bank accounts in favour of the lenders as security of its obligations under a credit facility. Since all toll-road collections paid by credit card were deposited in pledged accounts, the judge considered that monies deposited after the declaration of insolvency should not be considered pledged. He based his decision on the continuation of the professional or business activity principle and the protection of other creditors and arguing that there was no good reason for treating differently toll roads paid by credit card and those collected in cash by the insolvent estate. Even though the English law concepts of fixed charge and floating charge do not exist under Spanish law, this decision ultimately evidences the judge’s unswerving determination to prevent that floating charge holders may ‘step in and sweep off everything’ (in the words of Lord Scott of Foscote in *National Westminster Bank plc v Spectrum Plus Limited and others,*[9] quoting Lord Macnaghten in *Salomon v Salomon & Co. Ltd*).[10]

The Advocate General concluded at point 64 of his Opinion to the ECJ on *IS SIA v Swedbank* that ‘subject to the situations referred to in Article 8, the regimen under Directive 2002/47 does not cover collateral provided after the commencement of insolvency proceedings’. And the ECJ finally ruled that ‘sums paid into the collateral provider’s account after the commencement of insolvency proceedings are not, in principle, covered by the regime established by Directive 2002/47’.

Notes

1 Case C-156/15.
2 [2010] EWHC 1772 (Ch).
3 [2012] EWHC 2997 (Ch).
4 Resolution no. 116/2014 (ROJ no. SAP B 4142/2014).
5 Resolution no. 125/2008 (ROJ no. STS 3259/2008).
6 Resolution no. 650/2013 (ROJ no. STS 5875/2013).
7 Resolution no. 186/2016 (ROJ no. STS 1211/2016).
8 Resolution no. 122/2015 (ROJ no. SJM M 177/2015).
9 [2005] UKHL 41.
10 [1896] UKHL 1.

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The implications of a ‘hard’ Brexit for the banking activities of UK credit institutions operating in Belgium and the rest of the EU/EEA

Introduction

In her speech on 17 January 2017, the UK’s Prime Minister, Theresa May, stated that ‘we do not seek membership of the Single Market’.[1] This statement implies that the United Kingdom will make a ‘clean’ break, not only from the European Union, but also from the European Economic Area (EEA). Although Prime Minister May also stated that the UK might try to retain certain elements of current Single Market arrangements regarding financial services, it appears more likely that the UK would become a true third country from a financial regulatory perspective. As a result, credit institutions that have their head office in the UK (‘UK Credit Institutions’) would lose their ‘passporting’ rights to engage in banking activities within the territory of the Member States of the European Union and the European Economic Area (together, the ‘EEA Member States’).

What would such a ‘hard’ Brexit mean for UK Credit Institutions seeking to continue their banking activities throughout the EU/EEA?

This article examines this question from the perspective of the Capital Requirements Directive IV (CRD IV) package (comprising Directive 2013/36/EU and Regulation 575/2013) as implemented in Belgium; it is limited to banking activities in the strict sense of the word, being: the taking of deposits and other repayable funds from the public; and the granting of credit for its own account. Other directives and regulations

applying to credit institutions and other services provided by UK Credit Institutions will also be relevant following a 'hard' Brexit, but these other rules and services are not discussed in this article.

Is any action needed?

Location, location, location

Location is everything. The first question that any UK Credit Institution should ask itself is: do we provide any banking services within the EEA?

This is an important question as a 'hard' Brexit will obviously have little impact on UK Credit Institutions that do not conduct any banking activities within an EEA Member State's territory. Unfortunately, CRD IV provides very little guidance about the location of banking activities. CRD IV only refers to activities that are carried out within the territory of the EEA or an EEA Member State.

Approximately 20 years ago, within the framework of the Second Banking Directive (Directive 89/646/EEC of 15 December 1989), the European Commission (the 'Commission') provided some guidance on a banking activity's location in an interpretative communication (the 'Interpretative Communication').[2] The Commission took the view that banking services take place where the 'characteristic performance' takes place. According to the Commission, one should determine 'the essential supply for which payment is due' and the mere fact that a credit institution has clients abroad or even temporarily visits an EEA Member State's territory does not necessarily imply that the banking activity takes place within an EEA Member State's territory. Admittedly, 'characteristic performance' and 'essential supply for which payment is due' are fairly abstract concepts, but these concepts do help to determine where a banking activity takes place, as the Commission's view implies that the activity itself is more relevant than the marketing of such an activity when determining a banking activity's location. In this respect, the Commission considered that 'the prior existence of advertising or an offer cannot be linked with the need to comply with the notification procedure'.

