Position paper on Directive (EU) 2024/1619 amending the Capital Requirements Directive – new Article 21c creating a branch requirement for non-EU undertakings

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1. Summary

The new Article 21c of the CRD introduced by article 1(9) of the CRD VI ("Article 21c CRD") introduces a branch requirement for non-EU undertakings when providing certain core banking activities in the EU.

The new Article 47 of the CRD introduced by article 1(13) of the CRD VI ("Article 47 CRD") sets out the scope of this requirement, amongst others by defining core banking activities as **activities 1, 2 and 6 of CRD Annex I**, namely:

- Deposit taking, including:
  - Deposit taking accounts for the purposes of providing cross-border payment services;
- Lending, including *inter alia*:
  - consumer credit
  - credit agreements relating to immovable property
  - factoring, with or without recourse
  - financing of commercial transactions (including forfeiting)
- Guarantees and commitments

Accordingly, new restrictions will apply to the provision of cross-border 'core banking services' in the EU by non-EU entities.

The new restrictions will apply to the following activities in a Member State:

- **Non-EU banks/investment firms** (CRR definition) providing loans, credit, guarantees or commitments
- **Any non-EU entity** taking deposits or otherwise borrowing money

Exemptions will apply for:

- Business conducted on the basis of **reverse solicitation;**
- Business with credit institutions and investment firms that are captured by the extended definition of credit institution under Article 4(1), point 1(b), of the CRR;
- Business with other members of the same group as that of the undertaking established in a third country;

- **The provisions of investment (MiFID) services and accommodating ancillary activities (such as related deposit taking or granting of loans)**, the purpose of which is to provide services under MiFID;
- Rights under contracts entered into at least six months before the new rules apply (i.e. before 11 July 2026).

2. Preliminary comments

2.1 On the personal scope of application

2.1.1 On the non-EU undertakings concerned by the restrictions

As a preliminary comment, and in line with the position of other commentaries made in relation to the transposition of CRD VI into Luxembourg law, we believe that a clarification regarding the scenarios where a branch has to be established would be welcomed.

In that regard, Article 21c CRD sets out a prohibition applicable to "undertakings established in a third country as referred to in Article 47".

Article 47 of CRD distinguishes two scenarios for the establishment of an EU branch:

- **for the core banking services consisting in lending or the provision of guarantees and commitments**, the establishment of an EU branch would be required for an undertaking established in a third country that would qualify as a credit institution or that would fulfil the criteria set out in Article 4(1), point (1)(b), of Regulation (EU) No 575/2013 ("CRR") if it were established in the Union; and
- **for the core banking service consisting in deposit taking**, the establishment of an EU branch would be required for any undertaking established in a third country (without restriction regarding the status of that undertaking).

Accordingly, when reading Article 21c CRD together with Article 47 CRD, this means that the prohibition regarding the provision of core banking services on a cross-border basis in the EU will apply:

- in respect of lending or the provision of guarantees and commitments, if the third-country undertaking would qualify as a credit institution or an investment firm assimilated to a credit institution under the extended definition of "credit institution" in Article 4(1), point (1)(b) of CRR, in either case within the meaning of CRR, if it were established in the EU – which each third-country undertaking should assess on a case-by-case basis;
- in respect of deposit taking, for any type of third-country undertaking.

We believe that it would be useful to expressly clarify this in the Implementing Act.

In particular, it would be useful to see some concrete examples of the distinction between those two scenarios in the parliamentary work (including article commentaries), describing for instance the **activities of cross-border lending by non-EU AIFs or non-EU unregulated entities, which will continue to be able to perform such activities in the EU without additional restrictions** (subject, of course, to local law requirements that may apply to those undertakings).

2.1.2 On the potential restrictions that may apply to EU undertakings

We note that CRD VI restricts the exemption set out in Article 21c(2)(b) CRD, which applies to core banking services provided by third-country undertakings exclusively to EU credit institutions and investment firms that are captured by the extended definition of "credit institution" under Article 4(1), point 1(b), of the CRR. Accordingly, the provision of core banking services to, for example, investment vehicles such as EU-based pension funds, investment funds or securitisation vehicles would not be covered by the scope of this exemption.

Furthermore, it is our view that the consultation currently being conducted by the European Banking Authority ("EBA") (according to Article 21c(6) CRD) – intended to determine if this exemption should be extended to enable third-country undertakings to service other financial sector entities established in the EU will only have a limited effect. This is because the definition of financial sector entities under EU law (that is CRR and CRD) does not include pension funds, investment funds, securitisation vehicles, or other investment vehicles, except in the presumably rare cases where such entities also meet the criteria to qualify as a "financial institution" within the meaning of CRR.

2.2 On the possible exemptions

2.2.1 On the Reverse Sollicitation exemption (Article 21c(2)(a) CRD)

This exemption is currently widely used in the context of lending (in this case, ancillary to MiFID services) arranged by asset managers when they seek financing for their funds. Typically, the borrowers (the asset managers on behalf of their funds) issue a request for proposal (RFP) to various potential lenders, including third-country firms. They then select the best-rated provider.

