LEGAL NEWS ALERT
THIRD COUNTRY REGIME UNDER CRD 6

FEBRUARY 2024

CHIOMENTI

Gleiss Lutz

CONTENT

A. INTRODUCTION 3
B. CURRENT EU REGULATORY FRAMEWORK 4
C. TC REGIME UNDER CRD 6 4
D. NATIONAL IMPLEMENTATION AND IMPACT 8
DIGRESSION 9
CONTACT PERSONS 13

A. INTRODUCTION

In December 2023, the Council confirmed the final compromise ("**Final Compromise**") reached in the trilogue negotiations between the Council, the European Commission (“**Commission**”) and the European Parliament (“**EP**”) regarding a new amendment of the Capital Requirements Directive (“**CRD 6**”). This reform package is now in the final stages of the legislative procedure and will likely be adopted by the EP in early 2024.

Amongst other aspects, CRD 6 introduces a new regulatory framework for market access by third-country undertakings which intend to offer banking services to clients located in EU Member States (“**MS**”)[1]. This third country regime (“**TC Regime**”) restricts the ability of third-country (non-EU) undertakings to offer cross-border banking business EU clients, except when undertaken on a reverse solicitation basis. The TC Regime also harmonises the way in which MS regulate third-country undertakings conducting banking business through branches in the EU (“**TCB**”). As such, the TC Regime may have a significant impact on the ability of many non-EU banks to continue to deal with EU clients or counterparties on a cross-border basis in reliance on existing MS regimes.

[1] For the purpose of the Capital Requirements Directive regime and, therefore, this newsletter, any reference to EU Member States shall include also EFTA Member States, as provided by Annex IX to the EEA Agreement, Title II, Article 14(a).

B. CURRENT EU REGULATORY FRAMEWORK

Currently, market access for third-country undertakings is barely harmonised at EU level and MS are largely free to regulate market access and the establishment of TCBs, as outlined in the national overviews in the Digression below. In this respect, MS have taken differing approaches, with many MS allowing a third-country undertaking to engage in cross-border business only where such business results from the 'own exclusive initiative' of the client or counterparty (reverse solicitation). However, other MS provide for the possibility to get market access by obtaining a registration or waiver from authorisation requirements.

MS are currently free to decide how to regulate TCBs. MiFID has provided only for an optional regime under which MS could require non-EU undertakings to establish an authorised branch if they conduct cross-border business with retail clients and 'opted-up' professional clients (other than based on reverse solicitation).

With respect to their supervision, TCBs located in the Euro zone are not within the scope of the Single Supervisory Mechanism and are thus not supervised by the European Central Bank. Rather, the respective national competent authority ("**NCA**") exercises on-going supervision of TCBs.

Digression summarises the current regulatory regimes applicable to TCBs in:

- France;
- Germany;
- Italy;
- Portugal;
- Spain.

C. TC REGIME UNDER CRD 6

Reflecting the regulatory fragmentation across the EU, the TC Regime makes the provision of banking services by third-country undertakings throughout the EU (other than on a reverse solicitation basis) conditional upon the undertaking having established a previously authorised and supervised physical presence in the EU (see item I below). The Final Compromise would also harmonise the arrangements for the authorisation, capital, liquidity, governance, reporting and supervision of branches of non-EU undertakings conducting banking business (see item II below). Where NCAs conclude that a TCB is systemically important to a MS or the EU, they would also be able to require those branches to be restructured into a subsidiary (see item III below).

I. Scope of the TC Regime

The establishment of a TCB will be compulsory for third-country undertakings wishing to conduct or continue to conduct certain banking activities with clients located within the EU. Thus, MS will be required to adapt their national framework accordingly.

Without prejudice to the above, Article 21c para. 5 CRD 6 provides that contracts existing at the time of entry into force of the TC Regime will be exempted, in order to preserve client's rights under such contracts. In this respect, it remains to be seen to what extent

third-country undertakings which currently act on the basis of national exemptions may continue to do so after the implementation of the TC Regime.

Compared to the Commission's CRD 6 proposal, the Final Compromise limits the scope of the TC Regime to "core" banking activities. While the initial proposal referred to the entire list of activities under Annex I of the CRD, the current scope of the TC Regime encompasses only:

- taking deposits and other repayable funds;
- lending including: consumer credit, credit agreements relating to immovable property, factoring, with or without recourse, financing of commercial transactions (including forfeiting);
- guarantees and commitments.

