estate that is located in Hungary and in proceedings concerning lease and usufruct agreements;

b) in proceedings concerning registration of rights, facts and data with public registers in Hungary;

c) in disputes concerning enforcement in Hungary.

Italy

If the client qualifies as "Consumer", according to the Italian Consumers Code any dispute shall be submitted to the court of the place where the consumer has his domicile and it is not possible to derogate to such provision, as the relevant clause would be null and void.
In case of non-consumers, the relevant clause providing for a foreign jurisdiction should be specifically approved by the client.

Luxembourg

In case of investment services and ancillary services, a contract concluded between an foreign bank/investment firm and a consumer, the applicable law is the law of the country in which the consumer has his/her habitual residence provided that: (a) the professional pursues his professional activity in the country where the consumer has his habitual residence (b) the professional directs such activities to the country of the consumer; and (c) the contract falls within the scope of the activities. (article 6.1 and recital (26) of Regulation 593/2008 'Rome I Regulation').

Regarding contracts concluded between two professionals the applicable law can be freely chosen by the parties (principle of freedom to contract – article 1101 Luxembourg civil code). In the absence of choice in an international contract, the applicable law is the law of the country where the contract was concluded.

In conclusion, in case of a consumer contracts, in which a "weaker party" is present, the applicable law is Luxembourg law, while for peer-to-peer contracts the governing law can be freely chosen by the parties.

There is no exclusive jurisdiction clause as regards to the agreement between a foreign bank/ investment bank.

The general principle, concerning legal proceedings is that they can be started at the seat or habitual residence of the defendant, as set out in Regulation 44/2001 'Regulation Brussels I'. In case of a consumer contract, the latter may bring proceedings against the other party to the contract either in the courts of the member state in which that party is domiciled or in the courts for the place where the consumer is domiciled.

Poland

In accordance with Polish law and subject to international arrangements with third countries, the parties may choose another law to govern their contractual relations, and such choice has to be respected, although a Polish court may not grant recognition to a foreign jurisdiction due to: (i) the clause on preserving public order, which generally means compliance with most elementary provisions and concepts of Polish law (e.*g. observance of constitutional rights of Polish citizens*) and (ii) incompliance with EU and Polish legislation on consumer protection (*provisions excluding Polish jurisdiction are generally not allowed when dealing with consumers, and consumers may take action before the court competent for their domicile*). However, scenarios (i) and (ii) above should be considered as very unlikely and applicable to dealing with individuals only.

Portugal
Certain clauses are deemed null and void in the event such agreement are entered into without prior individual negotiation (i.e., the recipients are limited to accept such clauses without further or previous negotiation with the Counterparty).
In this reasoning, it is deemed null and void all the provisions that establish a jurisdiction that encompasses a considerable inconvenience to one party, without the existence of relevant interest from the Counterparty.

Furthermore, regardless of the law chosen by the Parties to govern the contract, Portuguese rulings will be applicable in the event such contract has a close connection with the Portuguese territory.

Such legal regime is frequently used by Civil Portuguese Courts and there is abundant case law re: the aforementioned restrictions and protecting the local customers.

Even though there is no restrictions on the contract being governed by foreign law and the courts of the foreign country having exclusive jurisdiction, information duties to local customers are intended to avoid the insertion of abusive clauses in such agreements.

Romania
There are no specific restrictions regarding applicable law or jurisdiction for the concluded agreements.

Spain
Provided that the relevant foreign bank or investment firm is authorised by the relevant Authority (Bank of Spain and/or CNMV) to provide said type of services, said entity would be subject to Spanish provisions on consumer protection. This being the case, please note that there is no restriction as regards the governing law of the agreements as far as the relevant governing law does not entail a waive to any right of the consumer.

As regards the exclusive jurisdiction, as per the above, the customer always has to have the right to file claims against the firm and also to make the firm filing claims against him at the local courts of his residence (since waiving the right to sue or be sued at his residence would be null and void).

The Netherlands
In principle (professional) parties entering a contract are free to choose the governing law and jurisdiction and will be bound by this choice.

The United Kingdom
There are no such restrictions in the UK.

4. Regulatory appetite for foreign banks

4.1 What is the attitude of your national regulatory authority to cross border business and the presence of foreign banks?

Austria
Conducting business activities in Austria on a local or cross-border basis is only permitted after obtaining a banking/investment license. The FMA tends to favour a broad application of the Austrian rules of conduct in cases where the client is located in Austria.

Belgium
Presence of foreign banks in Belgium is relatively limited (10 in total: 3 US, 4 Indian, 2 Japanese and 1 Pakistanese). Generally speaking, the Belgian regulator will supervise such branches as if they were Belgian banks.

Bulgaria
If they comply with local legislation, the attitude is positive.

Czech Republic
There has been no official communication of the CNB concerning the presence of foreign non-EU banks in the Czech Republic. However, in certain cases it may be difficult for a foreign non-EU bank to establish a branch in the Czech Republic. This is relevant in particular where the non-EU bank home state does not ensure the exchange of information necessary for due supervision of the branch between the foreign supervisory authority and the CNB, or if the CNB does not consider the supervisory authority of the non-EU bank qualitatively comparable to the supervision performed by the relevant authorities of the EU member states, as these are some of the conditions for issuing the license for the branch of a non-EU bank.

According to our inquiry, currently there is no non-EU bank carrying out its services in the Czech Republic through its branch and there are only a handful of representative offices of non-EU banks in the Czech Republic.

France
Extremely protective.

Germany
The regulatory standards and the supervision by BaFin generally, i.e. irrespective of the origin of the institution, are very strict.

As a rule, an institution with its registered office or ordinary residence outside of Germany has to obtain a licence if it wants to provide banking or financial services in Germany. Such institution is deemed, by regulatory practice, to provide banking or financial services in Germany if it "actively approaches" the German market in order to offer the respective services in a repetitive manner and at a commercial scale to undertakings or persons that have their registered office or residence in Germany ("zielgerichtetes Wenden an den deutschen Markt"). The threshold for such an active approach is considered very low by both the BaFin and German courts (for example, a German language website may already be deemed an active approach of the German market).

Hungary
The attitude of the NBH to cross border business and the presence of foreign banks is determined on the applicable laws and regulations (no discretional power) which in turn are based on the actual government's policy regarding the banking system. Such a policy has been changed since the political regime changed around the 1990s' as follows: A liberalization strategy started in the early 1980s as a result of which the share of foreign banks has gradually risen. In 1993, foreign banks outnumbered domestic banks. By the end of the year of 2000, foreign controlled banks accounted for over two thirds of the total banking portfolio. Following the financial crisis and the so-called FX loan situation, the attitude of the government has been changed and the Prime Minister, Viktor Orban has declared that it's an unhealthy situation that foreigners have such a high degree of ownership in Hungary's banking system and the government seeks to lift local bank-industry ownership to at least 50 %.

Italy
In the last years the Bank of Italy appeared to be more keen to permit foreign banks to operate in Italy.

Luxembourg
Luxembourg is known as a preferred hub for foreign banks in establishing branches and subsidiaries with the aim of reaching EU clients. The reasons for coming to Luxembourg are numerous: favourable regulatory framework, political stability, a multi-lingual workforce, and the agglomeration of specialized skills in accounting and legal services.

In December 2013 more than 20 % out of the total 148 credit institutions come from non-EU countries.

Cross-border services of non-EU banks are conducted through setting up of a branch or subsidiary in Luxembourg. The possibility to provide services without an establishments (freedom to provide services) is not available to non-EU banks.

Subsidiaries or branches need to obtain a banking license from the Ministry of Finance, which takes a decision based on the advice of the CSSF.

Generally, it can be observed a tendency to open more subsidiaries in Luxembourg (75 %) rather than branches (25 %). There were 9 branches of non-EU banks last December 2013 in Luxembourg, representing 23 % of the total number of branches.

It can be observed that branches are largely used for interbank lending and became recently have become specialized in interbank deposits, while subsidiaries are focused on all the rest of the activities.

In terms of customer loans there is no clear divergence/convergence between branches and subsidiaries, while for customer deposits it seems that subsidiaries have developed a specialization.

