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CRD VI and Its Impact on Lending into Europe



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December 2023 saw the publication by the EU of the near-final version of its 'Banking Package' that makes significant changes to the Capital Requirements Directive known as 'CRD VI'. This article is going to focus on the CRD VI prohibition on the provision of cross-border 'core banking services' into the EU by non-EU institutions; currently, it is up to individual European member states to decide whether and how non-European institutions can provide services to their citizens, and that is going to change and national waivers currently in place will terminate. New and existing 'third country branches' ('TCBs') will be required to apply for (re)authorisation subject to new pan-EU rules including covering capital requirements, unless they operate under one of CRD VI's exemptions.

The core provision requiring the authorisation of TCBs is set out in CRD VI article 21c.

Article 21c CRD VI: SCOPE

WHO: Third-country institutions that carry out:

(a) any of the activities ***referred to in points 2 and 6 of Annex I*** to this Directive by an undertaking established in a third country ***that would qualify as a credit institution or that would fulfil the criteria laid down in points (i) through (iii) of Article 4(1), point (b), of Regulation (EU) No 575/2013, if it were established in the Union;***

Annex 1 point 2 is 'Lending including, inter alia: consumer credit, credit agreements relating to immovable property, factoring, with or without recourse, financing of commercial transactions (including forfeiting).'

Annex 1 point 6 covers 'Guarantees and commitments'

(b) **the activity referred to in point 1 of Annex I to this Directive** by an undertaking established in a third country – this is the activity of taking deposits

So, TCBs will be made up of:

1. non-EU banks (that would qualify as banks if they were established in the EU, i.e., entities that both take deposits and make loans);
2. non-EU investment firms that deal on their own account OR underwrite financial instruments AND that have (or belong to a group that has) assets over EUR 30bn or which carry out investment services in amounts over EUR 30bn; and
3. any other deposit takers.

WHAT?

TCBs are providers of 'Core banking services' including deposit-taking, guarantees and lending. While there is a degree of ambiguity around the breadth of the term 'lending', the general assumption is that as it stands, wholesale lending is captured by the prohibition (and in particular, as any one or more such services are covered, lending need not be accompanied by deposit-taking in the EU in order to be covered).

EXEMPTIONS

1. Reverse solicitation – while the CRD VI definition of this is somewhat more generous than the prevailing concept in that it extends the scope to further business that is adjacent to the original business, the definition still requires the approach to be at the European client's 'own exclusive initiative';
2. Interbank – inbound business with an EU-based bank is exempt;
3. Intragroup – inbound business with an EU-based entity in the same group (which could in principle be a non-bank, non-investment firm entity) is exempt;
4. Core banking services ancillary to core MiFID activities/services – these are also exempt, though the scope of the exemption remains unclear (although it seems to be directed at ancillary banking activities such as margin lending by securities dealers).

GRANDFATHERING

'Existing contracts' entered into six months or more before the end of a transitional relief period (Q3/4 2025) can continue without triggering the requirement to establish a branch. It remains unclear whether material amendments to contracts on foot would trigger the branch requirement.

Ambiguities

1. What is providing a service in a European country (there is currently no definition). EU member states have taken different approaches on what

- constitutes a regulated interaction in their jurisdiction, and local implementation of CRD VI could perpetuate these differences.
2. It remains unclear as to whether a non-EU bank acting for an EU client's non-EU business would be captured by the TCB requirement.
 3. The scope of the exemption for services provided that are ancillary to core MiFID services (for example, related deposit-taking, credit/loans provisions) remains undefined.
 4. Within 12 months from the date the directive enters into force, the European Banking Authority must review whether any financial sector entities in addition to credit institutions should be exempted from the requirement to establish a branch for the provision of banking services in accordance with 21c. Presumably, this has the potential to expand the universe of exemptions.

Solutions

1. Establish a branch – this is generally an unattractive option, as a branch would be required in each EU jurisdiction where regulated core banking services are provided (and would itself be subject to EU prudential supervision and capital requirements).
 2. Establish a subsidiary – this allows cross-border passporting into other relevant EU territories and so would likely be preferable to a branch, but would, except as set out below, also be subject to EU prudential supervision and capital requirements.
 3. Conduct European lending business in a non-bank group entity – thus avoiding the core prohibition on credit institutions providing these services and taking advantage of the intra-group exemption.
 4. Rely on an exemption – as we have noted, reverse solicitation is generally considered unattractive, but if the business could be reshaped to be interbank or as ancillary to core MiFID services, then there is a clear pathway to exempt lending.
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