Does the Commission's view mean that UK Credit Institutions should only look at the place where the characteristic performance takes place? Unfortunately not. The Interpretative Communication is only a recommendation and it does not constitute 'hard' law. The EEA Member States are therefore free to determine whether or not a banking activity takes place within their territory. For example, the Belgian supervisory authority once suggested that a banking service might take place within the territory of Belgium, not only if the characteristic performance of the service takes place within Belgian territory, but also if the institution advertises its services to clients in Belgium.[3]

If a UK Credit Institution would like to determine if a banking activity is taking place within an EEA Member State's territory, then it should investigate the national laws of the different EEA Member States.

Regulated banking activities?

If the banking activity takes place within an EEA Member State's territory, then the UK Credit Institution must check if the banking activity is subject to a licence or other authorisation requirement under the laws of that EEA Member State.

A UK Credit Institution seeking to take deposits from the public within an EEA Member State's territory will require an authorisation to do so. Article 9 of Directive 2013/36/EU is very clear in this respect.

However, granting credit will not necessarily be subject to an authorisation requirement. Under Belgian law, for example, any person (including legal entities) may grant credit, provided that such a person: does not take deposits or other repayable funds from the public; and does not grant credit to consumers. So, even following a 'hard' Brexit, UK Credit Institutions can still provide credit to Belgian companies without the need to obtain a licence or any other authorisation.

If a UK Credit Institution's banking activities are located within an EEA Member State's territory and are subject to an authorisation requirement, then it should consider establishing one or more branches throughout the EEA or incorporating a new head office in an EEA Member State.

Should a branch be opened in one or more EEA Member States?

The CRD IV does not regulate the opening of branches by third country credit institutions in much detail. Recital 23 of Directive 2013/36/EU states that the 'rules governing branches of credit institutions having their head office in a third country should be analogous in all Member States', and Article 47 (1) of Directive 2013/36/EU provides that 'Member States shall not apply to branches of credit institutions having their head office in a third country, when commencing or continuing to carry out their business, provisions which result in more favourable treatment than that accorded to branches of credit institutions having their head office in the Union'. CRD IV neither prohibits nor obliges EEA Member States from allowing third country credit institutions opening branches within their territory. Therefore, the laws of each EEA Member State will need to be investigated separately.

Following a 'hard' Brexit, a UK Credit Institution will be able to open branches within Belgium's territory, provided that both the UK and the UK Credit Institution comply with certain requirements. For example, UK laws regarding the supervision of credit institutions must be equivalent to the CRD IV rules. The Belgian supervisory authority can even insist that the establishing of a branch is insufficient and that a head office must be incorporated in Belgium. The UK Credit Institution and its branch will also need to comply with certain Belgian law requirements.

The main drawback for a third country credit institution when opening a branch in an EEA Member State is that such a branch does not offer any 'passporting' rights. So a UK Credit Institution might need to open a branch in each EEA Member State in which it would like to continue its regulated banking activities. This requirement could be a cumbersome exercise, especially since the rules in each EEA Member State could differ from one another. This drawback can be limited given Article 47 (3) of Directive 2013/36/EU provides that '[t]he [European] Union may, through agreements concluded with one or more third countries, agree to apply provisions which accord to branches of a credit institution having its head office in a third country identical treatment throughout the territory of the [European] Union'. Such an agreement between the EU and the UK might help UK Credit Institutions establish branches throughout the EEA's territory.

Should a licence be obtained as an EEA credit institution?

UK Credit Institutions conducting regulated banking activities throughout several EEA Member States might wish to establish a head office in an EEA Member State and obtain a licence as a credit institution established in the EEA ('EEA Credit Institution'). Such a licence will allow the EEA Credit Institution to provide banking services throughout the EEA.

A UK Credit Institution may obtain such a licence in several ways. For example, it could incorporate a subsidiary in one of the EEA Member States. Another option would be to take over an existing EEA Credit Institution. The UK Credit Institution could also seek to move its head office from the UK to an EEA Member State, but this option could be more complicated from a corporate law perspective and will also affect the credit institution's banking activities within UK territory.

