

IRSG NARRATIVE – PROPOSED THIRD COUNTRY REGIME FOR BANKING SERVICES IN EU CAPITAL REQUIREMENTS DIRECTIVE (CRD6)

Proposals

1. The European Commission has proposed new harmonised rules for third country providers of banking services carrying out cross-border business into the EU or via EU branches. The new provisions are part of the Capital Requirements Directive (Article 21c).
2. The proposals represent a major change to existing regimes and would prevent the cross-border provision of banking services from a third country firm into the EU where this is not done either via a third country branch in the EU, or via reverse solicitation. Given the issues associated with reverse solicitation, the proposals effectively result in a new authorisation requirement.
3. The definition of banking services is very broad, encompassing all activities listed in annex 1 of the Capital Requirements Directive. This goes beyond retail deposit-taking and lending, to include wholesale lending, trading on own account or for account of others in securities, M&A advisory, portfolio management, payment services and custody inter alia. The CRD list of services overlaps significantly with MiFID services. While the proposal states that intragroup arrangements are not prejudiced by the provisions on cross-border services, there is no precise justification for which cross-border activities will be permitted between non-EU firms and their EU affiliates.
4. Currently, the CRD requires third country undertakings to be authorised only if they are taking deposits and lending to the public. However, there are no authorisation requirements for other CRD annex 1 services, many of which are not covered by other EU regulations either.
5. The proposals will impact not only third country banks and large third country investment firms, but also other non-bank third country undertakings providing CRD annex 1 services into the EU.
6. If the proposals are adopted and follow the standard EU legislative process they could become law in 2023 and operative in 2024.

GATS

7. The proposals as set out would be taking a step at variance with the EU's GATS Mode 1 (supply of banking services cross border into the EU) and risks impacting relationships with trade partners.
8. The EU could invoke the Prudential Carve-Out however it would need to prove the proposals are being adopted for good prudential reasons rather than to protect the EU market.
9. If challenged the process would allow firms time to adjust their business practices, however the end result could be that the EU restructure the proposals to avoid triggering GATS Mode 1 but with the same challenges for firms.

IRSG position

1. The new proposals mark a significant departure from the existing requirements. The new provisions go beyond a mere clarification of the status quo.

2. Although the proposed changes to the prudential requirements for third country branches (CRD article 48) was assessed in the run-up to the adoption of the CRD6, it appears there was no detailed impact assessment on the market access restrictions proposed in article 21 c.
3. The broad scope of the requirements will result in fragmentation of markets, creating problems for EU corporates, due to a loss of access to financing and account options, and EU firms carrying out core banking services. For example, it would be more problematic for EU entities and individuals to have bank accounts in non-EU jurisdictions, more challenging for EU corporates to raise finance or develop their businesses abroad, and harder for EU banks and investment firms to access international interdealer markets.
4. New barriers for EU firms, retail clients and citizens to access international capital markets would hinder the development of the Capital Markets Union, which we have argued before should consist of both internal EU market integration alongside openness to international markets.
5. The EU proposals appear tougher than the regulations governing cross-border market access into other important jurisdictions. Subject to certain criteria, a local establishment is not required for EU entities to deal cross-border into either the UK, US or Switzerland for example.
6. Since the adoption of the CRD6, there have been statements from the European Commission suggesting an openness to consider narrowing the scope of the market access restrictions in CRD6. This is welcome, and the IRSG, along with others bodies, is working to identify precisely what amendments may be required both to article 21 c, but also as regards the linked provisions in article 48.
7. The EU will be an outlier in comparison to other jurisdictions such as Switzerland, the US, the UK and other major jurisdictions which allow firms to cross-border business without the establishment of a locally authorised branch.
8. Overall, we support market access rules that increase harmonisation across the EU, but which do not unduly constrain the access to international markets and services currently enjoyed by EU entities and citizens.