Matheson

Access Europe – what CRD VI means for the provision of "core banking services" in Ireland post 11 January 2027

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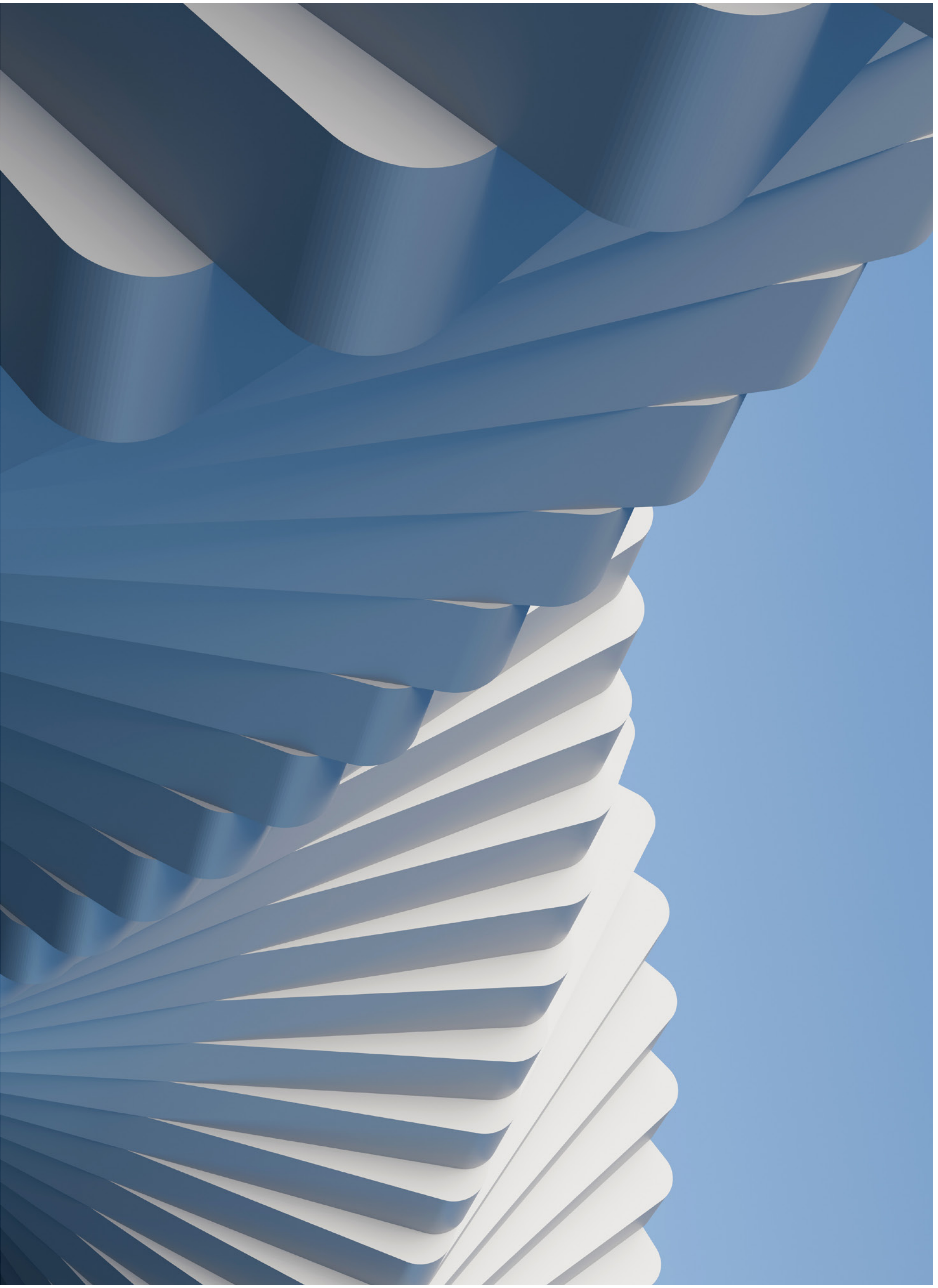


Article 21c: Regime Change Snapshot

CRD VI changes the way in which third-country undertakings ("**TCU**") are treated under EU law by prohibiting the direct provision of cross-border "Core Banking Services" into the EU[1]. Core Banking Services comprise deposit taking, lending (which is broadly defined and includes lending to non-consumers) and the provision of guarantees and commitments.