This exemption still requires firms to evidence and document, for each service provided, the reverse solicitation by the client. Practical experience in the context of the MiFID investment services demonstrates that reverse solicitation is not a straightforward basis for operating cross-border business for third-country firms. Lenders (usually banks) could apply quite restrictive and risk-averse policies regarding the use of reverse solicitation.

In relation to 21c(2)(a) CRD, expecting third-country undertakings to rely on the reverse solicitation exemption increases the likelihood of diverging interpretations between third-country undertakings and EU regulators, and potentially expose such lender firms to regulatory uncertainty or compliance risks.

2.2.2 On the definition of "accomodating ancillary services" to MiFID services (Article 21c(4) CRD)

Custody services as ancillary MiFID services

We note that the text of the CRD VI has raised some questions among our members **on the treatment of ancillary services related to the provision of custodial services**, stemming from the wording of Article 21c(4) CRD and Article 47(2) CRD.

It is clear that activities 12 and 14 of CRD Annex I, namely safekeeping and custody services are **not CRD core banking activities, and therefore were not intended to be captured by the CRD VI requirements**.

It should be noted that **custodial services generally also involve the receipt of cash by way of deposit and provision of short-term credit extensions to customers**. The intention of the legislator was clearly to encompass the entire range of custodial services.

Although "ancillary services" to MiFID services and activities are exempted from the scope of the relevant applicable MiFID requirements, the same express exemption cannot be found in similar words in CRD VI, but can in our view be inferred from the limited scope of CRD VI.

Since third-country custodians can provide MiFID services that are listed in Annex I, Section A of MiFID and accommodating ancillary services, they should also, on that basis, qualify for an exemption from the scope of Article 21c CRD requirements for custody services.

To avoid any legal uncertainty in this respect, it is critical that it is made clear in the Implementing Act or related work that the scope of the exemption in question (and Recital (6) of CRD VI) includes "*accommodating ancillary services […] the purpose of which is to provide services under that Directive*". Indeed, we should avoid any discussion that deposit taking and granting of credits/loans that are ancillary or incidental to a custody service are not exempted.

In other words, for consistency purposes between the MiFID and the UCITSD/AIFMD safekeeping and custody regime, and for the avoidance of doubt, **it must be stated that the provision of incidental ancillary services related to custody services such as deposit taking or granting of credit extension related to the provision of custody services do not fall under the requirements of Article 21c CRD**.

Lending activity ancillary to MiFID services

Another typical MiFID ancillary service explicitly listed under point (2) in Annex I, Section C of MiFID, is the granting of credit or loans to an investor to allow it to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction. This would typically include loans granted to a borrower who uses the disbursed loan amount to finance a transaction in financial instruments intermediated or advised on by the lender.

This situation arises for instance in the margin loan business and in fund financing transactions, where the bank also provides investment services (e.g. investment advice or execution only) for the benefit of the borrower.

Expressly identifying this type of out-of-scope lending business in the Implementing Act or the accompanying parliamentary materials (including article commentaries) is beneficial, as it would provide greater legal certainty for firms operating in this area and which shall then essentially comply with the MiFID framework (and applicable exemptions).

3. Possible impacts

3.1 Ongoing strategic review for non-EU lenders

Many non-EU players are currently doing an impact assessment of CRD VI on their cross-border lending activities across the EU and on whether and how to continue such financing activities.

Even if a third-country firm was to meet the conditions for licensing, the **costs of establishing a regulated branch are not likely to be justified by business volumes**, in particular in smaller EU Member States (in light also of the proposed restriction to provide services outside of the Member State where the branch is established).
More generally, the requirements to establish a regulated branch in each EU Member State in which the third-country firm is active will prove to be a highly costly and time-consuming exercise with no specific added-value for a number of non-EU financial service providers, **which may therefore decide to simply cease servicing at least smaller EU jurisdictions, if not the entire EU market** (if their projected business volume does not justify the costs of their establishment).

Some may decide to set up/increase their presence in the EU (e.g. bank subsidiary in the EU with EU passporting rights) to comply with CRD VI; for others, setting up a presence in the EU will be too burdensome (at least in short/medium term) and they may need to get comfortable on lending on the basis of exemptions available under the new framework of CRD VI, in particular for smaller jurisdictions.

Given these challenges, the manner in which Luxembourg transposes CRD VI and any related regulatory guidance will play a critical role in shaping third-country firms' willingness and ability to continue servicing Luxembourg-based borrowers.

3.2 Slight increase of the cost of funding for Luxembourg-based undertakings

Luxembourg-based investors have up to now relied extensively on external financings from non-EU lenders making loans on a cross-border basis, such as UK, US, Swiss, Australian/Asian lenders. Beneficiaries in Luxembourg of these financings include, inter alios:

- **Holding companies (SOPARFIs)** constituted in Luxembourg as holding/borrowing entities by (i) large international corporate groups, including private equity houses or (ii) investment funds; these entities are numerous and very frequently used to structure the acquisition of corporate groups or real estate held through Luxembourg property companies.

