I. Definition of Banking Business

Pursuant to Article 4 of EC Directive 2006/48, a “credit institution” is defined as “an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account.”

The European Union member states must require credit institutions to obtain authorization before conducting business (see Article 6 EC Directive 2006/48 excerpted below). If an entity engages in any of the activities listed in Annex I to the EC Directive 2006/48 (see below), such activity could also be subject to authorization requirements in the EC member states. Accordingly, each EC member state may decide whether one or more of the activities listed in Annex I is a regulated business requiring authorization, with the exception of number 1 of Annex I, which may only be conducted by authorized credit institutions.

Annex I to EC Directive 2006/48
List Of Activities Subject To Mutual Recognition

1. Acceptance of deposits and other repayable funds

2. Lending including, inter alia: consumer credit, mortgage credit, factoring, with or without recourse, financing of commercial transactions (including forfeiting)

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, certificates of deposit, etc.);
(b) foreign exchange;
(c) financial futures and options;
(d) exchange and interest-rate instruments; or
(e) transferable securities.

8. Participation in securities issues and the provision of services related to such issues

9. Advice to undertakings on capital structure, industrial strategy and related questions and advice as well as 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 reference services

14. Safe custody services

Pursuant to Article 23 of EC Directive 2006/48 (excerpted below), a credit institution may use the European passport regime only for business that is supervised in its home member state. For instance, if an EC credit institution would like to offer financial leasing (Annex I, item 3) in another EC member state, it would be eligible to the European passport regime only, if this activity is subject to authorization and supervision by the competent authorities of the home member state of the respective credit institution.

II. Cross Border Business

Cross border business may be conducted in three ways:

1. by establishing a subsidiary;

2. by establishing a branch;
3. through cross border services.

The main regulations of cross border issues within the EC are included in the following provisions from the EC Directive 2006/48 relating to ability to operate as a credit institution.

Article 6
Authorisation

*Member States shall require credit institutions to obtain authorisation before commencing their activities. ... they shall lay down the requirements for such authorisation and notify them to the Commission.*

Article 23
Credit Institutions

*The Member States shall provide that the activities listed in Annex I may be carried on within their territories ... either by the establishment of a branch or by way of the provision of services, by any credit institution authorized and supervised by the competent authorities of another Member State, provided that such activities are covered by the authorisation.*

Article 38
Branches of Credit Institutions Having their Head Offices Outside the Community

1. *Member States shall not apply to branches of credit institutions having their head office outside the Community, when commencing or carrying on their business, provisions which result in more favourable treatment than that accorded to branches of credit institutions having their head office in the Community.*

2. *The competent authorities shall notify the Commission and the European Banking Committee of all authorisations for branches granted to credit institutions having their head office outside the Community.*

3. *Without prejudice to paragraph 1, the Community 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 outside the Community identical treatment throughout the territory of the Community.*

These regulations have the following impact on the various cross border business issues:

- **The Establishment of a Subsidiary:**
Strictly speaking, the establishment of a subsidiary is not a cross border service, as any subsidiary must be established in the respective state according to the applicable local laws. Thus, the rules of the so called "European Passport" will not apply. The subsidiary must obtain an authorization from the competent authorities in the state in which it is formed if it conducts banking business or offers financial services according to the respective EC directives and the laws of the member states. If, however, an existing subsidiary has obtained an authorization from the competent authorities to conduct banking business, it could make use of the European passport system to do business in other member states.

- **Branch:**

Branches of credit institutions located in EC member states can make use of the European passport regime. They can provide the services for which they have an authorization in the home member state in every other EC state (host member state) via a branch without any authorization in these states. Branches of credit institutions outside the EC will be subject to Article 4 of the EC Directive (see above). As a result, branches from credit institutions located outside the EC must fulfill at least the same requirements as EC entities applying for a banking license in the respective member state.

- **Cross-Border Services**

For services offered without any physical presence in a certain member state, a credit institution from another EC member state can make use of the European passport. Cross-border services provided in an EC member state by a credit institution located outside the EC are not permitted without the authorization of the competent authority in the respective EC state. There is no restriction, however, on the so-called freedom to provide requested services, i.e., the right of persons and entities domiciled in the EC to request the services of a foreign entity on their own initiative. Transactions requested on the client’s own initiative are therefore not subject to authorizations from the competent authorities.

- **Recommendation**

US banks or comparable institutions that plan to conduct banking business in one or more EC member states, should consider the following issues:

a) the nature of the business to be conducted;
b) the EC states(s) in which the business should be performed;
c) the rules and regulations in the particular EC state(s) with regard to the business;
d) whether the business should be conducted through a branch, subsidiary or as cross border services.