Ireland faithfully transposed the Article 21c regime on **10 July 2026**, which means that there is **no gold plating** or express variations to the European regime and it also allows room for interpretation in an Irish law context.

The net effect of the Article 21c regime is that in the future (i.e. post 10 January 2027) TCUs will be required to establish (at least) a third-country branch ("**TCB**") in an EU Member State and to seek authorisation for that TCB in order to provide Core Banking Services. Exemptions to the Article 21c regime are provided for within Article 21c itself including an 'acquired rights' protection for existing contracts that were entered into before **11 July 2026**.

This paper crystallises some of the key challenges and provides outline approaches to their solution in a post January 2027 context.

1. Such as deposit taking banks and large investment firms.
2. 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
3. Ibid comprised principally of Articles 21c, 47 and 48

The objective of Article 21c

A patchwork of individual country rules for the provision of core banking services from providers outside the EU (Third Country Undertakings or TCUs) will be replaced by a single standardised EU-wide approach.

Within this EU measure - CRD VI[2], the so-called **Article 21c regime**[3] requires that:

"undertakings established in a third country [i.e. outside the EU] which seek to provide such core banking services in the [European] Union should at least establish a branch in a Member State and that such branch should be authorised in accordance with Union law, unless the undertaking wishes to provide banking services in the Union through a subsidiary."

The policy objective behind the Article 21c regime is to achieve a level playing field between EU and non-EU entities providing core banking services in the EU. Policymakers felt too that a more harmonised approach would assist in 'deepening the internal market for banking'. Neither are controversial in themselves however, the Article 21c regime potentially cuts across practices, norms and global financial services "plumbing" that had not previously had to concern itself with the establishment of a single access point for the EU for the provision of certain banking services, resulting in a number of important uncertainties for TCUs.

Matheson have been working closely with global financial services groups since initial Commission proposal was published to best understand where the Article 21c regime impacts their provision of core banking services in the European Union which have informed some of the insights that we are share below.

Scope of Application:

Impact of Article 21c for TCUs

From 11 January 2027, CRD VI provides that in order to commence or continue to provide **core banking services** i.e.,

- **lending**[4]
- issuing banking **guarantees and / or commitments**[5], and / or
- carrying out **deposit-taking** (including other repayable funds) activity

in an EU Member State, TCUs will have to establish a branch in the relevant EU Member State in which they are providing such Core-Banking Services and seek authorisation for that branch to act as a credit institution in the relevant Member State **unless** certain exemptions apply.

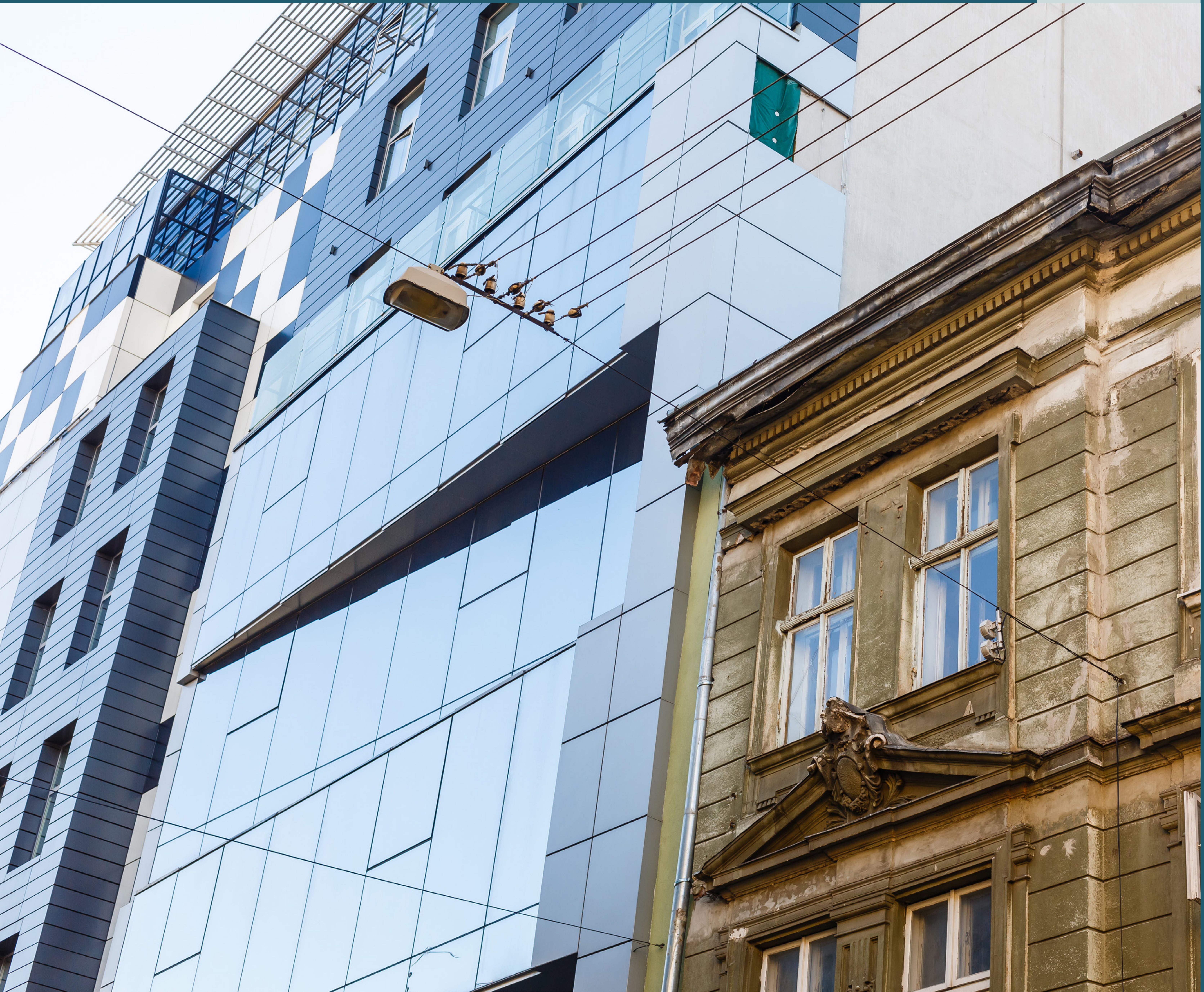
meaning:

