The New EU Third Country Branch Framework: What Firms Need to Know

November 2024

The new TCB framework

The new EU Capital Requirements Directive (CRD6) establishes a new harmonized and more restrictive framework for cross-border banking and lending into the EU. The new third country branch (TCB) rules will prohibit the provision of certain banking services into the EU on a cross-border basis by firms outside the EU, unless the TCB requirements are met. Only limited exemptions will apply.

Banks and investment firms established outside of the EU currently rely on national regimes or exemptions in order lawfully to access clients in certain Member States. Under the TCB rules, those firms meeting the scope requirements will be required to open a branch and seek authorization in each Member State where they take deposits, engage in lending, and/or provide guarantees/commitments, unless they can rely on one of the limited pan-EU exemptions established under CRD6. Once TCBs are authorized, a harmonized set of minimum compliance requirements will apply. TCBs will have no passporting rights of their own, and therefore firms seeking to operate in multiple Member States may require multiple TCBs to be established or consider subsidiarization in order to benefit from the passport.

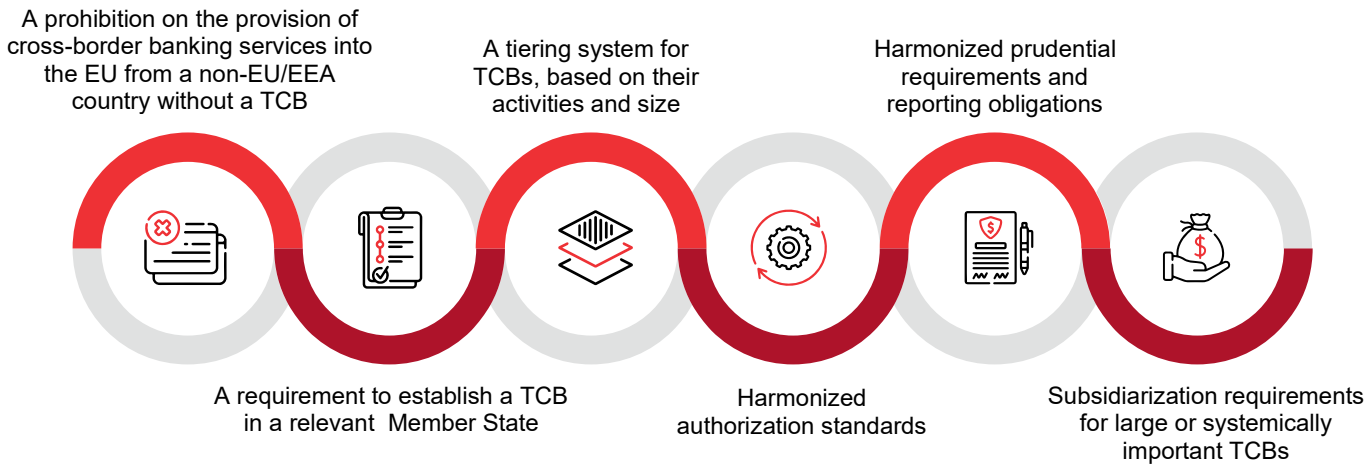
Implementation dates:

Member states must transpose CRD6 into national law by 10 January 2026 and fully implement the majority of the CRD6 reforms on TCBs by 11 January 2027, including the authorization requirements. This timeline is very tight for non-EU firms seeking to establish a compliant EU branch or mitigate the impact of the TCB framework through an EU subsidiary or business restructure; firms should act without delay to prepare, and begin reviewing the impact of the TCB requirements on their business and operations.

These new requirements are a step change in policy and will restrict the provision of agile cross-border financial services into the EU, with the potential to significantly impact the commercial lending market in particular.

6 Key Elements

There are six key elements in the new TCB framework:



What's in scope?

The rules will require undertakings established in third countries to set up a branch in each Member State into which they offer services and seek authorization to provide the following "banking services" in the EU:

Banking services in scope	Undertakings in scope
Taking deposits and other repayable funds	Any undertaking
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	Undertakings that are: ▪ banks (i.e., if established in the EU, would qualify as credit institutions); or ▪ in-scope investment firms. In-scope investment firms are undertakings (excluding commodity and emission allowance dealers, collective investment undertakings, and insurance undertakings) whose business consists of carrying out the MiFID activities of dealing on own account or underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis (or both) and the value of their assets (or other firms in the group carrying on these activities) exceeds EUR 30 billion. These entities will usually be systemic investment firms.

