

GERMAN PROPOSAL ON CRD6 THIRD-COUNTRY REGIME

On 22 August 2025 the German Ministry of Finance ("**BMF**") initiated the legislative process for the transposition of Directive (EU) 2024/1619 of the European Parliament and of the Council of 31 May 2024 amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, and environmental, social and governance risks ([CRD6](#)) into German law by publishing the ministerial draft of the Act on the Implementation of the Banking Directive and Reduction of Bureaucracy (*Bankenrichtlinienumsetzungs- und Bürokratieentlastungsgesetz - BRUBEG*) (the "**Draft**"). As mandated by CRD6, the Draft proposes significant amendments to the German Banking Act (*Kreditwesengesetz*, "**KWG**"), in particular to the regime concerning cross-border activities by third-country entities in Germany, including the German waivers regime. Certain key elements of the Draft are addressed in this briefing.

A REMINDER - THE CURRENT GERMAN FRAMEWORK FOR CROSS-BORDER BANKING BUSINESS

In order to understand how the CRD6 implementation will change the ability of third country firms to access to the German market, a quick reminder of the current licensing framework:

Germany follows a solicitation based approach so that licensable activities are performed "in Germany" not only if such activities are performed through a physical presence in Germany but also if the service provider targets the German market from outside Germany.

Under the current framework, while service providers located and licensed in the EU and the EEA may apply for a passport, and hence use the licence granted in their home state for providing banking services through a branch in or cross-border into Germany, a non-EU or a non-EEA entity ("**Third-Country Entity**") wishing to offer banking or financial services in Germany must generally establish a physical presence in Germany either through a subsidiary or a branch in Germany and obtain the necessary licences.

However, under the current regime, Third-Country Entities are allowed to offer cross-border banking services without a licence if such services are provided strictly on a reverse solicitation basis as applied by the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienst-*

Leistungsaufsicht – "BaFin"). Furthermore, Third-Country Entities may apply for a waiver with BaFin.

Reverse solicitation exemption

Pursuant to BaFin's longstanding administrative practice as in particular set out in its note on cross border business¹, a licence is not required for cross-border services offered on the basis of reverse solicitation (*passive Dienstleistungsfreiheit*). This is the case where clients domiciled in Germany approach the Third-Country Entity at their own initiative with respect to certain services and, importantly, without any prior solicitation by the Third-Country Entity itself (including e.g. through targeted internet presence) or by any third-party whose activities can be attributed to the Third-Country Entity.

Waiver Regime

Under the waiver regime of the KWG, upon application by a Third-Country Entity, BaFin had discretion to grant individual exemptions for providing specific banking services on a cross border business into Germany on the basis that the Third-Country Entity does not require supervision in respect of its conduct of banking and financial services in Germany where it is effectively supervised by its national competent authorities ("NCA") in its home country and the NCA cooperates satisfactorily with BaFin (usually through a memorandum of understanding). The exemptions are usually granted subject to conditions, e.g. a restriction on advertising that an exemption has been obtained, notification requirements in case of changes in the composition of the management board or annual provision of compliance certificates confirming that activities have only been conducted in line with the waiver.

However, in the past few years BaFin had – initially as a consequence of Brexit implementation laws and subsequently in light of the forthcoming implementation of CRD6 - practically suspended the issuance of waivers for Third-Country Entities under the KWG.

TCB establishment

A third-country branch ("TCB") is an integral part of the Third-Country Entity. However, for regulatory purposes, TCBs are subject to the same provisions and rules of the KWG as legal entities, with some modifications given the lack of separate legal capacity. The TCB must obtain authorisation from BaFin before commencing any business activities in Germany. This authorisation is specific to the services intended to be provided within Germany and the TCB may only act within the territory of Germany. The TCB is subject to regulatory oversight by BaFin. BaFin will make the appropriate authorisation of the Third-Country Entity in its home state a condition for the granting of any licence of the TCB in Germany and may refuse authorisation based on a lack of reciprocity. Certain derogations from regulatory oversight in Germany apply to US, Japanese and Australian TCBs on the basis of ministerial ordinances issued for such countries.

