UK banks who want to maintain an access to the EU market after Brexit are currently assessing their options. The prospect of a free trade agreement with the EU remains uncertain, and so are the prospects of an agreement before the UK actually leaves. The present paper sketches the three main options—i.e. establishing EU branches directly from the UK, setting up a representative office of an EU bank in the UK while visiting the UK, providing that he approaches the bank himself without having been contacted beforehand. But, this is obviously not the situation that has been considered. Nor could it be offered by a UK bank to a broader EU customer base. In order to actively serve EU citizens, a UK-based bank will have to argue that its presence is necessary to the country’s economic well-being and to the place of establishment of the bank by following the characteristic performance criterion promoted by the European Commission. It will be of help, as the UK will not be in a position to impose such a criterion in its relations with third countries, each Member State enjoys full discretion to claim jurisdiction over cross-border activities.

In sum, the option of making direct offers to EU clients appears to be extremely narrow and certainly too risky for any bank established in the UK to the extent it has ambitions to develop any substantial business with clients located throughout the European Union. Therefore, limited to either creating a subsidiary or establishing a branch in a Member State, through which the bank will be able to serve its European customers.

II. Establishing themselves within the European Union

Whilst EU Member States are free to determine the conditions under which they allow banking services residing within their territories including notably, requiring the UK bank to set up a permanent establishment within their jurisdiction (or to provide their service from such an establishment). At the same time, deny said banks the opportunity to do so.

Under the GATS rules, participating states are obliged to grant access to their markets to firms from other countries (GATS, art. XV). In the field of financial services, inclu...
ding bank activities, that obligation is explicitly foreseen in the 'Understanding of Commitments in Financial Services'. The Spanish version of the Agreement, taken by the European Union and its Member States on the GATS reinforces their obligation to allow broad access to the European market in a manner consistent with the principles of the Agreement, the so-called 'mode 3' under the GATS. Furthermore, the principle of national treatment (GATS, art. XVII) prevents the Member States from introducing such obstacles to conditions that are shown to be more stringent than those applicable to local firms. Finally, the Member States must also respect GATS' flexibility, such as the non-discrimination among capital of different countries (GATS, art. II). As already mentioned, if the EU were to enter into a free trade agreement with a GATS party, this interest may be reflected in the GATS rule that may become part of particular importance to countries like Switzerland, who have not yet managed to agree with the EU on either a general trade agreement or a sectorial agreement are harmonized at the EU level.

In the field of financial services, the precise effect of these general GATS principles, however, may be restricted by the so-called prudential carve-out. According to Paragraph 2(a) of the GATS Annex on financial services:

Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed, by a supplier, or in order to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, including this Annex, such measures may not be considered as falling within a Member's commitments or obligations under the Agreement.

Since the financial crisis, in particular, the scope of this financial service-provider exception has generally been interpreted as allowing EU Member States to impose restrictions on banks from another country, if a similar restriction exists in the home country of that bank.

The European Union explicitly supported this broad interpretation in its report submitted in this case.

Under GATS' prudential carve out, a GATS state can unilaterally impose, for example, a defined level of own funds for any subsidiary created by a foreign bank, which is a standard capital requirement. On the other hand, imposing a capital endowment by a branch of a bank from another country, applying the same capital requirements as those applicable in the state where the branch is to be established, could be considered an unreasonable boundary by the same regulatory standards as those applicable throughout Europe by the CRD IV. Assuming that those requirements in the CRD IV, or in an EU Member State would be hard put to consider them as equivalent to its own requirements. Thus, imposing a capital endowment on a branch of a UK bank may be possibly viewed, under such circumstances, as an intentional restriction on free trade that would not be covered by the prudential carve out. The EU and the US have both negotiated a mutual recognition of the equivalence of their respective prudential requirements, pursuant to which foreign banks can operate in accordance with Article 3 of the GATS Annex. This would allow preferential treatment for banks from both countries when setting up a subsidiary in the EU or the US. This could, however, also be provided by establishing and maintaining a separate infrastructure than to build and maintain a completely separate infrastructure. Today, secure and fast cross-border networks allow low the parent bank to run a banking subsidiary as a bookkeeping centre for clients located in different countries, all while respecting capital adequacy requirements while ensuring that it is not a "real" bank. A "real" bank has adequate local risk management, sufficient local staff and operational independence. A "real" bank also does not permanently book all of its exposures back-to-back with another bank, such that it faces too little risk and limit control over its own balance sheet. Thus the position that the ECB may take in this respect on intragroup exposures.

A UK-bank subsidiary, as a fully-fledged bank, will have the right to avail itself of the European banking passport. Member States will most likely compete among each to attract such banks. This may extend to regulations on banks holding long-term participation or ownership of the EU subsidiary is not restricted to serving a primarily domestic market, but is, rather, to expand its offer of services throughout the internal market, the subsidiary can operate from any Member State and freely provide its services to other EU citizens. This, in turn, could even branch out into various Member States while remaining, under the home country control principle, super- vised by the relevant National Authority in the home Member State where it decided to establish its headquarters.

Branches of third-country banks, on the contrary, are not entitled to take advantage of a European passport. Indeed, branches of foreign banks are subject to the restrictive home country regulation. However, they are permitted to provide services to EU citizens, but merely operate under the license granted to the foreign headquarters, even if an approval is required from the Member State where the branch is located. The perspective of the EU regulating credit institutions, a branch remains a non-autonomous establishment of a foreign bank.

For that reason alone, to the extent that a UK bank wishes to operate in the EU through a branch, it should be treated as a hub for its European operations, its choice is really limited to creating or acquiring a subsidiary in a Member State, as only a subsidiary will be able to reach out to customers in all other Member States through the European passport.

