



**Financial Services
Commission**

Banking Guidance Note No. 3 Provision Of Cross-Border Services

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Introduction

1. The conclusion reached by the UK Government, following a review of the supervisory activities of the Financial Services Commission, that Gibraltar's supervisory regime for banking matches standards of supervision in the UK has opened the way for Gibraltar credit institutions to take advantage of the "single passport" for the activities listed under the Banking Consolidation Directive (2000/12/EC) ("BCD").
2. It is now possible for the rights of Gibraltar credit institutions under BCD to be enforced due to the recent "post-boxing" arrangements that have been put into place between the Government of Gibraltar and the UK.
3. This Guidance Note explains the significance of the "single passport" and outlines the procedures a Gibraltar credit institution must follow in order to open a branch or provide services in EEA States¹.
4. Repealed.

Background

5. In the past, if it wanted to set up a branch in, or provide services into, an EEA State, a licensed credit institution had to go through that State's separate licensing procedures. BCD established the "single passport", or the principle of mutual recognition of licensing. This meant that a licence granted to a credit institution by, say, France - the "home state" - might be extended to each and every EEA State. For example, if the French credit institution wants to set up a branch in Germany - the "host state" - separate licensing in the host state is not required. Instead, in this example, the French company will apply to the French supervisory authorities stating its intention to open a branch in Germany. The host state (German) authorities will be consulted but it is only the home state (French) authorities which have the power to prevent the company opening the branch, or providing the services.
6. The UK Government's conclusion referred to above extends the "single passport" principle to Gibraltar. This means that Gibraltar credit institutions need approval only from the Commissioner of Banking ("the Commissioner") if they wish to open a branch in an EEA State. They do not need to obtain approval from the State in which the branch is to be established although they do need to comply with any provisions of the law of the State which are in the interests of the "general good". Gibraltar credit institutions must also notify the Commissioner if they wish to provide services in EEA States. The Commissioner will have sole supervisory responsibility for future prudential

¹ References in these notes to an EEA State are to a State which is a Contracting Party to the EEA Agreement. The EEA Agreement is the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17th March 1993. The EEA Agreement was amended by the Treaty of Accession which came into force on 1st May 2004.

The EEA States are therefore as follows:-

Austria	Belgium	Cyprus
Denmark	Estonia	Finland
France	Germany	Greece
Hungary	Iceland	Republic of Ireland
Italy	Latvia	Liechtenstein
Lithuania	Luxembourg	Malta
Netherlands	Norway	Poland
Portugal	Slovakia	Slovenia
Spain	Sweden	United Kingdom

supervision of the EEA branch or services business of Gibraltar credit institutions.

7. The European Commission adopted a Communication² on 26 June 1997 interpreting and clarifying the terms on which credit institutions may provide services in the Single Market in the light of the case law of the Court of Justice. Consultations undertaken with users of banking services and with credit institutions have shown that the numerous uncertainties that remain regarding the interpretation of the concepts of "general good" and of "freedom to provide services" are likely to limit cross-border activities. The Communication, which concerns in particular certain provisions of the BCD, lays down the exact scope and the conditions of use, within the framework of the freedom to provide services, of the notification procedure set up in the Directive. It also clarifies the situation regarding credit institutions' use of intermediaries and of electronic facilities to provide services. Finally the Communication stipulates that, to be justified in the name of the general good, any national measure constituting a restriction has to be non-discriminatory, objectively necessary and proportionate to the defined objective.
8. In the light of the many consultations that it has conducted with all parties concerned, the European Commission has developed a doctrine for interpreting BCD that gives full effect to the mechanisms it sets up. This doctrine clarifies the exact scope of the freedom to provide services and maps out the legal framework within which a Member State may invoke the concept of "general good" in order to restrict the provision of services by a credit institution legally established and approved in another Member State. However, the European Commission's interpretations do not prejudice the position of the Court of Justice, which has the last say in interpreting the EC Treaty and secondary legislation.

When to notify

10. Only those activities to be exercised by dint of the freedom to provide services on the territory of another Member State must be notified in advance (see Annex). In order to determine whether or not the activity is exercised on a given territory, the place at which the "characteristic performance", i.e. the essential service for which payment is due, is supplied must be determined.
11. Any form of advertising, whether targeted at a particular audience or not, and any offer of services from a distance by any means whatsoever is exempt from prior notification.
12. The notification procedure laid down by BCD pursues an objective of mutual recognition of supervisory authorities.

Making An Application To Open A Branch Or Provide Services In An EEA State

13. You should familiarise yourself with the requirements of the legislation. Section 38 of the Banking Ordinance 1992 ("the Ordinance") gives effect to the requirements relating to the "single passport" provisions as they affect Gibraltar.
14. If you wish to **carry on business through a branch in an EEA State**, you should use Form 2BCD1A. Form 2BCD1B is used for any subsequent notification of changes to the requisite details

² The European Commission published the interpretative communication (Sec(97) 1193) [in June 1997](#) on this issue. Institutions should read this in consultation with this guidance note.