- Non-EU credit institutions (including certain large investment firms) will be prohibited from lending or providing guarantees/commitments without at least the establishment and authorisation of a branch in an EU Member State; and/or
- TCUs will be prohibited from taking deposits

unless

- the provision of services by a TCU comes within one of the protections / **exemptions** provided for in the Article 21c regime (which we consider separately in detail below).

3 See Annex I, point 2, of CRD: “*Lending including, inter alia: consumer credit, credit agreements relating to immovable property, factoring, with or without recourse, financing of commercial transactions (including forfeiting).*”
4 See Annex I, point 6, of CRD: “*Guarantees and commitments.*”
5 See Annex I, point 1, of CRD: “*Taking deposits and other repayable funds*”.



Scope of Impact: The "it depends" situations

Although the Article 21c regime was intended to establish a single EU-wide approach for TCUs accessing the EU market for core banking services, the drafting of the legislation leaves quite a significant number of areas of ambiguity in the context of the actual application of the Article 21c regime. It is notable too that neither the EU Commission nor the European Banking Authority have issued comprehensive guidance on these new measures. This means that in many cases a determination of whether an exemption or exemptions will or will not apply will turn on the facts of a particular scenario or transaction. From a practical perspective, this can mean that you could have two scenarios that are 90% similar on their facts and circumstances but the 10% differential in facts can be the difference between Article 21c applying or not.

We consider below some of the exemptions or tools available to TCUs. Such exemptions or tools do not need to be considered in isolation. Rather, we are recommending a consolidated assessment.

The Exemptions

1. The interbank/interdealer and intra-group exemptions are clear and uncontroversial.

2. The scope of the MIFID exemption is clear in the context of the provision of core banking services when providing any of the services listed in Annex 1 A. It would be helpful if authorities could provide some clarity on whether ancillary services in Section B of Annex 1 might also benefit from this exemption.