WHAT CHANGES? - THE NEW REGIME

TCB Establishment obligation

In line with the requirements of CRD6, pursuant to which certain core banking services - namely lending services, guarantees and commitments and deposit

¹ BaFin guidance note (*Merkblatt*) regarding the licensing for conducting cross-border banking activities and/or providing cross-border financial services of 1 April 2005 (as amended on 11 March 2019) (German): <https://www.bafin.de/ref/19610242>

taking - must not be provided on a cross-border basis into Germany, unless an exemption applies (see below), the Draft provides for a licensing requirement for TCBs (referred to as "CRD-TCBs") where:

- the respective non-EU entity (which according to the draft and contrary to CRD6 includes not only such entity itself but also parent undertakings) establishing the TCB would be classified as a credit institution under CRR if it were established in the EU and the TCB provides either lending services or guarantees and commitments; or
- the TCB offers deposit-taking services.

Impact on Waiver Regime

The requirement to establish a branch for the provision of the above core banking services will also impact the waiver regime described above.

The Draft does not eliminate the possibility to obtain cross-border waivers in its entirety. However, it provides that waivers can only be granted to the extent not precluded by Article 21c and Article 47 of CRD6. This effectively means that waivers can no longer be granted (or used) for the provision of (i) lending services, guarantees and commitments where the respective non-EU entity would be a credit institution under the CRR if it were established in the EU and (ii) deposit taking generally. Accordingly, any waivers by BaFin will need to be limited to the provision of banking and financial services other than the aforementioned.

Further, the Draft also requires BaFin to rescind existing waivers to the extent that CRD6 mandates the establishment of a TCB for the services covered by the waiver. Existing waivers granted in recent years have generally been issued subject to conditions or withdrawal rights in certain circumstances, which need to be evaluated in the individual case. With respect to those waivers which do not contain any conditions or withdrawal rights, it will need to be assessed for each individual case whether a rescission is possible on the basis that EU law should take precedence over German law.

In accordance with the Draft, the above provisions enter into effect on 11 January 2026, which might at first glance seem premature given that CRD6 mandates the establishment of a TCB only from 11 January 2027. However, given the express reference in the Draft to the application of the TCB requirement under CRD6, the rescission powers should only be effective as of January 2027.

Exemptions

- Reverse solicitation

The Draft does not expressly implement Article 21c para 2 lit. a) CRD6 and the Draft does not include a definition of reverse solicitation. Given that reverse solicitation has been an established feature of German administrative practice for decades, it is likely that the legislator did not consider any express provision to that effect to be necessary. In our experience, where a relationship has been created on a reverse solicitation basis, a Third-Country Entity may provide comparable products to such customers, whereby BaFin, in line with the position in the Questions & Answers on MiFID 2 and MiFIR published by ESMA on 19 November 2021, does not assess this on a transaction-by-transaction basis but rather the specific type and risk of any

product that is solicited is to be analysed with respect to its comparability to the previous product originally requested by the client.

It is yet to be determined whether there will be any changes in the legislative process to expressly implement the reverse solicitation exemption. In any event, the Draft and the explanatory notes thereto recognise reverse solicitation (e.g. TCBs need to report to Deutsche Bundesbank on services by the Third-Country Entity to clients established or situated in the EU on the basis of reverse solicitation), so that we do not expect the administrative practice to change significantly as a result of the implementation of CRD6 at this stage. It remains to be seen if BaFin will update its note on cross-border business following the implementation or publication of any guidance by EU authorities.

- Intragroup business

Section 53c para 5 KWG as proposed in the Draft provides that activities for which the TCB has obtained a license may only be performed in Germany, other than group-internal financing transactions with other TCBs of the Third-Country Entity or on the basis of reverse solicitation in line with Article 48c para 4(d) CRD6. There is, however, no express provision implementing the intragroup exemption in Article 21c para 2 lit. c) CRD6, although the legislative reasoning mentions that transactions with intragroup entities should be permissible. Arguably, existing intra-group exemptions under the KWG have a narrower scope than the Article 21c para 2 lit. c) CRD6 exemption, which generally covers services provided to EU undertakings in the same group, while the existing exemption under section 2 para 1 no. 7 KWG only extends to transactions between parent undertaking and subsidiaries or sister companies as defined in Article 4 para 1 nos. (15) and (16) CRR and where no banking services are provided to third parties. Further, unlike the existing rules for TCBs, the new rules for CRD-TCBs do not expressly state that the latter are deemed to be a "credit institution", leaving some uncertainty if the exemptions in section 2 KWG would be applicable.

