

POSITION PAPER ON THE USE OF THE ARTICLE 21C EXEMPTIONS FOR CROSS-BORDER LENDING

Background

The Association of Foreign Banks (AFB) is a trade body which represents the interests of the non-UK headquartered banks operating in the UK to industry stakeholders, including the Government, regulatory bodies, and financial services organisations. AFB has around 170 international banking group members, representing around 80% of the UK's foreign banking market, providing financial services through branches, subsidiaries, and representative offices in the UK.

This paper outlines scenarios in which the reverse-solicitation exemption (as described below) and other exemptions may be applicable, focusing on a series of representative scenarios taken from the syndicated lending market. The position set out in this paper is not prescriptive, and firms should conduct their own analysis of how each Member State has interpreted and implemented the Directive. Firms relying on the reverse solicitation exemption should also maintain robust data-collection and governance arrangements as they may be required to provide evidence on their use of the reverse solicitation exemption to the relevant competent authorities.

Purpose of this Document

This paper is intended as a starting place for general consideration of the application of Article 21c as EU law, based on CRD VI itself. The legislation is inherently unclear in certain respects and the availability of reverse enquiry is inherently fact specific. Firms should take individual legal advice as to their position, including under Member State law.

Key Issue

On 19 June 2024, the Capital Requirements Directive VI (CRD VI) was published in the Official Journal of the EU, which can be read in full [here](#). Developed alongside the Capital Requirements Regulation III (CRR III) as part of the EU's 2024 'Banking Package', it completes the EU's implementation of the final Basel III reforms.

Article 21c of CRD VI stipulates that from 11 January 2027, a third country institution must establish and be authorised as a branch (or subsidiary) in each EU Member State to provide 'core banking' services¹ in the relevant jurisdiction.

There are four exemptions which permit the direct provision of core banking services by a third-country bank entity not licensed to provide cross-border services in the EU. They are reverse solicitation, Inter-bank and Intra group exemptions as well as MiFID activity and ancillary

¹Core banking services include, taking deposits and other repayable funds, lending activities, guarantees and commitments.

services thereto. The reverse solicitation exemption allows services to be provided to an EU client if the client approaches the third-country institution on its own exclusive initiative.

Syndicated lending enables multiple lenders, often drawn from both EU and third-country banking groups, jointly to provide large or complex loans to corporate, institutional, and sovereign borrowers. These transactions rely on the ability of international banks to participate at different stages of a loan's lifecycle, including origination, syndication, refinancing, and secondary loan trading. Article 21c has a significant impact on this market structure, creating uncertainty for third-country lenders (to EU entities) that traditionally participate on a cross-border basis. The practical challenge is that syndicated lending commonly involves intermediated communication through arrangers and facility agents rather than direct contact from the ultimate borrower.

It is not clear on the face of the law whether, making the "exclusive initiative of the client" requirement is satisfied where third party intermediaries are involved in the origination of a transaction, and there is no clear guidance on point either at the EU or at national level. As a result, industry participants have sought to articulate scenarios where use of the reverse-solicitation exemption may be considered within the syndicated loan context.

In setting out the scenarios and fact-patterns, the following assumptions have been made.

Assumptions

- The relevant Member State has transposed Article 21c CRD VI, including the reverse solicitation exemption, into its national legal and supervisory framework without adding stricter or divergent requirements
- No other marketing or solicitation arises between the borrower and third country bank.
- No other cross-border lending or market-access regimes conflict with, override, or qualify the Article 21c framework in that Member State (e.g., national licensing rules).
- The relevant Member State's regulator interprets "core banking services" consistently with the CRD VI definition (deposit taking, lending, guarantees/commitments) and does not expand it to capture ancillary or operational activities that accompany syndicated loans

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Scenarios

1. EU Borrower selects a mandated lead arranger, which subsequently invites third-country lenders to join a syndicate

Description of scenario: An EU borrower appoints an entity, which may be an mandated lead arranger (as opposed to a Lead Arranger or Arranger), sponsor, financial advisor, or agent (whether based in the EU or outside), to arrange and syndicate a facility. Acting on that mandate, the appointed entity contacts potential lenders, including third-country lenders, and invites them to participate. The borrower does not communicate directly with each lender. Subsequent activities by a third country lender, such as negotiations on the lending terms or holding due diligence meetings with the borrower, would be within the scope of the reverse solicitation exemption.