15. If you wish to **provide banking services into an EEA State**, you should use Form 2BCD2.

Progress Of A Notification

To Provide Services

16. This is a relatively simple procedure. You should address a notification that you wish to provide services in an EEA State to the Commissioner. We will forward it to the regulatory authorities in the State(s) into which the services are to be provided via the so called "Post-Box³". We will tell you when we have done this. You may then start to provide the services.
17. In all cases, you should tell us when you start to provide the services.

To Open A Branch

18. You should send your notification that you wish to open a branch in an EEA State to the Commissioner. This is a more complex procedure and you are advised to contact the Banking Supervisor at the Financial Services Commission (tel: 40283) before commencing the application. It is likely that he will ask you to submit the application in draft form initially. Once any difficulties on the draft notification have been resolved you will be invited to submit a formal notification. The Commissioner has three months in which to consider the formal notification, but if we have been able to comment previously on a draft application the timescale should be shorter than that.
19. If your notification in respect of a branch is acceptable, we will forward the information contained in it to the regulatory authorities in the EEA State in which the branch is to be established. We will attach to it details of the amount of own funds and the solvency ratio of the institution. Those authorities have a further two months in which to indicate the provisions that will apply in the interest of the "general good" (see below) to the conduct of business in that State. We will pass this information to you when it is received. In the absence of any response from the host State of the proposed branch, you may start business once those two months have lapsed.

"General Good"

20. A credit institution operating via a branch or by dint of the freedom to provide services which is required by the host Member State to comply with a national provision which restricts its operations could contest the application of that provision in its regard if it considers that it does not meet one of the following criteria determining whether it is justified in the general good:
- it must not have been subject to prior Community harmonisation ·
 - it must not be discriminatory ·
 - it must be justified by a compelling reason to protect the general good (e.g. consumer protection, fraud prevention, cohesion of the tax system) ·
 - it must not duplicate rules applicable in the home Member State ·

³ Notification to other EEA States is regarded by some member states as conducting external affairs for which only the UK has competence in respect of Gibraltar. To overcome this difficulty, a 'post box' arrangement was set up through which notifications that Gibraltar banks wish to provide banking services into other EEA States can be directed to the appropriate State through the UK authorities. The details of this formality do not affect banks' right to passport and should not delay the provision of banking services. They need only notify the Commissioner of their intentions and he will make the necessary arrangements

- it must, from an objective point of view, be necessary and proportionate to the objective pursued.
21. As regards the principle of proportionality, the European Commission considers that the Member States should, when imposing their "general good" requirements, make a distinction according to whether or not the services are supplied to customers who are fully aware of potential risks (sophisticated customers such as frequent investors and large, corporate customers).
22. All national rules must be compatible with Community law, regardless of the field they govern. Consequently, any restrictions resulting from national rules in the field of private law and applicable to banking services must conform to the general criteria outlined above

Powers of the host country

23. The host country is unable to control whether a credit institution intending to do business on its territory either by dint of the freedom to provide services or via a branch is complying with the harmonised terms on which the single licence was issued to by the home country. Only the home Member State is competent to carry out such control. It is on its responsibility that the single licence is issued, and the host country is unable to contest whether the licence should have been issued or not. The host country has, however, certain powers in ensuring the liquidity of a branch and may also request information for statistical purposes from a branch.
24. It would in all likelihood be contrary to Community law for a Member State to require a credit institution having operated on its territory by dint of the freedom to provide services for a given period to open an establishment in order to continue its activities.
25. Freedom to provide services may be exercised by a branch established in another Member State in respect of customers in a third Member State. In this case, notification must be given by the authorities of the institution's home country to the authorities of the third country.
26. **If you experience any particular difficulty establishing a branch or providing services in a particular EEA State, please let us know.**

Translation

25. The requisite EEA details for branches and services business should be submitted in English and the language of the host State⁴.

Further Information

26. Any enquiries or requests for further information may be addressed to the Banking Supervisor at the Financial Services Commission, P.O. Box 940, Suite 943, Europort, Gibraltar (tel: (350) 40283; fax (350) 40282).

⁴ Translations are presently required only for Belgium, France, Germany, Portugal and Spain.

Annex 1 - Activities Relevant For Certain Purposes Of The Banking Consolidation Directive

1. Acceptance of deposits and other repayable funds from the public.
2. Lending⁵.
3. Financial leasing.
4. Money transmission services.
5. Issuing and administering means of payment (e.g. credit cards, travellers' cheques and bankers' drafts).
6. Guarantees and commitments.
7. Trading for own account or for account of customers in:
 - (a) money market instruments (cheques, bills CD's etc);
 - (b) foreign exchange;
 - (c) financial futures and options;
 - (d) exchange and interest rate instruments;
 - (e) transferable securities.
8. Participation in share issues and the provision of services relating to such issues.
9. Advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings.
10. Money broking.
11. Portfolio management and advice.
12. Safekeeping and administration of securities.
13. Credit references services.
14. Safe custody services.

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⁵ Including inter alia

- consumer credit,
- mortgage credit,
- factoring, with or without recourse,
- financing of commercial transactions (including forfaiting)