Poland
While the FB may not perform any cross-border activity in Poland (please see the answer to question no. 1 above), the presence of the FB in Poland is not restricted (as of 31 December 2013, out of 59 banks (including branches of 28 credit institutions) registered in Poland, 43 had 100% foreign capital). However, the PFSA tends to impose additional compliance requirements on other foreign entities (e.g. credit institutions) operating in Poland (e.g. compliance with guidelines on consumer protection guidelines or regulatory arbitrage).

Portugal
Portuguese Regulators are keen on maintaining a quite strict regulatory environment applying relevant regulations.

Romania
If not authorised locally, foreign banks can only perform occasional and isolated activities on the local market – the view has been expressed by the regulatory authority by way of points of view on particular queries from foreign banks. If a branch of the foreign bank is established on the local market, the bank may provide a wide range of banking services through that branch.

Spain
Positive.

The Netherlands
The regulatory authorities have a rather open attitude to foreign banks. As the application process is strict and thorough, DNB facilitates a pre-application process during which informal discussion are possible on the business model and the requirements to be met for the application for authorisation. During this process as a first step the business plan (including financial projections for the first three years), the business strategy, but also the proposed governance (management board and supervisory board) and, if known, aspects relating to ethical and sound operational management (compliance, IAD, outsourcing and ICT) are assessed.

In the second phase the draft application is reviewed and a detailed written response as to the completeness and quality of the submitted documents and a description of any additional information that should be added in the case of a formal application is provided.

The United Kingdom
Many international banks operate in the UK and are significant providers of financial services to the UK economy. The PRA describes its policy towards branches of foreign banks as being relatively open, compared to that or some other national authorities, particularly where the home country regulatory regime is broadly equivalent to that of the UK..

However, the PRA is now taking a tougher stance with foreign banks in the UK. Where foreign banks carry on high risk activities ("Critical Economic Functions") e.g. retail deposit taking, they may be required to operate through a subsidiary, not a branch, and therefore submit to full PRA supervision. The PRA is focused primarily on banks' resolution arrangements, and potential harm that firms can cause to the stability of the UK financial system.

4.2 Is it generally more common for foreign banks to operate locally through a branch or a subsidiary, or both (and does this depend on the activities the bank carries out)?

Austria
See answer to question 4.4.

Belgium
To our knowledge, there are only 4 subsidiary of foreign banks in Belgium, meaning that the branch-way would be privileged.

Bulgaria
Both options are common.

Czech Republic
Foreign non-EU banks operate in the Czech Republic either through their subsidiaries or through the branches of their EU subsidiaries established outside Czech Republic. Banks with retail customers usually operate through a subsidiary, corporate banks through a branch of an EU subsidiary of a non-EU bank established outside Czech Republic.

France
In general, foreign banks (third countries' banks) use subsidiaries rather than branches**.**

Germany
Banks from the EU prefer branches to minimise capital requirements and regulation by the German authorities. Some offshore banks establish corporates in the UK, the Netherlands or Luxembourg which, in turn, establish German branches.

Hungary
It appears that foreign banks now prefer establishing a branch office to setting up a subsidiary (at the end of 2013, less than 9% of the total balance sheet asset of the Hungarian banking system belonged to the branch sector). Earlier, the trend was that foreign banks provided services in Hungary mainly through their subsidiary.

According to one of the studies of the NBH, it is a strategic decision whether foreign banks prefer branch to subsidiary. Accordingly, such a decision does not depend on the financial service which foreign banks intend to provide in Hungary.

If a subsidiary is to be set up, the requirements applicable to such an entity will be the same with a financial institution established as a new Hungarian financial institution. Special regulations apply to financial branch offices which, however, do not provide more beneficial legal environment for foreign banks than those applicable to the Hungarian entities. The main difference is the extent of the supervision power of the NBH (micro-prudential supervision over branches is exercised basically by the foreign supervisory authority).

Italy
It is more common the acquisition of participations into existing banks or the setting up of branches.

Luxembourg
See previous question.

Poland
No branch of the FB is currently registered in Poland. Current market practice shows that many FBs which are present in Poland perform their activities through representative offices or subsidiaries. Please note that the PFSA is known to actively encourage newcomers to operate in the local market through subsidiaries under its supervision.

Portugal

The majority of institutions which are not Portuguese operate in Portugal trough the EU provisions of freedom to provide services. However, it is not possible to determine a pattern regarding third country banks.

Romania
Third country banks may operate locally on a regular basis only by establishing branches, and not subsidiaries. No branches of third country banks are currently opened in Romania in accordance with the on-line registry held by the National Bank of Romania.

Spain
It is a business decision.

The Netherlands
There is no clear pattern and probably dictated by the type of business and the expectations of the targeted customers and markets, the long term strategy and the size of the operation.

The United Kingdom
Banks with wholesale market operations may prefer to operate cross-border through a branch structure given the flexibility to move funds across the bank. Banks raising deposits from host retail customers and lending to host economy are more likely to be subsidiaries.

Given that the business model that branches and subsidiaries adopt sometimes overlaps, it is common for firms to operate both in the UK with different business activity in each entity. In many cases a foreign bank will establish a subsidiary within the EEA (often in the UK) and this may then operate by branches in other EEA countries.

4.3 Is it mandatory, in any situation, to operate through a branch or subsidiary?

Austria
See answer to question 4.4.

Belgium
Yes.

Bulgaria
Yes. For example, if a bank takes deposits from more than 30 clients (other than banks and institutional investors) it must get a licence through a branch or subsidiary.

Czech Republic
Yes, any regulated financial service provided in the Czech Republic by a non-EU bank/investment firm must be provided either through its subsidiary or a branch (with appropriate CNB license.)

France
Both solutions are possible but using a subsidiary is easier to avoid conflicting obligations upon the same legal entities.

Germany
No, branches are able to do all the things that a subsidiary can do: conduct transactions, rent an office, hire staff, and send profits back home.

However, below the level of a branch or a subsidiary, banks from outside the EEA sometimes only establish a representative office which is only allowed to perform general marketing activity (not related to a specific product), relationship management and to collect business data in Germany.

Hungary
Yes, however please see the exceptions in question 1 above.

Italy
No, the choice is exclusively upon the bank.

Luxembourg
See question 4.1

Poland
An FB may operate through a representative office. However, a representative office of an FB performing any activity exceeding marketing and promotion services will be expected to apply for a licence from the PFSA, and to establish a branch or a subsidiary under the PFSA's supervision.

Portugal
No.

Romania
Third country banks may operate on a regular basis on the local market by establishing a local branch. As mentioned above, services on an occasional, isolated basis may be provided without local presence or authorisation.

Spain
No, both are valid alternatives.

The Netherlands
As such the FSA shows no preference for a legal form of the entity applying for licence.

The United Kingdom

No. (Although the PRA has recently confirmed that, where a bank's home state supervision is not sufficiently equivalent and the Home State Supervisor ("HSS") will not accept responsibility for the branch, the bank will have to operate in the UK as a subsidiary.

4.4 What are the benefits/disadvantages of operating through a branch or subsidiary?

Austria
The Austrian subsidiary of a foreign bank is a separate legal entity and generally only obliged to follow the laws of the host country (Austria), whereas unfavourable regulations of the foreign bank's home country will not affect the Austrian subsidiary. An Austrian subsidiary is able to passport its license to other EEA countries whereas foreign bank branches in Austria cannot passport their license and have no permission to offer services in other EEA countries pursuant to the freedom to provide services principle. This may also be the reason for why hardly any foreign banks operate through Austrian branches but prefer to establish subsidiaries in Austria.

If a foreign bank starts the application process for obtaining a banking licence in order to act via a local branch it has to provide additional documents and information such as (i) the foreign bank's balance sheets of the last 3 years or (ii) an internal authorisation of local managers/directors allowing them to make decisions in Austria. In addition at the end of every year the Austrian branch/foreign bank has to provide the FMA with balance sheets of the foreign bank.

The branch has to disclose additional information about the foreign bank, as the entity which is responsible for complying with the licensing requirements, whereas the subsidiary operates independently and the subsidiary itself is responsible for complying with the licensing requirements.