It is likely that the local supervisory authorities' expectations will depend on the exact scope of the business undertaken by the bank's subsidiary, the business model on which it relies, and the functional organization of the banking groups to which it belongs. It may vary depending on the structure of the banking sector in the particular Member State. The supervisory authorities in Member States that have high entry barriers into the EU banking market, for example, banks headquartered in that Member State may be far less inclined to adopt a flexible approach towards the subsidiarization of the bank subsidiary. While concerns from authorities from Member States in which most banks are already supervised by foreign groups that largely develop their European business through their domestic banks with the applicable formalities being a common feature in the vast majority of banks.

The solution offered in these texts recognizes that the regulatory and supervisory environment of a third country can be equivalent to that of existing EU law. Subject to an equivalence decision from the European supervisory authorities, their managers of alternative investment funds and investment firms of the relevant third country are allowed to deposit create branches in the Member States under conditions that are harmonized with those existing in the home Member States.

To date, nothing similar exists for branches of third-country credit institutions, payment service providers, electronic money institutions, or UCITS managers. Member States have full discretion to decide whether they will permit a bank from a third country to establish a branch within its territory rather than creating a subsidiary. While this is generally not expressly stated in local laws, market intelligence indicates that supervisory authorities for banks in the Member States.

9 Yonek-Araghi, GATS: Prudential carve-out in financial services and its Relation to a single prudential standard under the CRD IV, in 'Comparative Law', Vol. 33, No. 3 (Jul., 2010), pp. 613-644.
10 See the WTO report available at the website docs.eurp.org/242/EP/EU_SecurE_ReportFinalfile.pdf or SecurE_Report20101023.3ABK_pdf and specifically paragraph 6272 of the report.
11 See the WTO report available at the website docs.eurp.org/242/EP/EU_SecurE_ReportFinalfile.pdf or SecurE_Report20101023.3ABK_pdf and specifically paragraph 6272 of the report.
13 ČIE (Grande Chamber) 3 October 2006, Fidux Invest AG v. Bundesanstalt für Finanzdienstleistungsaufsicht, Case C-452/04.
14 ČIE (Grande Chamber) 6 October 2013, Schmita, Case C-692/14.
15 See the following article: "Is the new supervision regime for banks considering relocation in the context of Brexit an opportunity?" at the Technical workshop for banks considering relocation in the context of Brexit on 24th September 2016 at https://www.bankingsupervision. europea.org/ accessed on 30th March 2017.
16 See the information on "Locating in the euro area" by the EBC, https://www.bankingsupervision.europa.eu/banking/locating/inthediv. html.en.html.
tend to have a clear preference for the latter, which is not surprising given their preference for a higher degree of legal supervision and control over a branch that operates under the authority of management located in the foreign headquarters.

To the extent that a Member State chooses to welcome the establishment of branches of banks, it still enjoys full discretion to define and assess the conditions under which it will grant its approval. Such requirements, in that instance, may include, among other things, the ability of non-EU member states to supervise a branch of a third-country bank on a comparable basis. For its part, the ECB may require third-country banks to establish a branch in the EU that is subject to a proportionate level of supervision that is comparable to that provided by the local supervisory authorities, in line with the principles enshrined in the Bank Regulation. This would be consistent with the principle of equal treatment for branches of the same type and size, irrespective of the location of their parent bank.

To complete the picture, it is necessary to mention a recent initiative in line with the non-EU member states' demand for greater scrutiny of branches of third-country banks. The initiative is led by the European Banking Authority (EBA) and is aimed at providing a framework for the supervision of branches of third-country banks in the EU. The initiative, which is currently being prepared, is intended to ensure that the measures taken are effective, proportionate, and necessary to address the risks posed by branches of third-country banks in the EU. The initiative is expected to be adopted by the EBA in the first half of 2023, with the aim of providing a comprehensive framework for the supervision of branches of third-country banks in the EU.

The proposal's underlying idea is to make sure that, in case of failure, the EU banking authorities would be able to intervene quickly and effectively to avoid any system-wide risks. The proposal requires further discussion and refinement, and it may need to be adapted to the specific circumstances of different countries.

Among the conditions for the establishment of a branch from a third-country bank, a potential capital requirement is certainly the most critical. Branches from banks established in the EU cannot rely on the own funds collected at the level of the headquarters. They are, indeed, considered to be a part of the legal entity headquartered in the EU, which is the reason why they are subject to supervision by the authorities in the Member State in which the branch is set up, but remain within the scope of supervision of the authorities of the bank's home country. Branches from banks established in the EU may not enjoy the benefits of such treatment.

Member States seem to unani-
mously condition their approval of such branches on the same requirements as those applied to a full-fledged bank license. Notwithstanding the fact that the branches are deprived of legal personality, they typically have to be endowed with capital for a certain amount of time, which, obviously, significantly reduces any advantages of creating a branch rather than a subsidiary. As noted above, imposing high capital requirements on branches from EU banks may be used by some Member States to restrict the ability of third-country banks to open branches in the EU.

The main benefit of creating a branch can be summarized as the ability to offer banking services to clients who are not eligible for the branch itself to operate independently of branch operations.

Following the UK's exit from the EU, the UK G-SIIs will fall within the scope of the Fundamental Rights of the EU. This is a key element of the fund and the regulation of the European Union. The new rules will apply to all G-SIIs in the EU, but the UK will have to follow the EU framework without any further legislative action. The new framework will ensure that the EU has an adequate proportionate level of supervision for the UK G-SIIs.

The EBA is currently preparing a consultation on the new framework and is expected to publish its findings by the end of the year. The new framework will be implemented in phases, with the first phase expected to be implemented in 2024.