

Question ID	2013_190
Status	Final Q&A
Legal act	Directive 2013/36/EU (CRD)
Topic	Other issues
Article	35
Paragraph	-
Subparagraph	-
COM Delegated or Implementing Acts/RTS/ITS/GLs/Recommendations	Not applicable
Article/Paragraph	N/A
Date of submission	29/08/2013
Published as Final Q&A	08/11/2013
Disclose name of institution / entity	No
Type of submitter	Competent authority
Subject matter	Notifications of agents and subagents of credit institutions in the European Economic Area (EEA)
Question	<p>1) Is it allowed for a credit institution to provide money remittance services via agent cross-border in the EEA? 2) Do agents have to be notified to the home-/host authority and if so under which directive? 3) Do agents have to be notified by way of freedom of establishment or by way of freedom to provide services? 4) Are agents to be treated as branches? 5) Is it allowed for an agent of a credit institution which provides money remittance services cross-border in the EEA to use subagents? If yes: a) Does a sub-agent have to be notified? b) On which legal basis? c) To which Authority? d) Does the credit institution or the agent provide notification and, if so, freedom of establishment or by way of freedom to provide services?</p>
Background on the question	<p>Some credit institutions in the EEA offer money remittance services through agents and subagents. The European Authorities agree that EC legislation on The right of establishment and on the freedom to provide services Directive 2013/36/EC (formerly Directive 2006/48/EC) neither defines nor contains any provisions as regards agents and subagents of credit institutions. Due to this circumstance the FMA and other European Authorities have different opinions in this matter. In the opinion of other European Authorities, credit</p>

institutions within the meaning of Article 3, subsection 1, para 1 of Directive 2013/36/EC (formerly Article 4, subsection 1 of Directive 2006/48/EC) can exercise the right of establishment and the freedom to provide services in another Member state only in accordance with Articles 35 et seq of Directive 2013/36/EC (formerly Article 25 et seq of Directive 2006/48/EC). Payment institutions, on the other hand, can exercise the right of establishment and the freedom to provide services in another Member State in accordance with Article 25 of Directive 2007/64/EC. The European Authorities support the view that agents of credit institutions could be treated similarly only to agents as defined in Article 4, subsection 22 of Directive 2007/64/EC. The understanding of those European Authorities is that Directive 2007/64/EC is the latest and the most comprehensive European legal act governing the provision of payment services and money remittance services in particular within the European Community, and it applies to credit institutions also by virtue of their qualification as payment service providers in Article 1, subsection a of Directive 2007/64/EC and, point 4 of Annex I of Directive 2013/36/EC (formerly point 4 of Annex I of Directive 2006/48/EC) as amended with Article 92 of the Directive 2007/64/EC, which also refers to „payment services“ as defined in Article 4, subsection 3 of Directive 2007/64/EC. The European Authorities brought to the attention of the FMA that Directive 2007/64/EC and its corresponding national legal acts do not provide for the use of subagents to carry out money remittance business. Therefore, in order to ensure legality of agent/subagents business and its compliance with the relevant EU legal framework, which requires a notification from the competent authorities of a Home Member State to the competent authorities of a Host Member State, all agents/subagents acting on the territory of a Host Member State need to be notified or confirmed by the authority of the Home Member State to the authority of the Host Member State.

EBA answer

According to Articles 17 and 25 of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, any authorised payment institution wishing to provide payment services in another Member State by engaging an agent shall inform the competent authorities in its home Member State, which in turn shall take account of the opinion of the competent authorities of the host Member State before registering the agent.

Neither Directive 2007/64/EC nor Directive 2013/36/EC (or currently Directive 2006/48/EC) contain any provisions as regards agents of credit institutions, meaning that they neither forbid credit institutions from offering money remittance services through agents or subagents. In the absence of provisions in the EU legislative texts, the decisions of whether and how to authorise and regulate agents and subagents are left to the discretion of Member States.

This discretion is however limited; the provision of services by agents should

still be possible under the general framework established by the EU Treaties; a control by the host Member State is possible insofar as it complies with certain requirements (such as general interest and proportionality). When (if) limiting the free provision of services for agents mandated by credit institutions established in another Member State, the host Member State shall take into account what has already been done in terms of control by the home Member State.

In any case, a Member State cannot use Articles 17 and 25 of Directive 2007/64/EC as a legal basis to require the application of the procedures set out in these articles to agents acting on behalf of a credit institution:

- Articles 17 and 25 of Directive 2007/64/EC clearly specify that the provisions of these articles only apply to payment institutions and not to credit institutions; otherwise, both articles would have referred to "payment service providers" instead of "payment institutions"; "payment service providers" is the general term referring to all financial entities which are allowed to carry out payment services, including credit and payment institutions; Article 1 of Directive 2007/64/EC also makes a clear distinction between "credit institutions" and "payment institutions". As other provisions also distinguish between payment institutions and credit institutions, there is no reason to consider that the same treatment should necessarily apply to all agents irrespective of whether or not these agents act on behalf of a credit institution or a payment institution on the grounds that this would ensure equal treatment between credit institutions and payment institutions. In a similar way, a Member State cannot use Articles 35 and seq. of Directive 2013/36/EU as a legal basis to require the application of the procedures set out in these articles to agents acting on behalf of a credit institution;
- Articles 35 and seq. of Directive 2013/36/EU only specify the notification requirements for the establishment of a branch in another Member State without referring to any agent; these articles cannot be interpreted so that agents would be automatically included in the scope of application of these requirements;
- It is not because Directive 2007/64/EC provides for the same treatment for both agents and branches in its articles 17 and 25 that agents acting on behalf of a credit institution should be treated as branches; an agent is different from a branch, given that the former is a separate natural or legal person from the credit institution although acting on behalf of this credit institution; a branch is not a separate legal entity and forms a dependent part of the credit institution; another difference between these two types of banking offices is that branches may accept deposits, while agents cannot.

DISCLAIMER:

This question goes beyond matters of consistent and effective application of

	<p>the regulatory framework. A Directorate General of the Commission (Directorate General for Internal Market and Services) has prepared the answer, albeit that only the Court of Justice of the European Union can provide definitive interpretations of EU legislation. This is an unofficial opinion of that Directorate General, which the European Banking Authority publishes on its behalf. The answers are not binding on the European Commission as an institution. You should be aware that the European Commission could adopt a position different from the one expressed in such Q&As, for instance in infringement proceedings or after a detailed examination of a specific case or on the basis of any new legal or factual elements that may have been brought to its attention.</p>
Link	https://www.eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2013_190

European Banking Authority, 16/01/2022
www.eba.europa.eu