In this respect, the banking activities listed above may only be provided without authorisation if they are offered (i) on a reverse solicitation basis or (ii) in the contest of interbank and interdealer transactions.

On the other side, the TC Regime will not apply to MiFID investment services pursuant to Annex I, Section A of MiFID (including ancillary services).

II. Key issues of the TC Regime

1. Authorisation

Under the TC Regime, TCBs need to obtain an authorisation to operate in the MS where they are established. The scope of these authorisations is limited to the MS where the TCB is located. Therefore, the EU passport regime does not apply to TCBs and which means that they may not offer its banking activities on a cross-border basis to clients located in other MS (except for intragroup funding concluded with other TCBs of the same non-EU undertaking).

For MS with existing TCB authorisation regimes (such as Germany and Italy), the Council successfully negotiated a grandfathering option (Article 48c para. 5 CRD 6). In this respect, NCAs may decide, regarding TCBs whose authorisation was granted at least 12 months before the CRD 6 application date, that such authorisations remain valid, provided that these TCBs comply with the minimum requirements laid down in CRD 6.

2. Risk-based classification of TCBs

The TC Regime calibrates the prudential requirements applicable to TCB on the basis of the business conducted in the MS. In fact, one of the main changes provided by the CRD 6 is a new classification system for TCBs. These are classified either as Class 1 or as Class 2 on the basis of different criteria connected mainly with the risks that the TCBs may pose to the financial stability and market integrity of the EU and the specific MS where they are established.

Under the TC Regime, in order for a TCB to fall within the Class 1 scope, it needs to fulfil at least one of these requirements:

- the total value of the assets booked or originated by the TCB is equal to or higher than EUR 5 billion;

- the TCB's authorised activities include deposit-taking from retail customers, provided that the amount of deposits is equal to or higher than 5 % of the TCB's total liabilities or exceeds EUR 50 million;

- the TCB is not a so-called "qualifying TCB"

A TCB will be considered a "qualifying TCB" if its head office's non-EU home country:

- has been assessed as having prudential and supervisory standards and confidentiality requirements for the supervisory authority which are at least equivalent to CRR/CRD, and

- is not listed as a high-risk country for the purpose of AML rules.

A Class 2 classification applies to any TCB which is not classified as Class 1 – including the "qualifying TCBs" – and are thus considered as rather small and non-complex.

3. Applicable prudential requirements

Article 48c of the CRD 6 states the minimum conditions required to grant the authorisation of TCBs. Those conditions require that: (i) the activities that the head undertaking seeks authorisation for in the MS are covered by the authorisation that such head undertaking holds in the third country where it is established and subject to supervision therein and (ii) the TCBs meet the minimum regulatory requirements laid down in Articles 48e to 48i CRD 6. These conditions include:

- capital endowment requirements: it is equal to 2.5 % of the TCB's average liabilities for Class 1 TCBs (subject to a minimum of EUR 10 million) and 0.5 % for Class 2 TCBs (subject to a minimum of EUR 5 million); the requirement is to be fulfilled with cash, cash assimilated instruments or debt securities issued by central governments or central banks of a MS as well as any other instrument that is available to the TCB for unrestricted and immediate use to cover risks or losses as soon as those occur;

- liquidity requirements: all classes of TCBs are obliged to maintain unencumbered and liquid assets sufficient to cover liquidity outflows over a minimum period of 30 days and in addition, for Class 1 TCBs, they impose the obligation to comply with the CRR Liquidity Coverage Requirement;

- rules on internal governance and risk controls: it is required that all TCBs (i) have at least two persons in the relevant MS effectively directing the business of the TCB who meet the applicable fit and proper requirements, (ii) comply with internal governance, remuneration and risk management function requirements applicable to CRR credit institutions with stricter provisions for Class 1 TCBs, (iii) establish reporting lines to the management body of the TCB's head office regarding material risks and risk management policies, (iv) monitor and manage their outsourcing arrangements also to ensure that NCAs have full access to all information they need. Moreover, where TCBs engage in back-to-back or intragroup operations, they shall ensure adequate resources to identify and properly manage their counterparty credit risk and where critical or important functions of the TCB

- are carried out by its head undertaking, it shall be done in accordance with internal arrangements or intragroup agreements;

- booking requirements that impose the maintaining of a "registry book", in compliance with booking arrangements policies which shall be regularly reviewed and updated, enabling TCBs to track and keep a comprehensive record of all assets and liabilities booked or originated by the TCB in a MS and managing these assets autonomously.