Belgium
A branch shall be subject to a double layer of regulations: regulations of its home country and, in addition, (i) the Belgian provisions of general interest and (ii) Belgian regulatory requirements (heavier than a branch of a EEA bank), which tend to be similar regulatory obligations as for a Belgian bank.

A subsidiary will be subject to a single layer of (Belgian) regulation, with application of the full regulatory regime applicable to Belgian banks.

Bulgaria
One of the disadvantages is namely the requirement to obtain a licence in the event of regulated activity. Further, they are subject to the supervision from the Bulgarian regulators.

One of the advantages of a local subsidiary is that it can operate within the EU based on the single passport rule.

Czech Republic
As there is no material difference in licensing requirements and process for the non-EU banks to set up their business in the Czech Republic (and since for certain banks it may be difficult to obtain a license for its branch, as indicated above), it may be more convenient for the non-EU bank to establish a subsidiary, rather than a branch.

Obviously, the most efficient way would be to operate a branch of a subsidiary of a foreign non-EU bank established in any EU member state through single EU banking license passport.

France
The main benefits/advantages are connected: Using a branch does not require structuring a specific legal entity but, from a pure regulatory perspective, the requirements applicable to the branch of a third-Country's entity are the same as those that would apply to a subsidiary (i.e. in terms of "own funds", means and resources, supervision by the French regulators, etc…) whilst the said branch will also be subject to its Home State regulations.

Germany
A branch is not considered a distinct legal entity from the foreign company, whereas a subsidiary is regarded as an independent German company. From a practical point of view, a branch is more of an extension of the parent company. It cannot act by itself and has no board of directors. Its creation involves fewer formalities.

A subsidiary, on the contrary, is owned by the parent company and is run by the latter. It can act by itself and has its own board of directors, declaration of non-objection and internal rules. A subsidiary is required to hold shareholders' meetings and comply with other corporate formalities.

Setting up a branch has the following advantages:

- No minimum assigned capital is required for setting up a German branch.
- No intervention of a German notary public is required for opening up a branch.
- Apart from a few exceptions, German corporate law does not impose any requirements regarding the establishment of a board of directors, the distribution of profits or the organisation of shareholders' meetings.
- Setting up a branch offers also a number of tax advantages.
- For some companies, a branch office as an extension of headquarters also fits better with their legal and tax parent structure.
- A branch can generally be closed down at any time. Subsidiaries can be terminated only by way of a formal liquidation procedure which requires more time. If operations in Germany are intended to be temporary or if the prospects for the near future are very uncertain, establishing a branch instead of a subsidiary is preferably.

Setting up a subsidiary has the following advantages:

- Because the subsidiary and the parent company are distinct legal entities, the parent company is not exposed to any liabilities of its subsidiary. The liability of the German subsidiary is limited to its own assets. By contrast, a foreign investor is always liable for the activities of its German branch. This means execution of the branch's liabilities can be enforced at the expense of the foreign investor's assets, even if these are located abroad.
- Through a subsidiary it is possible to avoid situations in which a board member of the parent company becomes liable in respect of business activities of the subsidiary.
- The domestic subsidiary and its parent company are also subject to tax separately. A subsidiary may also enjoy tax advantages.
- From a commercial point of view, a subsidiary will be considered a German or European company rather than a foreign company.
- If the foreign company is liquidated or falls into insolvency, the effects of such liquidation or insolvency also extend to the German branch office.

Hungary

Subsidiaries operate as a Hungarian registered entity (limited liability company) with their own independent legal capacity whilst a branch office (notwithstanding that it is subject to registration with the Hungarian company register) represents its founder (i.e. the branch has no own (separate from the founder) legal capacity. Therefore, it means an advantage for establishment of a subsidiary that the foreign company and the branch office have joint and several liability for all debts incurred by the branch office.

An advantage for the branch office may be that the employees at the branch have an employment contract with the foreign banks. Therefore, the employers' rights are exercised by such foreign bank through the branch office (closer instruction power).

Notwithstanding that, as set out above in this section 4, whether a branch or a subsidiary is established in Hungary, it is a decision which is primarily based on the business strategy of the foreign banks rather than legal factors.

Italy
The operation through a subsidiary would be more burdensome in terms of compliance with respect to a branch, which would be subject to less stringent Italian rules.

Luxembourg
See question 4.1

Poland
Establishing a subsidiary is time-consuming and may take up to a year. On the other hand, establishing a branch should not take more than several months, although the operational capability of a branch is limited by the scope of the FB's domestic licence and (depending on the scale of the intended activity) may be limited by additional restrictions and/or requirements imposed by the PFSA. In both scenarios a licence from the PFSA has to be obtained.

Portugal
Mainly, the subsidiary allows isolating the risk, as, in general, only the share capital of the subsidiary will be accountable for its liabilities. On the other hand, a subsidiary will be a Portuguese Bank for all purposes and regulation will apply accordingly.

Romania
The main benefit of operating through a branch is that the third country bank can provide on a regular basis the entire panel of banking activities / services. Third country banks may only operate locally on a regular basis by establishing a local branch.

The disadvantages of opening a local branch may be related to the capital level required (EUR 5,000,000) and general supervisory rules and compliance requirements of the local regulatory authority.

Spain
The subsidiary is subject to the control and regulation of the local authorities, whereas the branch, despite of being authorised locally, is subject to the control and regulation of the holding's regulations (despite of some provisions which must be complied with on a mandatory basis, please see below).

The Netherlands
From a regulatory point of view there are not really advantages the other areas such as tax, corporate employment law etc. are out scope and would require other specialist input.

The United Kingdom
For a foreign bank to have a UK deposit-taking branch, the bank as a whole must meet the PRA's Threshold conditions for authorisation, but the branch does not need to have its own capital base.

A UK subsidiary would require its own governance and risk management, as well as complying with UK capital and liquidity requirements. Operating as a subsidiary involves higher costs, because banks have to set aside ring-fenced capital and create systems and controls to satisfy UK regulation.

5. Establishing a branch

5.1 Does a branch have rights/recognition to trade in other countries?

Austria
The banking license of a foreign bank's Austrian branch whose home member state is Austria cannot be passported to other countries. Even if a foreign bank's branch has been duly licensed under the laws of Austria it cannot operate in other EEA Member States on the basis of the freedom to provide services principle.

Belgium
No.

Bulgaria
Generally, Bulgarian branches of foreign banks are allowed to act within the territory of Bulgaria only.

Czech Republic
No, a Czech branch of a foreign non-EU bank may provide its services under the Czech license within the Czech Republic only.

France
Yes to the extent however that question as to whether they may benefit from an EU legislation passport.

Conditions for the setting-up of branch (subsidiary*) are:

(a) its registered* office and its effective management in France;
(b) a share capital*/own funds ;
(c) thoroughly disclosed its operational procedures;
(d) allocated adequate means and resources the contemplated activities;
(e) disclosed the identity of its shareholders to the AMF/ACPR (thorough disclosure obligations);
(f) two "core-managers" (dirigeants responsables) (one of which must be based in France) that will manage the branch/subsidiary and that both will have sufficient experience, integrity and competence;
(g) two managers for each type of activities conducted by the branch/subsidiary (an individual may qualify for different activities if he/she can demonstrate having a solid experience of these activities);
(h) an adequate corporate structure (SA or SAS)*;
(i) a valid business plan for each type of activity the branch/subsidiary intends to conduct;
(j) a compliance/risk officer (employee of the branch/subsidiary or outside consultants) ; and
(k) entered into standard agreements with third parties.

Germany
A branch which as part of an entity (a branch from the German legal perspective is never an independent entity but always a part of the main entity) which is licensed with BaFin in Germany or which by way of EU passport is allowed to provide regulated banking or financial services in Germany may only provide such services within the borders of Germany. The legality of the provision of regulated banking or financial services of such German branch cross-border in another state depends on the regulatory provisions in the state in which said services shall be provided.

Hungary
This is not regulated under Hungarian law [except for the Section (19) of the preamble of 2006/48 EU Directive, according to which a branch office of a foreign bank does not have the right to provide services

to or establish an entity in any other Member States of the EU] because it is subject to the legislation of such other countries.