Non-EU lenders which are neither banks nor in-scope investment firms will not be caught by the new rules – they will continue to be able to rely on national exclusions/exemptions (where available) to carry on their cross-border lending activities, or obtain any bespoke national registrations, as they do now.

It is still unclear what providing these banking services "in" the EU means. There is no harmonization or clarity within the provisions of the TCB framework in CRD6, and Member States have generally taken different approaches under their domestic regimes. It is possible that a Member State may apply a broad solicitation test under which all activities with clients in their jurisdiction could be considered as the provision of a service "in" that Member State, rather than what is known as the “characteristic performance” test, where a service is provided "in" a Member State if it is the place of provision of the 'characteristic performance' of the service, i.e. the essential supply for which payment is due. The determination will require a case-by-case analysis.

Are there any exemptions?

Yes. There are exemptions for

- Interbank and interdealer activities
- Intragroup activities
- Reverse solicitation, i.e., services provided at the own exclusive initiative of the client or counterparty (including the continuation of services solicited, or banking services closely related to those originally solicited)
- Existing contracts entered into before 11 July 2026 (though it is unclear what happens if those grandfathered contracts are extended, rolled over or renewed after that date)

There is also an exemption for MiFID core activities and accommodating ancillary business. The rules will not apply to related deposit taking or the granting of credit or loans the purpose of which is to provide services under MiFID. This means, potentially, that lending or deposit-taking could be exempt if they are undertaken as an ancillary activity to a MiFID service – for example, where a non-EU prime broker extends credit associated with the trading of securities/derivatives by EU hedge funds. Of course, MiFID itself imposes a third country perimeter and accordingly any core MiFID services to which the banking services are ancillary would need to be provided in compliance with the MiFID perimeter (e.g., on the basis of the MiFID reverse solicitation provisions).

Will services to other financial sector entities be exempt?

CRD6 includes a review clause on whether to extend the interbank exemption to services provided to other financial sector entities (for example, funds). The review is to be completed by the EBA by 10 July 2025, 18 months before the implementation deadline. This review is intended to take into account financial stability concerns and the impact on the competitiveness of the EU, and will be one to watch particularly for the lending market.

What about passporting?

No passport is available. TCBs are expressly prohibited from providing in-scope banking services cross-border in the EU. This means that banks and in-scope investment firms must open a branch and seek authorization in each Member State in which they wish to provide these services. This will apply even where the Member State does not regulate within its domestic regime the particular banking services provided, such as commercial lending.

What requirements will apply to TCBs?

The new minimum common requirements for TCBs include:

- An authorization process, under which the TCB must satisfy certain conditions. These include that:
  - the TCB meets the minimum regulatory requirements;
  - the TCB's proposed banking activities are "covered by the authorization" that they hold in the third country where they are established;
  - the TCB's home jurisdiction supervisor has been notified; and
  - the Member State national competent authority (NCA) is able to access all necessary information from, and effectively coordinate supervisory activities with, the TCB's home jurisdiction supervisor.
- An express prohibition on the authorized TCB from offering or conducting the activities for which it is authorized in other Member States on a cross-border basis (i.e., no passport is available for TCBs). This prohibition does not apply to intragroup funding transactions concluded with other TCBs of the same head undertaking or transactions entered into on a reverse solicitation basis.
- Compliance with minimum regulatory requirements, including capital and liquidity requirements, internal governance and risk control obligations, and the implementation of booking arrangements to track the assets and liabilities linked to the activities conducted by the TCB in the Member State.
- Periodic reporting requirements relating to regulatory compliance and financial information (including the assets and liabilities held on their books in accordance with the booking arrangements above).

NCAs are required to conduct regular reviews of TCBs' compliance with their regulatory requirements and to take supervisory measures to ensure or restore compliance with those requirements.

Will the requirements apply to all TCBs in the same way?

The application of these requirements will depend on whether the TCB is classified as "Class 1" or "Class 2".