Rationale for using the Reverse Solicitation Exemption: The borrower's decision to mandate an entity to raise a syndicate is itself an act of initiative. On the basis that the entity is executing a defined borrower mandate, the borrower's initiative could be treated as extending to the lenders approached on its behalf and follow on discussions. Note: syndicated lending generally relies on arranger-mediated outreach to lenders.

2. EU Borrower issues an RFP to a banking group, and a third-country entity responds

Description of scenario: An EU borrower sends a financing request for proposal (RFP) to a banking group, without specifying the specific legal entity within the group that will provide the funds. The enquiry is received by an EU subsidiary of a non-EU headquartered banking group, but internally the banking group determines the response should be made by a third-country/non-EU branch or its head office that is better placed to participate in the transaction.

Rationale for using the Reverse Solicitation Exemption: For most corporates, banking groups interact with them as integrated group structures and corporates expect the group to determine internally which booking entity will respond. The borrower's act of approaching the group constitutes its exclusive initiative.

However, if the RFP is addressed explicitly and exclusively to a named EU legal entity, with no reasonable basis to infer broader group intention, arguments supporting the use of reverse solicitation are not applicable.

3. EU Borrower initiates amendments or extensions delivered through the facility agent or the mandated leader arranger (MLA)

Description of scenario: An EU borrower instructs the Agent/MLA of a syndicated facility to circulate a proposed contractual change to the terms of the facility to the full lender group, e.g., a maturity extension or covenant amendment. The Agent/MLA then forwards the

borrower's request to all members of the syndicate, including third-country lenders, rather than the borrower contacting them directly.

Rationale for using the Reverse Solicitation Exemption: Under standard arrangements, the Agent/MLA acts merely as a conduit for borrower-lender communication, not as a marketer or originator of transactions. Many amendments do not create new principal exposures but modify existing obligations. In this case, the service should be understood as an own-initiative request to extend or amend a borrower-initiated lending relationship, consistent with the purpose of the reverse solicitation exemption. In the main, borrowers usually communicate requests through the Agent/MLA, not bilaterally.

4. EU Borrower has authorised a general syndication following an underwriting commitment by the MLA

Description of scenario: An EU borrower mandates an MLA who underwrites the entire commitment of the loan. Following the signing of the deal, the borrower expressly authorises that the MLA may conduct a general syndication to a broad group of potential lenders, including third-country institutions. The MLA then reaches out to a range of lending institutions, including third country, in line with that mandate. The borrower does not contact those additional lenders themselves.

Rationale for using the Reverse Solicitation Exemption: In this scenario, the MLA's approach to additional lenders is a direct implementation of the borrower's mandate, not an independent marketing initiative. Given that general syndication is a standard feature, this borrower-authorized process may be treated as compatible with the reverse solicitation exemption.

5. Purchase of a Secondary Loan Position of EU Borrower

Description of scenario: A non-EU banking entity purchases a fully drawn term loan (or receivable) from the secondary trading desk of a EU banking entity, where the underlying borrower is an EU entity.

Rationale for using the Reverse Solicitation Exemption alongside the Grandfathering Exemption: First, there is no further extension of credit to the EU borrower, as it is not a revolving facility which could be drawn upon. Secondly, the EU banking entity would have obtained consent from the borrower to sell-down or trade its exposure under the loan agreement, which would stipulate how the loan can be transferred or assigned, as well as which investors would be qualified to make such purchases.

6. EU Corporate/NBFI deposit with a non-EU bank matures

Description of scenario: An EU corporate/NBFI deposit with a non-EU bank is reaching maturity. The bank asks whether the corporate/NBFI wishes to roll over the deposit for a further term.

Rationale for using the Reverse Solicitation Exemption alongside the Grandfathering Exemption: The rollover is a continuation of the original client-initiated deposit. No new solicitation is undertaken as the bank is responding to an existing relationship.

Further scenarios may be added following AFB member discussions.

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