Italy
A branch of a foreign bank/investment firm is allowed to provide the relevant authorized activities only in Italy.

Luxembourg
The Luxembourg branch of a non-EU bank does not have recognition or cannot provide services in other EU countries (article 34 of the Law of 5 April 1993)

In order to legally operate in Luxembourg through the branch of a non-EU Bank head-office, the non-EU bank has to file a dossier for obtaining a banking license in accordance with article 3 of the Law of 5 April 1993.

The information to be provided to the CSSF (in accordance with the Circular CSSF 09/392) are the following:

- Presentation of the applicant with audited financial statements for the last 3 years
- Rationale for establishing in Luxembourg together with a list of proposed activities
- Details on the shareholders and beneficial owners
- Description of the administrative and accounting structure
- Three years business plan
- Draft articles of incorporation\
- Curriculum vitae and declaration of honor of the members of the board
- Identification of the external auditor

Poland
A branch of an FB has the same rights/recognition to trade in other countries as the FB, as it is not a separate legal entity distinct from the FB, therefore the right to perform respective activities in other countries is limited to the extent of the FB's licence (e.g. relevant licence/approval have to be obtained to perform activities within territory of the other EU member state). The same applies to a branch of an IF.

Portugal
The Portuguese law doesn't regulate the rights and recognition of branches of foreign banks in other countries. However, authorized Portuguese branches may trade in other countries to the extent/in the terms permitted under those countries' laws.

Romania
A branch established in Romania may not operate in other countries.

Spain
There are no Spanish provisions that deal with the possibility of a bank acting in Spain through a branch operating in other countries. It may depend on the regulation of the respective "third" country.

The Netherlands
In principle yes, but it depends on the extent of the authorisation granted by DNB.

The United Kingdom
[no answer]

5.2 How is a branch regulated?

Austria
The Austrian banking license may be withdrawn in case the foreign bank's banking license in the home country expires. Branches are treated like independent or standalone entities and have to fulfil their duties under Austrian banking law.

Belgium
- Regulatory regulations (e.g. Banking law, MiFID law)
- Corporate regulations
- Accounting regulations
- Tax regulations
- Social regulations

Bulgaria
It must be licenced by the Bulgarian National Bank (if a branch of a bank) or by the Financial Supervision Commission (if a branch of an investment intermediary). The regulators exercise initial (through the licencing process) and on-going control on the activity of the branch. If the branch does not comply with Bulgarian law, the licence shall be revoked. The licence of the branch may cover only services included in the licence of the foreign bank/investment intermediary. The regulators may impose fines in the event of breach of local legislation.

Czech Republic
A Czech branch of a foreign non-EU bank is regulated to a similar extent as the Czech banks.

France
The French branch of a Third Country entity is subject to the same rules as those of a French institution.

Germany
In case of a branch of an entity which is not located in an EU member state, the entity needs to apply for a licence with BaFin in order for the branch to provide regulated banking or financial services in Germany, i.e. the branch is regulated "through" the entity to which it belongs so that there is no difference between the regulation of the entity and the branch.

In case of branches of EU member state banks or financial services providers, such branch may profit from the home member state licence of the entity to which it belongs. Even in case of EU passporting, though, the branch is subject to certain regulatory provisions and therefore to BaFin supervision. Excerpt of important German law provisions which apply to branches holding an EU passport:

- Prohibited business, section 3 of the KWG (e.g. deposit business if the majority of the depositors are persons employed by the institution/branch (company savings banks)), conduct of lending business or deposit business if, by agreement or in line with standard business practice, it is not permissible or extremely difficult to withdraw the amount of the loan or the deposits in cash).

- Instructions by BaFin in case of suspicion of financing a terrorist organisation etc., section 6a KWG

- Prohibition of certain means of advertising, section 23 KWG

- Collection and use of personal data of clients, section 10 subsection 2 KWG

- Numerous statutory obligations to notify BaFin or to disclose information to BaFin and/or German Central Bank ("Deutsche Bundesbank") (e.g. in case of changes regarding the branch office, notification of loans of EUR 1,000,000 or more, general duties of disclosure towards BaFin/right of examination of BaFin, presentation of statistical reports to German Central Bank.

- General power of BaFin to employ the means necessary to counteract undesirable developments in the banking and financial sector which – among others – may impair the proper conduct of banking business or provision of financial services, section 6 subsection 2 KWG.

Hungary
Financial branch offices in Hungary do not have own legal capacity, therefore they act on behalf of their founders. This practically means that they cannot acquire rights and any engagement taken by them obliges directly their founder. Also, they can only represent their founder in a court procedure.

A branch office is to be considered as the organisational unit of its foreign company, but can determine its own business activity. The foreign company and the branch office have joint and several liabilities for all debts of the branch. Thus, termination of the Hungarian branch offices would not have an impact on the existence, validity or effectiveness of the agreements made by such branch offices on behalf of its founder.

Setting-up a financial branch office is subject to the licence of the NBH. Such a licence (if issued) will authorise the foreign bank to establish such a branch office and the branch office to commence the activity in Hungary. The licencing procedure is free of any charge. However, strict formality requirements apply and the procedure requires a bunch of documents to be provided to the NBH (e.g. organisational and management structure of the foreign bank, certificate issued that at least 50% of the subscribed capital has been actually paid). Notwithstanding that the NBH should finish the procedure within three (3) months from receipt of the application, the procedure usually takes about six-eight (6-8) months.

To set up a branch office, the foreign bank must donate to its branch a minimum initial capital of 2 billion HUF (approx. 6,367,000 EUR) that must be paid up in cash.

Italy
A branch of a foreign bank duly authorized to perform banking activities in Italy is subject to several Supervisory Provisions issued by the Bank of Italy concerning among others:
- the rules related to the good repute and professional requirements requested to the directors and members of the board of statutory auditors of Italian banks;
- provisions concerning the supervisory capital (patrimonio di vigilanza);
- rules governing the equity participations in banks and banking group;
- provisions regulating the internal control system;
- transparency provisions in the banking services and operations;
- anti money-laundering provisions

Luxembourg
See previous question

Poland
Subject to certain exceptions (e.g. approval of the Minister of Finance for establishing such branch or supervision of such branch on the basis of a specific arrangement between the PFSA and the relevant regulator from the home country), Polish law on banking and investment services applies equally to domestic banks and branches of an FB (in respect to banking activity), as is the case for domestic investment firms and branches of an IF (in respect to investment activity).

Portugal
An authorisation shall be granted, on a case-by-case basis, by the Minister of Finance. This competence may be delegated on Bank of Portugal.
For the establishment of branches that intend to carry on in Portugal any intermediation activity in transferable securities, Bank of Portugal, before deciding, shall request the CMVM to provide information on the suitability of the shareholders .

The application for authorisation shall be submitted to Bank of Portugal, accompanied by a notice from the supervisory authority of the home country of a series of information, including the programme of

operations setting out, inter alia, the types of business envisaged and the structural organisation of the branch, and a certificate stating that such business is covered by the credit institution's authorisation.

The management of the branch shall be entrusted to at least two managers, with appropriate powers to deal with and definitely settle, in Portugal, all matters pertaining to its activity .

Within six months after receiving the application, the bank shall be notified of the decision of Bank of Portugal. The lack of notification within that period is considered as a refusal of the application .
In case the authorisation is granted, the subsidiary must begin its activity within twelve months, or the authorisation will lapse.

Branch's assets, shall be primarily liable for the debts contracted in Portugal and will only be available to back the debts of the home country credit institution provided that the debts of the branch are fully paid .

The capital earmarked for operations to be carried out by the branch shall be sufficient to cover those operations and no less than the minimum amount required by the Portuguese law for credit institutions of the same type having their head office in Portugal.

The credit institution shall be responsible for transactions carried out by its branch in Portugal.

Romania
The opening of the branch of a third country bank in Romania must be approved by the National Bank of Romania. The regulatory authority from the third state must not oppose the opening of the branch in Romania. The branch must comply with the provisions of Emergency Government Ordinance 99/2006 regarding credit institutions and capital adequacy, Regulation No. 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 and legal provisions adopted for the implementation thereof. The minimum capital requirement for a branch of a third country bank is EUR 5,000,000. The branch may carry out those activities provided in the authorization issued by the National Bank of Romania which may not exceed the authorised activities for the mother credit institution.