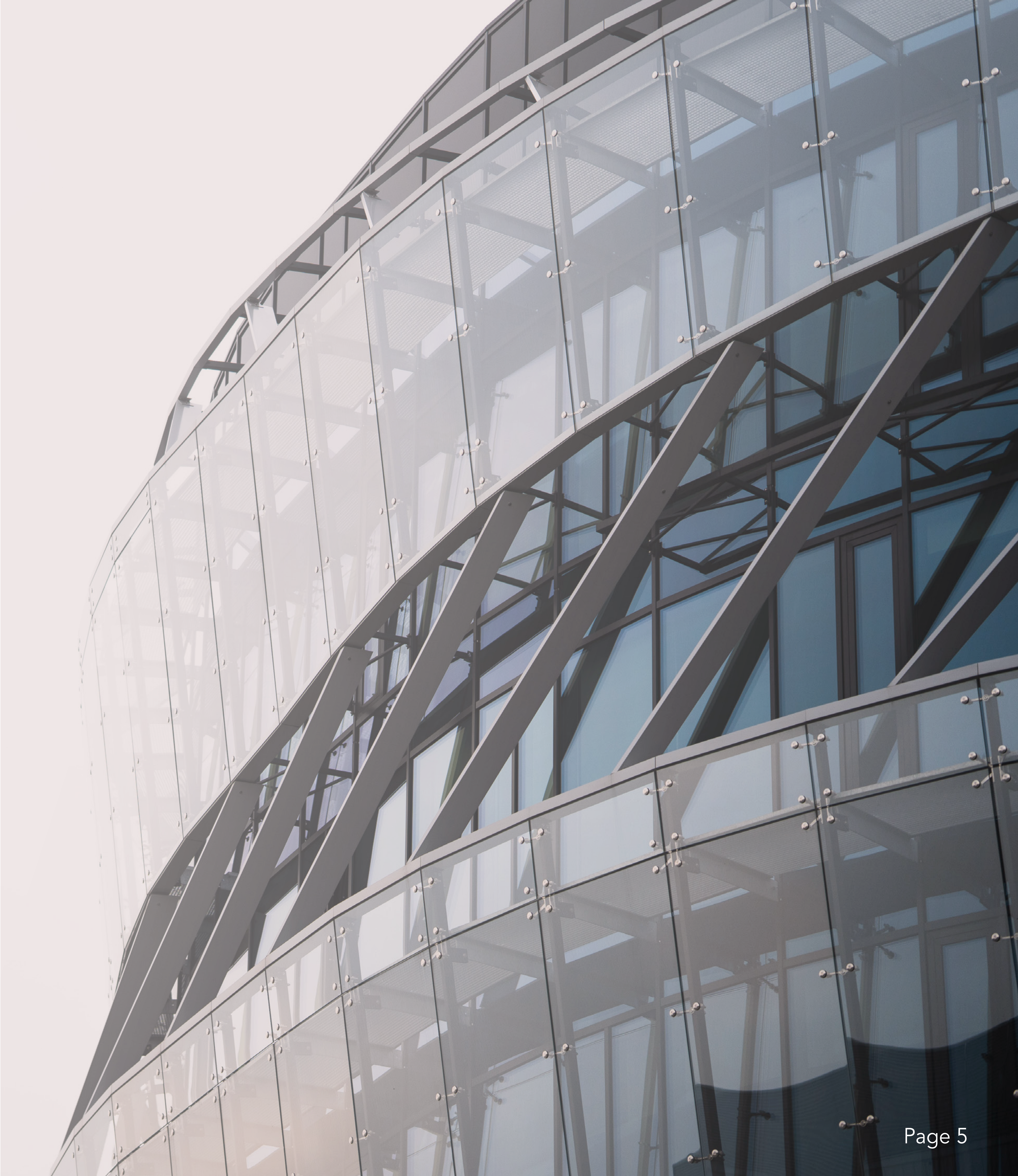
3. The reverse solicitation exemption is clear and an important exemption in the context of Ireland's financial services industry, but firms need to be aware that it applies where the product/service was at "exclusive initiative of the client/counterparty".

For Example...

Taking an example of a lending facility, when the borrower of record is not decided until a material way through the negotiation of the facility, that is a scenario whereby exclusive initiative can likely be demonstrated. However, if there is active marketing to the borrower of record this will likely frustrate the use of the reverse solicitation exemption.

Similarly in the case of a syndicated loan facility, if it is clear in the syndication documentation that the appointed arranger is engaged by the borrower and that the borrower asks the arranger to seek additional syndicated credit institutions into the facility, rather than the arranger acting on instruction from the lender then there are, in our view, clear grounds to apply the reverse solicitation exemption.

While the reverse solicitation exemption is certainly helpful and its inclusion is consistent with similar exclusions in other EU licensing regimes, the "exclusive initiative test" is deliberately intended to narrow its scope. We are already seeing certain industry-accepted forms of borrower confirmations being inserted into loan documents. Accordingly, we think that establishing a process to capture and record the reverse solicitation determination in advance of the 11 January 2027 deadline will be critical.



Has the transposition of CRD VI affected the exemption parameters as set out under Article 21c?