- Interbank business

Similarly, there is no express provision implementing Article 21c para 2 lit. b) CRD6, which provides that the establishment of a TCB is not required where the above mentioned core banking services are provided to other credit institutions, although the reasoning to the Draft mentions that such services should be exempt. To some extent, such transactions may be covered by existing administrative practice, since, for example, taking deposits from other credit institutions is not considered to be taking deposits "from the public", and hence outside the scope of licensable deposit taking. This principle does, however, not generally extend to lending and guarantee business (although providing loans as deposits to other credit institutions is permitted according to current BaFin guidance).

- MiFID services

In accordance with the Draft, the new provisions for TCBs are not applicable where the TCB "only" conducts MiFID services or deposit taking or lending services constituting ancillary services to such MiFID services. It will need to be seen how this will be interpreted by BaFin in practice, given the list of MiFID services does not exactly match services under the KWG, and safe custody business, which is an ancillary service under MiFID, is also licensable banking business under the KWG. Further, the draft transports the uncertainties from CRD6 as to what "accommodating" (*verbundene*) ancillary

services means. Conversely, the Draft does not expressly implement the MiFID exemption in Article 21c para 4 CRD6.

APPLICATION PROCESS FOR TCBs

The Draft provides for a distinct licensing process for CRD-TCBs, which in terms of preconditions that must be fulfilled, follow closely those stipulated by CRD6. In particular, minimum capital requirements depending on risk classification, liquidity requirements, internal governance and risk management, specific booking requirements. CRD-TCBs are subject to ongoing reporting requirements and prudential supervision.

GRANDFATHERING AND TRANSITION

One of the areas where the Draft currently lacks clarity is in relation to grandfathering provisions. While the legislative reasoning mentions the grandfathering provision in Article 21c para 5 CRD6, which provides that, order to preserve clients' acquired rights under existing contracts, the requirement to establish a TCB shall be without prejudice to existing contracts that were entered into before 11 July 2026, there is no express provision in the Draft to that effect. For relationships that were previously established on the basis of reverse solicitations, this should not be of any consequence, however, the effect on relationships established on the basis of a waiver that is subject to revocation is currently unclear.

With respect to the requirement to establishment a CRD-TCB, BaFin may order that existing licenses (i.e. those granted until 10 January 2027) remain in effect if the respective TCB fulfils the requirements newly stipulated to be applicable to a CRD-TCB. In this respect, it is noted in the explanatory memorandum, that privilege that conflict with CRD6 cannot be maintained. However, according to transitional provisions, ministerial ordinances which have provided certain derogations from regulatory oversight for TCBs established in Germany shall continue to apply insofar as they do not conflict with the requirements applicable to CRD-TCBs stipulated in sections 53ca to 53cp (implementing Articles 48a *et seqq.* CRD6).

NEXT STEPS IN THE LEGISLATIVE PROCESS

The Draft is currently in the public consultation process. The federal states of Germany, industry bodies, associations, organisations, etc. may submit comments until 9 September 2025. This is only a short comment period, however, given the deadline for implementation of CRD6 by 10 January 2026, comments will need to be considered swiftly for the final draft to be submitted to the government. Based on the final ministerial draft, the German government will prepare its governmental draft and submit it to the German parliament.

The Draft is available on the BMF [webpage](#) (German only).

FURTHER READING

For general background on the harmonisation rules introduced by CRD6 see our briefing, [CRD6: New EU rules for EU branches of non-EU banks](#), and [CRD6: New EU rules for Third-Country Entities conducting cross-border banking business in the EU](#), available on our website.

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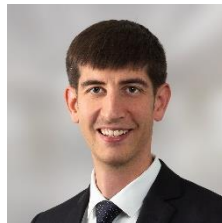
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