Branches of foreign country investment firms must be locally authorized by the Romanian Financial Supervisory Authority.

Spain
According to article 9.2 of Royal Decree 1245/1995, the incorporation of a branch of a foreign bank in Spain will be subject to the authorization of the Minister of Economy and Finance following the report of the Bank of Spain.

The Netherlands
A bank with a seat outside of the EEA that intends to conduct the business of a bank in the Netherlands as meant in the FSA trough a branch requires authorisation of DNB. The requirements a branch has to comply with are almost identical to the requirements of bank seated in the Netherlands.

The United Kingdom
For non-EEA banks, PRA has recently stated that it will refuse authorisation unless: (i) the HSS is judged to be equivalent; and (ii) the HSS will accept responsibility for the branch; and either (iii) the branch does not/will not conduct CEFs and there is an appropriate level of assurance over resolution, or (iv) where CEFs are involved, there is a high level of assurance over resolution and an agreed split of supervisory responsibilities and focus on UK financial stability, such that the risk to UK financial stability is within PRA's risk appetite.

Responsibilities for the prudential supervision of branches are split between the HSS and the PRA. All branches are subject to the FCA's conduct of business rules.

The PRA will seek clear acceptance from the HSS of its prudential responsibilities for the UK branch, confirmation that the bank as a whole meets the PRA's Threshold Conditions and a clear firm-specific split of responsibilities for prudential supervision of the branch and information sharing.

The PRA's approach is focused on understanding the UK branch's activities as well as the financial strength and resolvability of the whole firm. The PRA will also look at business risks, liquidity, capital, management and governance and risk management, systems and controls.

Under a new PRA rule, which took effect from 5 September 2014, non-EEA banks with a UK branch are required to take all steps within their control to ensure that their resolution plan provides adequately for the resolution of the UK branch.

6. Establishing a subsidiary

Austria
The application and criteria for an independent subsidiary of a foreign bank obtaining a banking license would be the same as those for an Austrian bank seeking to obtain a banking licence. A subsidiary is an independent entity and has to fulfil its duties under Austrian banking law irrespective of the foreign bank.

The banking license of a foreign bank's subsidiary, whose home member state is Austria can be passported. If a foreign investment firm's subsidiary/foreign bank's subsidiary has been duly licensed under the laws of its EEA Home Member State, e.g. Austria, such a subsidiary may also offer its services in other EEA Member States, provided that it notifies the relevant Member State regulator about its intention to offer services.

Furthermore, investment licenses may be passported to other EEA Member States if an investment firm is duly authorised and registered in Austria.

Belgium
[no comment]

Bulgaria
[no comment]

Czech Republic
A subsidiary licensed in the Czech Republic may provide its services in EEA under the single EU banking license passport.

France
Same rules as for branches save with respect to the specific regulatory supervision.

Germany
A subsidiary of a third country (non-EEA) institution generally requires a licence according to section 32 (1) KWG to do banking business or to render financial services in Germany. However, there is a possibility to be exempted from this requirement in case that there is an effective supervision of the responsible home country authority and cooperation with BaFin. Nevertheless, the exemption is a decision on a case-by-case basis. However, with regard to Swiss institutions there is for example some facilitation due to a special agreement between the Swiss Financial Market Supervisory Authority ("FINMA") and BaFin.

Hungary
Whilst a branch office will be one of the organisational units of the foreign bank, the subsidiary will be an individual Hungarian legal entity owned by a foreign bank with its own separate liability.

If the foreign bank decides to establish a subsidiary in Hungary, depending on which financial service such a subsidiary intends to provide, the following forms of financial institutions would be available:

a) credit institutions which may be:
   - banks (Banks are those special credit institutions which may carry out collecting deposits, receiving other repayable funds from the public, granting loans and money transmission services. They can be established with an initial capital of 2 billion HUF, approx. 6,367,000 EUR);
   - specialized credit institutions (such as mortgage banks);
   - cooperatives (with an initial capital of 300 million HUF, approx. 954,000 EUR).

Credit institutions can be private limited companies.

The following financial services may be provided only by credit institution:

- collecting deposits and other repayable funds from the public;

- currency exchange services.

b) financial enterprises:

A financial enterprise is authorized to provide one or more financial services (with the exception of money transmission services, issuance of electronic money, collecting deposits and other repayable funds from the public and currency exchange services) and to be engaged in the operation of payment systems. Also, a financial enterprise may be engaged in financial brokering on the interbank market (only on exclusivity basis). Financial enterprises (with the exception of financial holding companies (minimum 2 billion HUF, approx. 6,367,000 EUR) and financial enterprises operating payment systems (minimum 5 hundred million HUF, approx. 1,590,000 EUR)) may be established with a minimum initial capital of 50 million HUF (approx. 159,000 EUR).

Italy

[no comment]

Luxembourg

A subsidiary of a non-EU bank has to apply for a banking licence in Luxembourg.

The requirements at point 6 above apply

Poland

Pursuant to the Polish banking law, a subsidiary of an FB may be established in the form of a joint-stock company under a licence from the PFSA. The PFSA's approval specifying licensed banking activities can by granted to the subsidiary after certain documents and information have been examined by and/or agreed with the PFSA (e.g. details of the executives and funds structure etc.). The subsidiary has to meet and comply with certain requirements (e.g. amount and quality of the funding capital), and observe the relevant provisions of Polish law (e.g. laws related to consumer protection, corporate governance, and regulatory reporting). A similar licence mechanism and principles are provided for establishing a subsidiary of an IF.

Portugal

In order to incorporate a subsidiary of a foreign bank, a prior consultation with the supervisory authority of the home country is requested. Afterwards, the application for authorisation shall be submitted to Bank of Portugal. The authorisation, which falls in the competence of Minister of Finance, shall be preceded by an opinion of Bank of Portugal, which may request additional information and make the inquiries that it deems necessary. The Minister of Finance mat delegate the competence for authorisation on Bank of Portugal

Within six months after receiving the application, the bank shall be notified of the decision of Bank of Portugal. The lack of notification within that period is considered as a refusal of the application.

In case the authorisation is granted, the subsidiary must begin its activity within twelve months, or the authorisation will be cancelled.

Romania

A third country bank/investment firm must establish a branch in Romania in order to provide services and not a subsidiary.

Spain

Subsidiaries of foreign banks incorporated in Spain must comply with all procedures of authorisation required for banks operating in Spain.

The Netherlands

A subsidiary of a non EEA has to comply with the same requirements as bank seated in the Netherlands. As a result passporting across the EEA is possible.

The United Kingdom
[no comment]

7. Supervision

7.1 Which national regulatory authority authorises, regulates and supervises foreign banks/investment firms/subsidiaries in your jurisdiction?

Austria
National as well as foreign bank branches or subsidiaries /investment firms are supervised by the FMA and the Austrian National Bank (OeNB).

Belgium
Branches and subsidiaries of foreign banks: National Bank of Belgium.

Branches and subsidiaries of portfolio management and investment advice companies (one sort of MiFID Belgian investment firms): Financial Services and Markets Authority.

Branches and subsidiaries of brokerage firms (the other sort of MiFID Belgian investment firms): National Bank of Belgium.

Bulgaria
The main regulators are the Bulgarian National Bank (banks, financial and payment institutions) and the Financial Supervision Commission (investment intermediaries).

Czech Republic
The national regulator of banking activities of both domestic and foreign banks/investment firms in the Czech Republic is the Czech National Bank.

France
Autorité de contrôle prudentiel et de résolution:
- authorises credit institutions and supervises their activities/organisation;
- authorises investment firms and supervises their activities/organization except with respect to portfolio management and investment advise;
- supervises banking services (including the nature of the services and, to a certain extent, the conduct of business rules connected to such services) ;

Autorité des marchés financiers:
- authorises investment management companies (under UCITS, AIFM or MIFID) and supervises their activities/organisation;
- authorises investment firms and supervises their activities/organization solely with respect to portfolio management and investment advise;
- supervises investment services (including the nature of the services and the conduct of business rules connected to such services).