While the above requirements would apply equally to all TCBs in the EU, MS may require TCBs to comply with the same provisions applicable to CRR credit institutions instead of the specific TCB requirements introduced by the TC Regime. In this respect, the impact for TCBs located in Germany and other jurisdictions that already treat TCBs like CRR credit institutions should be rather limited or, in fact, the TC Regime may be even less stringent *(e.g.*, - in Spain and – to a certain extent – Italy, the prerequisites to set up a TCB are the same, *mutatis mutandis*, as to set up a bank).

III. Power to require establishing a subsidiary

Under conditions set up by Article 48j CRD 6, all MS shall ensure that NCAs have the power to require TCBs to apply for authorisation as a CRR credit institution. This power may be used by NCAs at least where a TCB:

- has or is engaged in core banking services on a cross-border basis with customers or counterparties in other MS;

- raises concerns regarding systemic importance, namely the TCB: (i) meets the systemic importance indicators[2] or (ii) the TCB is assessed as being systemically important and poses significant risks to the financial stability in the EU or the respective MS (on the basis of criteria related to *e.g.* the size of the TCB, the complexity of the TCB's structure and business mode, the importance of the TCB for the activities of the third-country group in the MS where it is established, *etc*.);

- the aggregate amount of assets of all TCBs (in the EU) of the same third country group amounts to at least EUR 40 billion; or the amount of the TCB's assets on its book in the MS where it is established is equal to or higher than EUR 10 billion.

For the systemic importance assessment, assets held by the TCB in connection with EU central bank market operations (*e.g.* - deposits held with central banks) do not count towards the EUR 40 billion threshold.

However, an NCA may only require subsidiarisation in accordance with the proportionality principle. This requires that the NCA also considers less onerous measures, first and foremost whether the TCB could restructure its assets so that they cease to be systemic or meet the relevant thresholds outlined above, or whether it could impose additional

[2] These indicators are listed in Article 131(3) of Directive 2013/36/EU.

prudential requirements, *e.g.* - additional capital requirements - or other measures of ongoing supervision.

D. NATIONAL IMPLEMENTATION AND IMPACT

With respect to the provision of investment services, the fragmented framework across the EU will continue to exist since MiFID II only provides for the option to require third country firms to establish a TCB and to obtain an authorisation. A harmonised third country regime also does not exist with respect to the provision of payment services under PSD 2, and is not proposed by the new PSD 3 package, either. In this respect, even under CRD 6, third-country undertakings have to observe the applicable local requirements in the MS where they intend to offer their financial services.

Nevertheless, the adoption of the TC Regime, although narrowed down compared to the original Commission proposal, is noteworthy and a political signal towards the movement of fully harmonised banking rules in the EU.

Once adopted, MS will have 18 months to implement CRD 6. Once the 18-month transposition period ends, a 12-month timeframe is required before the TC Regime applies. Consequently, assuming that CRD 6 will be finally adopted and enter into force in Q1 2024, it would need to be implemented in national laws by Q3 2025, whereas the TCB requirement and the rules on TCB supervision would apply from Q3 2026 onwards.

DIGRESSION

FRANCE

Under French law, as in many other countries, credit institutions enjoy a fairly extensive banking monopoly, under which any person who does not have credit institution status is prohibited from carrying out credit transactions on a regular basis, receiving repayable funds from the public on a regular basis, or providing banking payment services (Article L. 511-5 of the French Monetary and Financial Code).

In order to carry out banking activities on French territory, it is therefore necessary to obtain the status of credit institution on French territory, which in practice means applying for a banking licence from the French banking supervisor (*Autorité de contrôle prudentiel et de resolution*) in conjunction with the ECB (Article L. 511-10 of the French Monetary and Financial Code).

It is therefore not possible for any person not authorised as a credit institution on French territory to carry out banking activities there.

