MAPLES GROUP

UPDATE

CRD VI and Third Country-Branches: Irish Transposition in Focus

What You Need to Know

- The Irish Department of Finance has published a consultation on national discretions regarding Ireland's implementation of the Capital Requirements Directive VI[1] ("CRD VI").
- A key issue is whether branches established by third-country firms under CRD VI ("Third-Country Branches") will be subjected to full credit institution requirements.

Consultation

On 16 January 2025, the Irish Department of Finance published a consultation paper[2] on national discretions regarding the implementation of CRD VI (the "Consultation"). The consultation period runs until 14 February 2025.

The Consultation sets out seven questions. The primary question, which will be in focus for stakeholders and third country banks currently operating within the EU, is whether Ireland should apply i) the full regime applicable to a CRD credit institution to these Third-Country Branches, or to a sub-set of them (and if so, what criteria should be used), or ii) the branch-specific requirement to all Third-Country Branches.

To apply the full regime would be a significant departure from how the third-country bank regime currently operates under Irish domestic legislation.

The first option would mean more stringent regulatory requirements, including as regards capital adequacy, governance and internal risk management frameworks, which may be a deterrent to third-country firms.

The second option would seem key to allow Ireland to continue to attract impacted third-country banks and would also be logical, given that there is a subsidiarisation/full licence requirement on the branch once the balance sheet hits a certain size.

CRD VI

CRD VI is the latest iteration of the EU Banking Directive/Regulation package and includes a variety of amendments to the Capital Requirements Directive[3] ("CRD"). Member States must transpose CRD VI into national law by 10 January 2026. The majority of the changes introduced by CRD VI are (subject to transposition) intended to apply from 11 January 2026, but the provisions relating to Third-Country Branches should apply from 11 January 2027.

Contracts entered into by third-country banks in the final 6 months of this transitional relief period will not be grandfathered at all which,

[1] Directive (EU) 2024/1619 of the European Parliament and of the
Council of 31 May 2024 amending Directive 2013/36/EU

[2] gov.ie - Public consultation on the implementation of the Capital Requirements Directive VI

[3] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms

from a transactional activity perspective, brings the effective commencement of the Third-Country Branch regime forward to 11 July 2026. The practical effectiveness of the grandfathering regime is to be determined by the markets affected by the regime, meaning licencing and structuring solutions may be implemented in advance.

What is the Third-Country Branch Regime?

Article 1(9) of CRD VI introduces a new Article 21(c)(1) into the CRD, prohibiting third-country banks from providing "core banking services" in a Member State without establishing a branch there. Core banking services are accepting deposits (or other repayable funds), lending and providing guarantees/commitments.

All third-country firms offering deposit-taking/other repayable funds are in scope, regardless of their own status. All third-country firms who would be considered credit institutions if established in the European Union (effectively, any third-country bank) are in scope of the lending and guarantees headings.

CRD VI does not provide any guidance or parameters on what constitutes providing a service "in" a Member State. Commentary so far suggests all activities with EU clients could be considered as the provision of a service "in" a Member State, applying the "solicitation" test rather than the "place of characteristic performance" method. Member States may try to make this restriction less onerous.

Exemptions

While exemptions exist for reverse solicitation, interbank activity and intragroup activity, these are quite narrow in practice, meaning that on a literal reading the regime could apply to any third country bank making any loan to an EU borrower.

Reverse solicitation in particular presents various challenges, given that a loan is more of a contained or isolated service as opposed to a continual investment service, although a loan may be viewed as a continual relationship during its life. As this is a directive, reverse solicitation will also face local transposition risk in all Member States, whereas a non-EU bank will want to adopt a single approach from a regulatory and policy perspective.

In addition, the statement published by ESMA[4] in 2021 highlights various other issues in relation to reverse solicitation.

The provision of cross-border investment services under the Markets in Financial Instruments Directive[5] regime ("MiFID II") remains unaffected. Banking services such as lending, deposit taking and providing guarantees provided on an ancillary basis to core MiFID investment services and activities are excluded from scope.

It is not yet clear, though, how remote banking activities can be from core MiFID activities. As such, questions arise in practice as to whether an institution has to date been providing those services from a credit institution or an investment firm, and also on the detail of how some services, for example prime brokerage and custody services to investment funds, will align with the CRD VI regime.

Licencing and structuring solutions

We have been tracking the regime closely since the initial publication of the proposed directive through its trilogue and final adoption negotiations. While a branch might be the right solution for some institutions with significant enough business in a particular member state - for example in Ireland, lending to leading Irish industries such as investment funds or aviation leasing - it is non-passportable.

[4] https://www.esma.europa.eu/sites/default/files/library/esma35-43-2509_statement_on_reverse_solicitation.pdf

[5] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments

For pan-European business, a full subsidiary with credit institution licence will be required and Ireland is a viable option in this regard, particularly when combined with the growth of the financial services industry post-Brexit and government priorities for this sector, as well its general approach and track record in relation to foreign direct investment. Nonetheless, obtaining a credit institution licence is a significant undertaking regardless of choice of jurisdiction, with a minimum of a year's lead-in time required.

Structuring solutions using existing private and structured credit technologies are also possible and, particularly in respect of certain lending activity, we expect the regime to drive further growth in those areas.

Next steps

Should you be interested in contributing to the Consultation or want to discuss any aspect of the third country regime, including licencing and structuring solutions, please reach out to your usual Maples Group contact or any of the persons listed below.

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