Germany
See the regulatory chart.

Hungary
The NBH is the national regulatory authority. It shall supervise those entities and other persons who provide financial services in Hungary in addition to issue licences for establishment and operation of such entities and other persons.

Italy
Banca d'Italia (Bank of Italy) is the competent authority for supervising banks and financial companies in Italy.

CONSOB is the competent authority for supervising investment firms and banks limited o the provision of investment services.

Luxembourg
CSSF is the supervisory authority for foreign banks/investment firms/subsidiaries.

Poland
The Polish Financial Supervision Authority (in Polish: "Komisja Nadzoru Finansowego").

Portugal
The Bank of Portugal and the CMVM.

Romania
The banking sector in Romania as well as the activity of foreign banks branches in Romania are authorised, regulated and supervised by the National Bank of Romania.

The capital markets sector, as well as the activity of investment firms or foreign investment firms branches in Romania are authorised, regulated and supervised by the Romanian Financial Supervisory Authority.

Spain
The Bank of Spain (credit entities/banks) and the CNMV (investment firms).

The Netherlands
The Dutch Central Bank and the Authority Financial Markets since 2004 the Netherlands applies the TwinPeaks supervisory model (prudential supervision by DNB and conduct-of-business supervision by the Netherlands Authority for the Financial Markets (AFM)).

The United Kingdom
The PRA is the prudential regulator for all banks and major investment firms. The FCA is the conduct regulator for all firms operating in the UK (and the sole regulator of investment firms which are not major investment firms). For new applicants, authorisation can be granted only where both the FCA and the PRA are satisfied that their respective requirements have been met.

7.2 Is there any split in supervision between the local regulator and the foreign/home regulator – e.g. in the case of locally authorised branch?

Austria
The Austrian authorities will supervise (i) Austrian subsidiaries of foreign banks/ investment firms and (ii) Austrian branches of foreign banks, which are treated like independent or standalone entities. Such an Austrian branch must fulfil its duties under Austrian banking law on its own although it may in fact depend on the foreign bank's instructions.

Belgium
To the contrary of EEA institutions, the Belgian regulators have a comparable supervision power on foreign banks' branches as if they were Belgian institutions.

Bulgaria
Yes. For example, the competent foreign regulator must consent to the establishment of a branch of a foreign bank in Bulgaria. The BNB shall grant a licence to a local branch if it is satisfied that the foreign regulator exercises effective control over the foreign bank and if the regulators have entered into a supervision cooperation agreement.

Czech Republic
Yes, the supervision is shared.
For the purposes of the licensing of a branch, the foreign non-EU bank must provide the CNB with a written statement of the foreign non-EU bank supervisory authority confirming that it will carry out a supervising authority over the branch. CNB may enter into an agreement with the foreign supervisory authority over coordination and cooperation concerning on-site controls.

France
In practice, yes. For branches, by definition, the ACPR/AMF will liaise with the Home State regulator to organise the supervision. For subsidiaries, it is not per se a requirement but, it may be the case in practice. In that respect, please note that French regulators have entered into specific MOU with other Third Countries' regulators for supervision of branches/subsidiaries.

Germany
With regard to third country (non-EEA) institutions, there is no split in supervisions. As a branch of a third country bank or financial services provider generally has to apply for a ("full") licence with BaFin (as passporting is not possible), the branch is subject to the same regulations as an originally German bank or financial services provider.

For branches of EU member state banks or financial services providers which have passported their business, there might be a certain regulatory split between BaFin regulatory rules and the supervision by the home regulator. This is because the German supervisory rules have "gold-plated" certain EU regulations, e.g. investor-protecting rules that have to be complied with for German financial services providers. Please find below the most relevant examples but note that a conclusive answer is not possible but depends on the individual case (home member state and what kind of financial services are provided):

- Statutory product information (pre-PRIPS) there is a statutory obligation to provide (as retail clients classified) clients with a two-paged information sheet similar to the UCITS KIID for every financial product in case of providing investment advice (purchase advice).

- Inducement catalogue: Further, German financial services providers have to maintain an inducement catalogue containing the use of inducements and their designation to enhance the quality of the investment service.

- "Minutes" of the investment advice have to be prepared and handed out to the client in advance of any order related on such advice (otherwise a revocation-right might be applicable).

Hungary
There is no binding rule that would result in splitting competences between local and foreign regulators.

However, the NBH is a party to certain multi- and bilateral co-operation treaties made with foreign authorities which among others cover the exchange of information, providing documents and consultation.

Italy
The home regulator would be competent for supervising certain aspects generally relating to compliance with capital requirements and operational organization, whilst the Italian regulator would supervise mainly on compliance with Italian conduct of business rules.

Luxembourg
Exchange of information between the CSSF and the local foreign regulator can occur.

Poland
No. Subject to a specific arrangement between the PFSA and the home regulator, the PFSA holds exclusive supervision over a Polish branch or a representative office of an FB. In the case of an IF, the PFSA holds supervision pursuant to the relevant arrangements with the home country regulator.

Portugal
As a prerequisite for the commencement of the provision of services in Portugal, the supervisory authority of the home country shall notify Bank of Portugal of the activities which the institution intends to carry on in Portugal, and certify that such activities are covered by the authorisation granted in the home country.

Romania
Both authorities supervise the activity of the branch and in certain cases the local regulatory authority concludes collaboration protocols with home country authorities in order to enforce supervision.

Spain
Obligations in terms of solvency standards are required to branches of foreign banks, which are also subject to Spanish banking sanctions regime.

As per investment firms, solvency standards are not required, provided that the laws of their home country include equivalent provisions to those which apply in Spain. Investment firms whose parent company is a credit entity in a foreign country will not be subject to supervision on a consolidated basis in Spain provided that they are subject to said type of supervision in their home country.

The Netherlands
Depending on the home-country of the supervised entity, the existence and content of the cooperation agreement with the home-country regulator and assessment of the branch the DNB may consent in a split in supervision.

The United Kingdom
There is a split in supervision between the PRA and the HSS. This is agreed between the PRA and the HSS for each individual firm being authorised (in order to take into account the fact that HSS may not be as competent in certain areas) and also includes an appropriate level of information sharing.

If the PRA assesses the HSS to be reasonably equivalent, it will support the HSS's supervision of the UK branch. However, if, on assessment, the PRA deems the HSS not to be equivalent, then the firm will need to operate in the UK as a subsidiary.

The PRA will work with the HSS to assess the links between the UK subsidiary and the wider consolidated group, as well as the group's recovery and resolution plans, and may limit the links between the UK subsidiary and the group.

8. Individuals

8.1 Where a local branch or subsidiary is established and (if applicable) authorised, are individuals personally regulated and/or liable to fines?

Austria
Pursuant to Sec 9 of the Administrative Penal Act 1991 responsibility under administrative penal law for the compliance with the provisions of the administrative law by legal persons under commercial law shall rest, unless provided otherwise by provisions of administrative law or unless "special responsible representatives" are appointed, with the persons appointed as regular representatives. The managers appointed as regular representatives in Austria have the right and to the extent it is necessary to ensure responsibility under the penal law also the obligation, to appoint, upon request by the authority, one or several persons to be special responsible representatives to ensure compliance with the provisions of the administrative law for the whole company or for certain premises or departments of the company. The persons appointed as regular representatives for the foreign banks branch remain responsible under Austrian penal law, in spite of having been appointed as a special responsible representative, if they deliberately did not prevent the offence. Legal persons under commercial law are solely and severally liable for the payment of any fines imposed on persons appointed as regular representatives of the company or on a special responsible representative as well as for any other damages expressed in money and for the cost of legal proceedings.

As a licensing requirement of a bank/ foreign banks branch other than that of an investment firm, at least one of the two mandatory managers of a bank needs to have his centre of main/vital interests in Austria in order to ensure enforceability of local banking provisions and fines.

Belgium
Yes.

Bulgaria
Yes, certain individuals are regulated. By way of example, these include members of management and supervisory bodies of local subsidiaries; mangers of local branches of foreign banks/investment intermediaries; certain other administrators, etc.
They may be subject to fines and/or criminal liability (where the breach constitutes a criminal offence).