There are only two exceptions to this principle:

- the 1st is for the benefit of credit institutions located in the European Union: thanks to the harmonisation of banking licensing conditions in the various member states of the European Union and the EEA, promoted by EU law, credit institutions registered in one of these states can validly use the European passport to operate in France on the basis of their original banking licence (under the freedom to provide services or the freedom of establishment);

- the 2nd for the benefit of any person carrying out operations benefiting from one of the exceptions or derogations provided for by French law to the banking monopoly (for example, entities and institutions governed by foreign law may acquire unmatured professional claims resulting from credit operations under certain conditions, this type of operation having been excluded from the scope of the banking monopoly by Article L. 511-6, 4° of the French Monetary and Financial Code).

Apart from these exceptions, as French law does not provide for an equivalence regime for non-EU institutions in terms of access to regulated banking activities, third-country institutions cannot carry out their activities on French territory, including via branches established in France, without complying with the licensing requirement set out in Article L. 511-10 of the Monetary and Financial Code.

As France is already seeking to ensure equality of treatment with French or EU credit institutions, the impact of CRD 6 should be fairly measured on this point, and entail relatively few changes to the currently applicable legal regime.

GERMANY

Generally, any person who intends to perform licensable banking activities on a commercial scale in Germany requires a banking licence from the ECB (for certain banking activities) or from the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "**BaFin**") (for banking activities not regulated by ECB) under the German Banking Act (*Kreditwesengesetz*, "**KWG**"). Such licence requirement

applies irrespective of whether banking services are offered via a physical presence in Germany or (outside the reverse solicitation exemption) on a cross-border basis.

In this respect, third-country undertakings which intend to offer banking services in Germany would need to establish a branch or a subsidiary and apply for a banking licence, which cannot be granted for cross-border activities. In this respect, it is important to note that TCBs located in Germany are already treated like credit institutions and have to comply with the full set of prudential requirements. Hence, most of the requirements imposed by the TC Regime would not have a significant impact.

However, in addition to the applicable reverse solicitation exemption, the current German regime provides for the possibility to obtain a waiver from German licence requirement. Pursuant to section 2 para. 5 KWG, BaFin may grant a waiver from the licensing requirements under the KWG for cross-border business of non-EU/EEA service providers upon the service provider’s application, if the service provider is effectively supervised in its home county with regard to the business conducted in Germany and, hence, does not require additional supervision by BaFin.

BaFin only grants such waiver if (i) the service provider holds the necessary permissions to perform the licensable business or services in its home state, (ii) the service provider is, in BaFin’s opinion, adequately supervised in its home state according to international standards for the performance of such business or services and (iii) the service provider's home state regulator (confirms that it) cooperates with BaFin.

However, within the recent years, BaFin has (in light of Brexit and the upcoming TC Regime) significantly reduced the granting of new waivers. As the TC Regime only provides that existing contracts at the time of entry into force of the TC Regime will be exempted, it remains to be seen whether BaFin also revokes existing waivers with respect to any new business activities.

ITALY

The Italian regulatory framework governing market access for non-EU undertakings seeking to provide banking services in Italy – both on a cross-border basis and by establishing a branch – implies a prior authorisation issued by the Bank of Italy. By contrast, and in line with the current draft of the CRD 6, no authorisation is required in case of services provided under reverse solicitation regime.

Of course, there are some divergencies in the provisions applicable to third-country undertakings operating cross-border and with a branch. According to the Italian Consolidated Banking Act and its implementing provisions, while non-EU credit institutions duly authorised to operate in Italy on a cross-border basis are only subject to a restricted perimeter of provisions depending to the type of services provided, duly authorised TCBs shall comply with a more articulated framework, tailored on the basis of the activities undertaken in Italy. Indeed, TCBs are subject to almost the same rules applicable to Italian credit institutions (*e.g.* obligation to enrol in the Italian Credit Bureau, rules on remuneration practices and policies, rules on transfer of qualified holdings, the obligation to set up an endowment fund of at least EUR 10 million, *etc.*), as well as to the same prudential regime, with certain exception applying to branches of undertaking established in specific third-countries (namely, Canada, Japan, Switzerland and the US).

TCBs are subject to certain information and inspection powers of the Bank of Italy. Moreover, those appointed to carry out administrative and managing functions of TCBs shall comply with Italian fit-and-proper requirements.