A Class 1 TCB is a TCB which meets certain size conditions, or is not a "qualifying TCB" (essentially a TCB from a jurisdiction assessed as equivalent by the European Commission). More stringent prudential and reporting requirements will apply to Class 1 TCBs, which are deemed riskier than Class 2 TCBs. The Commission's original proposal estimated that, out of 106 TCBs operating in the EU (based on 31 December 2020 data), up to 40 would be classified as Class 2.

Which TCBs be required to become subsidiaries?

Under the TCB framework, NCAs are empowered to require large TCBs or those assessed as systemically important to apply for authorization as a subsidiary. NCAs may also require subsidiarization where the TCB engages in transactions or business with counterparts in other Member States in contravention of the TCB framework rules (excluding intragroup funding transactions concluded with other TCBs of the same head undertaking and transactions entered into on a reverse solicitation basis). Further, NCAs may require subsidiarization on other grounds where it can justify that its other supervisory measures and powers are insufficient to address the material supervisory concerns – a potentially wide-ranging and subjective power.

The issue of commercial lending

The TCB framework raises some potential difficulties where Member States do not currently regulate the banking services within scope, such as commercial lending. For example, it is unclear whether a TCB authorized in a jurisdiction which does not regulate the particular activity of commercial lending, like the UK, will qualify for authorization under the TCB framework. The issue may turn on what it means for a banking activity to be "covered by" a TCB's authorization. In the UK example, although commercial lending is not itself a regulated activity, when it is carried on within a UK credit institution it is in effect subject to prudential regulation and is caught within the regulatory regime applying to senior managers. The position is similar in other major jurisdictions. It seems unlikely that EU policymakers would consider this lending is not "covered by" a TCB's authorization, with the result that significant capital inflows cease to originate from those jurisdictions.

Additionally, it is unclear whether Member States that do not currently regulate commercial lending, such as Ireland, will modify their domestic regulatory perimeters to harmonize them with the TCB framework given that TCBs will be subject to regulation in relation to any lending (including commercial lending). This could lead to the imposition of new regulatory requirements on a whole population of currently unregulated entities.

What does all this mean for third country undertakings and the markets?

There are a number of key points that market participants should bear in mind:

- The TCB framework is very broad and has the potential to catch within scope a range of different cross-border lending and financing activities in addition to deposit-taking. Activities involving other products which may include financing or credit elements, like certain securities financing transactions and derivatives, may require careful analysis.
- The availability of exemptions will need to be carefully considered. Some lending markets, particularly those which are relationship-based, may be more able to rely on reverse solicitation to continue to carry out cross-border lending, but other markets may need to consider the exemptions more carefully. Global syndicates of lenders with EU and non-EU members may add further complications. The question of when a banking service becomes a MiFID ancillary service and therefore exempt from the TCB framework is also likely to be an important distinction.

- As TCBs do not benefit from a passport, branches would need to be established and authorized in each Member State in which the TCB intends to do business. This means that the establishment of a subsidiary, which benefits from passporting, may be a more attractive way to do business in the EU – although relying on the establishment of a subsidiary may involve potentially complicated restructuring issues and implications for the regulatory capital that needs to be held in the EU, as well as the supervisory and compliance obligations applicable to subsidiaries.
- One option for third country groups may be to restructure activities like lending (provided the activities can be properly separated from deposit-taking, etc.) so that they are provided by non-bank non-investment firm entities, such that they fall outside the scope of the TCB framework. This means relying on existing national exclusions/exemptions to provide services into the EU, as is the current status quo. However, bear in mind that national exclusions/exemptions may be modified or removed to align the domestic regulatory perimeter with the TCB framework.
- It remains to be seen whether Member States will require existing authorized TCBs to reapply for authorization under the new framework. NCAs are permitted to allow authorizations of TCBs granted by 10 January 2027 to remain valid, provided that the existing authorized TCBs comply with the minimum requirements laid down in the new CRD6 TCB framework.
- The requirements applying to the authorization of TCBs are minimum harmonized requirements which Member States may choose to gold plate, leading to potentially more robust requirements in different Member States.
- Finally, note that there is no harmonized method under the TCB framework of determining when a particular activity is deemed to be carried out in a Member State – this will require careful factual analysis.

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