Czech Republic
Yes, there are certain rules the individuals employed by a local branch or subsidiary must follow. A breach of such rules may lead to their liability to fines. These rules mainly pertain to certain reporting duties of the bank's management to CNB, the breach of banking secrecy rules, or prohibition of accumulation of certain management positions. In extreme cases, a serious breach of prudential rules may lead to a criminal prosecution.

France
Yes. Any employee/representative located in France [is].

Germany
Obviously, board members, managers, other employees as well as controllers of credit institutions or financial services institutions are criminally liable in accordance with German criminal law if these persons commit an offence in Germany (territoriality principle, section 3 German Criminal Code or "StGB").

Among others, decision makers of a bank can be held criminally liable for embezzlement (section 266 StGB) in case of lending contrary to duty. This would apply if a decision maker grants a loan without having diligently evaluated – on the basis of comprehensive information – the chances and the risks of such loan beforehand.

- Indicators for an insufficient risk assessment are, among others: the exceedance of the maximum credit limit; self-serving acting of the decision maker; the responsible person is not authorized to grant a certain loan.

- The decision maker's non-compliance with section 18 KWG (obligation to require the borrower to disclose his financial situation, in particular by submitting his annual accounts, at certain thresholds) has an indicative effect in this respect as well.

Compliance Officers of banks/investment firms etc. are criminally liable for nonfeasance (cf. section 13 StGB): If a bank's employee commits criminal offences with regard to the bank and the Compliance Officer does not intervene, the latter is liable for aiding and abetting.

Banks' and financial services institutions' managers can be held criminally liable in case of deficiencies of their risk management system if the firm's survival is threatened hereby (54a KWG; imprisonment up to five years or fine).

Furthermore, managers can be subject to a fine according to section 130 of the Act on Breaches of Administrative Regulations ("OwiG") if they infringe their obligatory supervision (in such cases the manager's negligence is sufficient).

The representatives of credit/financial services institutions can be liable to fines up to EUR 200,000 for several reasons (e.g.: exceeding the credit limit, lending without the required documentation/information) according to sections 56 KWG and 9 OWiG.

According to section 36 (1) KWG, BaFin is able to recall banks' and financial services institutions' managers in several cases, for instance if there is a lack of personal reliability (e.g. if a financial crime has been committed or if criminal proceedings are pending) or professional qualification. In such cases BaFin is even able to recall the managers' eligibility to act as board members of financial institutions at all. The same applies with regard to members of the supervisory body.

Hungary
Yes.

The executive officers and the members of the supervisory board of a financial institution and a branch must ensure that the financial institution and the branch perform the authorized activities. They must act at all times with due diligence and expertise consistent with the professional requirements applicable to their respective positions.

The amount of the fine may be in the range from one hundred thousand to twenty million forints (approx. EUR 64,000). If the executive officer is obliged to pay the fine, such fine may not be paid by the financial institution or the branch.

Italy
Italian Law provides for specific rules concerning the good repute and professional requirements to be met by the managers of branches of foreign banks.

Save for the above rules, individuals are not personally regulated though they may be subject to fines in case of specific violations sanctioned by CBA.

Luxembourg
Directors of the subsidiary have to be approved by the CSSF and have to be in the possession of good repute (proved by extract from criminal records or affidavit). In case of breach of company law or articles of incorporation, directors can be criminally liable and may incur fines and prison punishments (article 163, to article 166, article 167, article 169, article 171-1 of the law of 10 August 1915).

The provisions apply equally to resident or non-resident directors and even to "shadow directors".

Poland
Individuals violating certain provisions of Polish banking law may be exposed to administrative, civil and/or criminal liability irrespective of whether they are employees (contractors) of a Polish bank/investment firm, a representative office of the FB/IF or a branch of the FB/IF.

Portugal
Registration of members of the management and auditing boards with the Bank of Portugal is a prerequisite for the performance of their functions. The registration may be refused based on the lack of suitability, experience or availability on the part of the members of the management or auditing boards.

The members of the management board in charge of the day-to-day management of the credit institution and the official auditors belonging to the auditing board shall have appropriate experience to perform their functions, namely adequate academic qualifications and professional experience.

If the legal or statutory requirements for the regular operation of the management or auditing boards cease to be met, Banco de Portugal shall stipulate a period for the change in the composition of the board in question. Should the situation not be settled within the stipulated period, authorisation may be withdrawn.
The above are also applies to branches and representative offices of foreign banks.
Individuals will also be generally liable pursuant to Portuguese civil/criminal applicable rules.

Romania
The general rules applicable for the management of credit institutions would also apply for the representatives of local branches of foreign banks. In case of fraud or other breaches of applicable legislation such persons can be held liable as would be the case for the management of Romanian credit institutions management members, therefore fines or even criminal liability may be applicable.

Spain
In some cases, yes.

The Netherlands
AFM and DNB have the possibility to impose an administrative penalty, as a fine, to one or more natural persons that have (actually) been in charge of the offense by a regulated entity person, such as the director(s) of a financial institution that has committed a violation. Natural and legal persons are subject to the same range of fines.

The United Kingdom
Yes, for a subsidiary, under the Approved Persons Regime ("**APER**") individuals are personally regulated by the PRA/FCA. Certain senior individuals are required to be individually approved to hold 'controlled functions'. Approval is granted only once the PRA/FCA is satisfied that a candidate is fit and proper to perform the controlled function applied for.

For a branch, only certain roles need to be authorised, such as directors or non-executive directors where they are performing a function that has responsibility for the regulated activities of a UK branch which are likely to enable them to exercise significant influence over that branch or where their decisions or actions are regularly taken into account by the governing body of the branch.

The new Senior Management Regime ("**SMR**") will replace the current Approved Persons regime in 2015 for deposit takers and PRA-regulated investment firms. Although HM Treasury is still consulting on whether and how to apply the SMR to foreign branches, the PRA has proposed to apply the regime. These banks would have to put forward an individual for approval who would be subject to full personal regulation by PRA with the personal liabilities and responsibilities that the new SMR involves.

As of 5 September 2014, there is also a new requirement for a senior individual in the UK management team of a foreign branch to give an annual attestation to compliance with the SYSC sourcebook of the PRA Handbook.

The FCA/PRA can impose a financial penalty of such amount as it considers appropriate if a person has at any time performed a controlled function without approval or that person knew, or could reasonably be expected to know, that they were performing a controlled function without approval. Other enforcement actions include withdrawing an approved person's approved status, granting a prohibition order or taking disciplinary action for misconduct.

8.2 Does this extend to individuals overseas/in the home country?

Austria
The managers of foreign banks could be held personally liable for a branch in case the management of this branch cannot be held responsible.

In cases, e.g. when establishing a representative office without giving notice to the FMA or operating without a banking license, the manager of the foreign bank will be responsible and could therefore be held liable if no special responsible representative was appointed effectively in a foreign banks branch. In case of direct liability of foreign managers, the question of whether administrative fines issued by Austrian authorities are enforceable, has to be assessed separately for every home country and is generally contingent on bilateral agreements.

Belgium
Yes.

Bulgaria
Yes, this extends to individuals overseas if they are managers of branches, members of management/supervisory boards, representative of entities that are members of such boards, certain shareholders and representative of certain shareholders, etc.

Czech Republic
Yes. Czech law does not distinguish for these purposes between individuals residing in the Czech Republic and overseas.

France
Yes: foreign based core managers and representatives of these entities. Also, any person that has breached French law (any employee) is subject to sanctions/fines.

Germany
With regard to criminal liability the territoriality principle applies (see [question] above).

However, according to section 25l KWG ("Group-wide compliance with due diligence standards"), credit and financial services institutions shall develop group-wide internal safeguards in order to prevent money laundering, terrorist financing and other criminal actions, also they must ensure compliance with the due diligence standards of the Money Laundering Act and of the KWG with regard to their subsidiaries and branches. The managers shall be responsible for the proper fulfilment of these duties. Hence, German managers may be liable for nonfeasance if they do not implement such group-wide standards overseas.