PORTUGAL

Under Portuguese banking laws, credit institutions established in third countries (i.e., non-EU countries) may only carry out banking services in Portugal provided that they establish a TCB, which is subject to prior authorisation by the Bank of Portugal. No cross-border regime is allowed for TCB. The reverse solicitation is not expressly foreseen in the law for banking services, although it is a concept that is generally accepted.

The application procedure for the establishment of a TCB in Portugal is subject to similar requirements to an application for the incorporation of a credit institution, save that the competence for its approval or refusal lies entirely with the Bank of Portugal.

TCB may only carry out in Portugal the activities for which the respective entities (which must be the equivalent to credit institutions in their home country) are allowed to carry out in their home country.

TCBs are required to fulfil *mutatis mutandis* the same prudential and conduct requirements as credit institutions. As examples, the TCB shall be managed by at least two managers in Portugal (who have to meet fit and proper requirements), has to comply with own funds and liquidity requirements, and is subject to a minimum capital endowment of equivalent to the share capital requirements applicable to credit institutions (i.e. EUR 17.5 million).

As such, the Portuguese regulatory framework is not expected to change dramatically, although some of the provisions to be included in the transposition measures may clarify some aspects of the current regime.

SPAIN

The Spanish regulatory framework provides for the access of non-EU undertakings to the Spanish market, both on a cross-border basis (except to gather deposits) and via the setup of a TCB. In both cases, the prior authorisation of the Bank of Spain is needed. The establishment of a TCB in Spain entails the same requirements as the establishment of a banking subsidiary, save for the implications of the different legal form (*e.g.*, the EUR 18 million minimum capital required from new banks translate into an endowment fund of the same minimum amount, and the board members "fit and proper" requirements will be predicated from the TCB managers). TCBs will be subject to the "double minimum" requirement whereby they will not be able to carry out activities they are not allowed to undertake in their home country, even if otherwise permitted to Spanish banks. Licenses may be denied on grounds of lack of reciprocity, i.e., if Spanish banks are not allowed to set up a branch in the non-EU country in question, applications from such country may be validly rejected irrespective of other merits.

Except when their home country systems offer Spanish depositors the same level of protection as home ones, the TCBs will have to join the Spanish deposit guarantee scheme. Furthermore, *mutatis mutandis*, the ongoing supervisory requirements, including capital requirements, will be the same applicable to Spanish banks. This general rule may

be waived, totally or partially — provided that rules may in no event be loser for TCBs than for EU branches — if, among other conditions, (i) the third country in question applies a solvency regime that includes the TCB and is equivalent to the Spanish/EU one and (ii) the third country applies reciprocity to branches of Spanish banks with regard to solvency requirements.

CONTACT PERSONS

FRANCE - GIDE

GIDE LOYRETTE NOUEL

Romain Rard

Partner | Banking & Finance
+32 2 231 11 40
romain.rard@gide.com

Olivier Bernardi

Partner | Banking & Finance
+33 (0)1 40 75 94 56
olivier.bernardi@gide.com

Gilles Briatta

Senior Counsel | Banking & Finance
+33 (0)1 40 75 35 43
gilles.briatta@gide.com

GERMANY - Gleiss Lutz

Christian Hissnauer

Partner | Banking & Finance
+49 69 95514-444
christian.hissnauer@gleisslutz.com

Aike I. Würdemann

Lawyer | Banking & Finance
+49 69 95514-444
aike.wuerdemann@gleisslutz.com

Tobias Kempf

Lawyer | Banking & Finance
+49 69 95514-444
tobias.kempf@gleisslutz.com

ITALY - CHIOMENTI

Alessandro Portolano

Partner | Banking & Finance
+39 02 72157 635
alessandro.portolano@chiomenti.net

Vincenzo Troiano

Partner | Banking & Finance
+39 06 46622 268
vincenzo.troiano@chiomenti.net

SPAIN AND PORTUGAL - CUATRECASAS

Fernando Minguez

Partner | Corporate and M&A /
Financial Services & Insurance
+34 915 247 953
fernando.minguez@cuatrecasas.com

Paulo Costa Martins

Partner | Funds /
Financial Services & Insurance
+351 21 355 38 00
pcmartins@cuatrecasas.com