

UK – 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?

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?

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.**

[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)?

[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?

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**

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)?

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?

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 of 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)?

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?

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?

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

[No answer]

5.2 How is a branch regulated?

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

[No comment]

7. Supervision

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

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?

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?

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?

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?

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.

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