- **Securitisation vehicles** where they are financed by loan instruments or where additional/ancillary financing is provided by loan instruments

- **Investment funds** across all sectors (liquid funds, PE, RE, Infra, debt/private credit). Such financings are used by funds at the beginning of their lifecycle (capital call facilities) and at a later stage (NAV and other financings).

A concern **created by the rules under the new directive would be to potentially reduce the range of options currently available for the financing of these entities by reducing the number of possible lenders due to lack of legal certainty.**

After consultation of banks and AIFM/Management companies' representatives, we also anticipate a slight increase of the cost of funding:

- slightly more costly loans from EU based banks, including back-to-back refinancing with their respective head offices;
- need to repaper funding contracts with the new EU banks details;
- slight increase of the cost of business for banks to comply with the substance requirements of CRD VI.

This would directly impact the borrowers referred to above and the attractiveness of the Luxembourg financial centre for new investors looking for a place to start their activities, and more broadly for players outside the EU.

3.3 Negative impact on to the provision of custody services if considered into scope

Any enforced change as to how custody relationships are booked and managed would limit the services available to EU corporates and non-financial institutions, while burdening them with increased fees and, as a result, higher costs for end-users of financial services.

It would also limit the investment opportunities available to EU investors, potentially restricting them to under-performing asset classes, with broader impacts on EU growth and competitiveness.

4. Recommendations:

On the grounds of the potential negative impacts on the EU – and more specifically Luxembourg - markets, which are very dependent on openness to investments, financing and other services being provided cross-border, including from outside the EU, we are jointly pleading for taking the points below into consideration when transposing CRD VI into national law:

1) We would recommend to clarify that all custody and safekeeping services including ancillary services are not in scope/are exempt from of CRD VI

This would ensure that where deposit taking and the granting of credit or loans are ancillary to any custodial services or any other MiFID services, these activities are scoped out of/exempted from of Article 21c CRD.

We have no reason to doubt that it is the intention of the legislator, but a confirmation of this point would provide reassurance to our custodian banks members and their groups.

2) We would recommend that the concept of territoriality be expressly clarified in the Implementing Act (including specific explanations and concrete examples to that effect in the parliamentary work).

Indeed, with regard to the question of the location of the service, **there is no harmonization at European level on this subject**. Luxembourg is therefore free to further specify and/or clarify the approach to this question in the Implementing Act and/or to adopt an administrative practice based on the longstanding pragmatic doctrine and case law (if any evolving, including by the EUCJ as regards the underlying CRD VI text) in Luxembourg.

We note that **CRD VI does not define where, specifically, a core banking service is in fact provided in the EU**. Neither Article 21(c) CRD, Article 47 CRD, nor the related Recital (5) of CRD VI define the concept of territoriality or restrict the possibility for national legislators or competent authorities in each EU Member State to interpret this concept of territoriality (i.e., what amounts to carrying out a core banking activity in their respective jurisdictions).

To further illustrate the current lack of harmonisation on the concept of territoriality, it is also worth mentioning the discussions of the EBA in its report of 29 October 2019 on potential impediments to the cross-border provision of banking and payment services. We refer in particular to Section 2 (paragraphs 10 et seq.) and Section 3 (paragraphs 40 et seq.) thereof which highlight the lack of guidance on how to determine when a service is effectively carried out on a cross-border basis in a Member State[1].

Accordingly, we are of the view that the situation is comparable to rules dealing with the provision of cross-border investment services by third-country MiFID/MiFIR institutions (notably Article 39(1)/42 MiFID and Article 46(1)/46(5) MiFIR), **and that there is no reason to interpret the CRD VI rules in a different way.**

CSSF Circular 20/743, which amended Circular CSSF 19/716 on the provision in Luxembourg of investment services or performance of investment activities and ancillary services in accordance with Article 32-1 of the Law on the Financial Sector, provides the following:

The CSSF considers that the investment service is considered to be provided in Luxembourg where one of the following conditions is fulfilled:

- *the third-country firm has an **establishment (e.g. a branch) in Luxembourg**;*
- *the third-country firm provides an investment service to **a retail client established or situated in Luxembourg**; or*
- *the place at which the "characteristic service" is supplied, i.e. **the essential service for which payment is due, is Luxembourg.***

Thus, there are particular situations where, although the third-country firm provides investment services to a client other than a retail client, established or situated in Luxembourg, the service can be considered as not being provided "in Luxembourg".

Applied to CRD VI, this means that a **core banking service will be deemed to be provided in Luxembourg** (and therefore will require the establishment of a Luxembourg branch or that the conditions for an exemption be met) if the place where the "essential supply of the service for which payment is made" is provided in Luxembourg. Whether this is the case will have to be assessed by each third-country undertaking contemplating to serve Luxembourg clients on a case-by-case basis.

If we take the specific example of (fund) financing, in most cases, the sole fact that a borrower / fund is established in Luxembourg does not mean that the conditions for the lending service to be performed in Luxembourg would be met. This would be supported, in particular, by the fact that the bank account (from and/or to) which funds are disbursed under the loan is opened abroad and/or that the account where the loan is repaid is also abroad.

[1] See the following link: The EBA calls on the European Commission to take action to facilitate the scaling up of cross-border activity | European Banking Authority