If the UK Credit Institution would like to obtain a full licence as an EEA Credit Institution, then it must carefully consider where such a licence would be obtained. Several elements must be taken into account, such as: the geographical location, the available workforce, living standards, tax rates, local laws (corporate law, labour law, supervisory laws, etc.) and the supervisory authority's attitude. Politics should not be left outside the assessment either: several EEA Member States face political movements advocating that their country also leaves the EU. It is important to choose a country that is likely to remain part of the EEA.

Although Belgium's taxes and labour costs are often considered to be quite high compared with other countries, the country also has several advantages. It is located close to the UK and is easily accessible by train and plane. It has high living standards and has a very skilled, multi-lingual workforce with a lot of experience in the banking industry and the financial markets. Being incorporated in Brussels also has the advantage of being close to many of the EU institutions and diplomatic corps. Belgium is also very likely to remain within the EU as there are currently no significant political movements favouring a breaking away from the EU.

Conclusion

It is increasingly likely that the UK will become a true third country within the meaning of financial supervisory law. Following such a 'hard' Brexit, each UK Credit Institution will need to ask itself the following key questions:

- Do we conduct any banking activities within the territory of any EEA Member State(s);

- if so, are such banking activities subject to any licence or other requirements under the laws of that/those EEA Member State(s); and
- if the answer to both questions is yes, then can we open a branch in the relevant EEA Member States or should we obtain a full licence as an EEA Credit Institution?

The Commission has noted previously, in its Green Paper on retail financial services of 10 December 2015, that the 'current level of direct cross-border transactions in retail financial services is limited'. So the UK Credit Institutions that are likely to be affected by a 'hard' Brexit are those that conduct wholesale banking activities. Wholesale banking activities, however, might not even be subject to an authorisation requirement in each EEA Member State: for example, UK Credit Institutions may continue to extend credit to Belgian companies without the need to obtain a licence, provided that they do not take deposits or other repayable funds from the public in Belgium.

As a final thought, it should not be forgotten that a 'hard' Brexit might not only impact UK Credit Institutions, but also EEA Credit Institutions that provide banking services in the UK. While the UK has always been quite open towards credit institutions from third countries, it will be interesting to see if a 'hard' Brexit and the negotiations with the EU will affect this policy.

Notes

1 The full version of Prime Minister May's Brexit speech of 17 January 2017 is available on *The Daily Telegraph's* website: www.telegraph.co.uk/news/2017/01/17/theresa-mays-brexit-speech-full/.

2 Commission Interpretative Communication 'Freedom to provide services and the interest of the general good in the Second Banking Directive' (97/C 209/04), OJEC No C 209/6.

3 CBFA (now named the National Bank of Belgium), *Financial services via the Internet: Prudential requirements*, Circular CBFA_2009_17 of 7 April 2009.

Russia: amendments to banking laws improving credit repayment procedure

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Introduction

The current banking system of the Russian Federation comprises the Central Bank of Russia as the primary regulatory authority (the 'Bank of Russia'), credit organisations including banks and non-banking credit organisations, as well as representative offices of foreign banks.

The Bank of Russia monitors activities of the banking system, and in particular inspects and sanctions credit organisations which do not comply with the requirements of Russian law (eg, where a credit organisation's capital falls well short of the ratios prescribed by federal laws or a credit organisation carries out banking transactions not permitted under its licence) and, as an ultimate solution, revokes banking licences and liquidates non-compliant banks. Intensified controlling activities of the Bank of Russia from June 2013 to the present day have resulted in the number of Russian credit organisations decreasing from 958 to 635.[1]

During 2015-2016 the Russian banking system and respective legislation has undergone significant changes covering inter alia the following areas:

- the status and functions of the Bank of Russia;
- the statutory ratios applicable to non-banking credit organisations;
- revocation of banking licences; and
- debt repayment procedure.

In this article we will consider amendments relating to the debt repayment procedure which entered into force in 2016.

Additional measures ensuring loan repayment

Article 33 of the Federal Law 'On Banks and Banking Activities' (the 'Law on Banks') came into effect in November 2016.[2]