Hungary
Yes, the fine can be enforced against those individuals who are out of Hungary and in this case, the competent Hungarian authority will take all steps available to it to collect fines in foreign countries. Any action of the Hungarian authority is subject to foreign enforcement law. However, Hungary is a party to certain bilateral treaties the aim of which is to facilitate enforcement procedures abroad.

Italy
Depending on the relevant violation, the CBA provides for administrative sanctions applicable to directors employees and individuals exercising direction activities, regardless of whether are located abroad or in Italy.

Luxembourg
Poland
Yes. Polish law provides extraterritorial civil and criminal liability for violation of certain provisions of Polish banking law, although, as a matter of practice, recognition and enforcement of Polish judgements might be an issue, and it all depends on the relevant international arrangements.

Portugal

This applies to all people integrating the board of the local branch or subsidiary regardless of their location.

Romania
This would not extend to individuals that are employed by the mother credit institution / investment firm in the home country.

Spain
In some cases, yes.

The Netherlands
Relevant is if the person has (actually) been in charge of a violation of the FSA not the location where he was when the violation was committed.

The United Kingdom
Yes, in certain circumstances, for example directors on the board of a firm's parent company or holding company.

8.3 Which officers and employees are subject to local vetting, and are the owners/controllers subject to local vetting?

Austria
Managers of foreign banks subsidiaries and branches have to fulfil certain qualifications as a licensing requirement and will be subject to a fit and proper test. Internal auditors and certain members of the supervisory board may also be subject to fit and proper tests.

Owners/controllers of Austrian subsidiaries are subject to constant local vetting insofar as Austrian banks have to disclose information concerning the identity of their shareholders with qualifying holdings. Foreign banks have to disclose information concerning the identity of their shareholders with qualifying holdings at the time of the licence application. Owners/controllers do not have to fulfil fit and proper requirements but a reliability of the shareholders must be given.

Belgium
In case of a subsidiary, directors, owners/controllers are subject to local vetting. In case of a branch, directors/permanent representatives are subject to local vetting.

Bulgaria
Generally, this include, amongst others, members of management/supervisory bodies of local subsidiaries; mangers of local branches of foreign banks/investment intermediaries; certain other administrators such as people who manage and/or control units engaged in activities directly related to the main business activities. Certain owners/controllers are also subject to local vetting (e.g. shareholders who own 3% or more of the voting shares in the capital of local subsidiaries of foreign banks, direct or indirect owners of 10 % or more of the shares or the voting rights in a local investment intermediary, etc.). Brokers engaged by investment intermediaries are also subject to local vetting.

Czech Republic
For the purposes of granting a license, the reliability, experience and professional expertise of persons proposed to become the management of a branch are subject to the vetting by CNB. The same shall apply in respect of the members of the board of directors and supervisory board of a subsidiary.

If there is a change in the management of a subsidiary/branch occurring after the license is granted, CNB does not have the vetting rights in respect of newly appointed officers, however if the officers do not comply with the CNB requirements concerning reliability, experience and professional expertise, CNB may start a legal proceedings against the bank/subsidiary for not complying with the requirements of law. Therefore, it is a good practice in the Czech market to ask the CNB for an approval with the appointment of the officers in advance.

France
Core managers (i.e. the responsible persons for the branch/subsidiaries, whether they are in France or abroad), legal representatives (from a corporate point of view) that are not core-managers for subsidiaries.

The owners/controllers are also subject to local vetting.

Germany

According to section 25c KWG, the managers of a credit or financial services institution have to be qualified, reliable and have to devote sufficient time to their duties (there are tight restrictions concerning the acceptable number of mandates). To this effect, BaFin regularly performs fit and proper tests.

Section 33 KWG lists all the cases in which a banking licence will be denied by BaFin, including:

- If there are facts suggesting that one of the managers is not reliable
- If the owner of a significant share or, if this is a legal entity, a representative, or if it is a partnership, even a partner is not reliable
- If there are facts suggesting that the owner or a manager do not have the professional qualification in order to manage such credit/financial services institutions

Besides, the German legislator requires credit and financial services institutions to appoint several officers in order to ensure that these institutions comply with certain legal provisions. Almost all officers that are legally required (such as the Compliance Officer, the Anti-Money Laundering Officer and the Data Privacy Officer) are subject to local vetting. For instance, AML Officers must have sufficient expertise for the performance of their function; Compliance Officers are subject to extensive requirements regarding their position and duties; Data Privacy Officers must ensure their required reliability and expertise.

Hungary
Local vetting as such does not exist in Hungary. However, a similar process is implied in the licensing procedure of a branch office / subsidiary when the NBH examines whether or not the executive officers to be appointed for the financial institution meets certain personnel and commercial requirements. The NBH examines among others:

Personnel requirements are for example the submission of a certificate evidencing the absence of any criminal record and a proof of good business reputation.

Commercial requirements: The NBH will approve the appointment of an executive officer unless he/she:

• has or had a qualifying holding in or who is or has been the executive officer of a financial institution, provided that (a) in the case of such financial institution, insolvency could be avoided only by exceptional measures of the NBH or (b) such financial institution was terminated in liquidation proceedings after the NBH has withdrawn the licence of the financial institution and the liability of whom for such a situation has been declared in a final and binding court decision;
• has violated the Hungarian banking regulations and such has been determined by the NBH, another authority or the court in the previous 5 years;
• has less than 3 years of experience in banking, financial or business management;
• has any other position which may prevent him from complying with his duties as an executive officer of a financial institution.

Italy
The following officers and employees are subject to local vetting: directors, managers and auditors, employees and non-employees entrusted with specific responsibilities in key-areas.

Luxembourg
[no answer]

Poland
In the case of an FB, the PFSA's approval is required for the appointment of a director of a branch and a director's deputy. In the case of an IF, at least two executives are required to have higher education, more than three years of relevant experience, and a good standing. The respective applications to the PFSA have to provide relevant information in respect of such individuals. No information regarding parent executives/owners/controllers needs to be disclosed in the application unless the PFSA requests it.

Portugal
If the legal or statutory requirements for the regular operation of the management or auditing boards cease to be met, Banco de Portugal shall stipulate a period for the change in the composition of the board in question. Should the situation not be settled within the stipulated period, authorisation may be withdrawn.

In regard to owners and controllers, any natural or legal person who proposes to hold or increase a 'qualifying holding'— a direct or indirect holding which represents at least 10% of the capital or of the voting rights of the participated entity, or which for any reason makes it possible for its holder to exercise a significant influence over the management of the participated entity— in a credit institution shall first inform Bank of Portugal of his intention, which will assess his suitability. Bank of Portugal may vet the qualifying acquisition or such increase if he considers that the proposed acquirer doesn't gather the conditions that ensure a sound and prudent management, or if the information provided by the person in question is incomplete.

Romania
The management/representatives of the local branch are subject to local vetting when branches are authorised by local regulators. Generally, such persons must be reputed and experienced professionals who can ensure the proper management of the branch. Owners/controllers of the branch are subject to vetting in the process of the branch obtaining the authorization from local regulators.

Spain
When these type of entities are subject to authorisation, Bank of Spain and/or the CNMV require a report on good repute of the shareholders and/or managers of the bank/branch/subsidiary.

Managers must also comply with experience and capability requirements.

The Netherlands
As a principle the integrity and suitability of directors and supervisory board members are crucial to the integrity of the financial sector. This is why DNB assesses all directors and other policymakers in the financial sector. The aim of the screening is to ensure that, ultimately, only people with sufficient knowledge and skills are appointed as directors and supervisory board members. Owners/controllers are also vetted in relation to the independent functioning of the SB as an organ and of the individual SB member's vis-à-vis one another, the Managing Board, the shareholder, the Company Council (Ondernemingsraad), the employees etc. and from an AML perspective.

In case of a branch the responsible management as well as owners/controllers will be vetted.

The United Kingdom

Any individual holding a controlled function is subject to local vetting. These are set out in the FCA & PRA rules and include directors (and non-executive directors), CEO, CFO, FCA required functions, systems and controls functions, significant management functions and customer-dealing functions.

For a PRA or FCA regulated subsidiary, the owners/controllers of the company are monitored by the regulator and any changes to the controllers need to be approved.