As referenced above, the Irish legislation transposing CRD VI (European Union (Capital Requirements) (Amendment) Regulations 2026 S.I. No. 326 of 2026), is intended to be a full and faithful transposition of CRD VI.

- No gold-plating (i.e. additions to or material variations of the Article 21c regime as set out in CRD VI);
- No national law exemptions (i.e. no specific carve outs under Irish law for services that would otherwise be considered ‘core banking services’ under the Article 21c regime);
- No further detail or guidance (actual or promised) with respect to as to what ‘overall compliance’ with the third country regime looks like from an Irish law perspective; and
- The exemptions as set out in Article 21c are all available to be considered under Irish law.

In summary, the full suite of Article 21c exemptions, as drafted in CRD VI is available under Irish law, i.e. there are neither Irish law restrictions on the suite of exemptions nor additions to the Article 21c suite of exemptions.

Scope: Questions concerning application

When considering scope, TCUs will need to clarify whether the firm is:

1. a third country undertaking (*important for the provision of* ***deposit-taking services***);
2. a third country credit institution (*important for the provision of all* ***core banking services***);
3. providing core banking services (*important as an undertaking can meet the definition of a TCU, but not come within the scope of Article 21c because is it not providing a core banking service e.g.* ***being a noteholder is not typically considered lending as it is a financial instrument, so is not in scope of the definition of core banking services); or, acquiring a fully drawn down loan facility could also be properly considered an account receivable and not the provision of lending services.***
4. providing core banking services on the basis of contracts/facilities on the basis of an 'existing facility' i.e. existing contracts that were entered into before 11 July 2026 (*important to benefit under the "acquired rights /"grandfathering" protection from Article 21c requirements*);
5. providing a core banking service which is an ancillary or accommodating service to activities listed in Annex I, Section A, to Directive 2014/65/EU ("**MiFID**"), the purpose of which is to provide services under that Directive; (*important to application the "MiFID" exemption*);
6. providing core banking services on an interbank / interdealer basis (*important for the application of the "interbank / interdealer" exemption*);
7. providing core banking services to an undertaking of the same group as that of the TCU. (*important for the application of the "intra group" exemption*);
8. providing a core banking service where my client/counterparty approached me as a TCU at their own exclusive initiative for the provision of any core banking services? (*important to establish the "reverse solicitation" exemption*)?

These questions are not only important in the context of the design or inception phase of a facility, they will continue to have material relevance throughout the provision of a core banking services, especially if the core banking service in question is complex, designed with a 'lengthy' duration in mind or is being amended. Some scope determinations will be one and done (e.g. can be expressly provided for in term sheets or facility agreements) but others will need ongoing review.

Acquired Rights / Grandfathering Provisions

While not an exemption per se, the Article 21c regime does allow for existing contractual arrangements to continue, in order to avoid a cliff edge in January 2027.

Specifically, Article 21c (5) provides - "*In order to preserve clients' acquired rights under existing contracts, the requirement laid down in paragraph 1 shall be without prejudice to existing contracts that were entered into before 11 July 2026*."

This is further explained by Recital 6 which says "*…when transposing this Directive, Member States should be able to take measures to preserve clients' acquired rights under existing contracts. Such measures should apply solely for the purpose of facilitating the transition to implementation of this Directive and should be narrowly framed to avoid instances of circumvention. To prevent the circumvention of the rules applicable to the cross-border provision of banking services by third-country undertakings, competent authorities should be able to monitor the provision of those services.*"

The difficult practical question will be the extent to which existing arrangements have to be fully detailed and in place before they can benefit from this provision. In the absence of any guidance each case will have to turn on its own facts – for example, where a loan agreement which came into force prior to 11 July 2026 and which contemplates an accordion increase, we would expect such accordion increase post 11 July 2026 may be considered an acquired right, depending on the terms of such accordion clause.

Other examples of changes post 11 July 2026 where we do not believe the acquired rights protection would be lost include:

- mere administrative or operational changes as in the majority of cases such changes are necessary in order to give effect to actual or contingent rights, vested in the EU borrower over a contract for a facility of any duration.

- changes or alterations proposed unilaterally by the borrower as such changes are necessary in order to give effect to actual or contingent rights, vested in the EU borrower.

- drawdowns post 11 July 2026, should not frustrate the acquired rights protection as the principle of acquired rights is drawdown agnostic and regardless drawdowns are the outcome of actual or contingent rights, vested in the EU borrower in a pre 11 July 2026 timeframe.

- extensions of credit in a revolving facility within previously specified limits or mechanic.

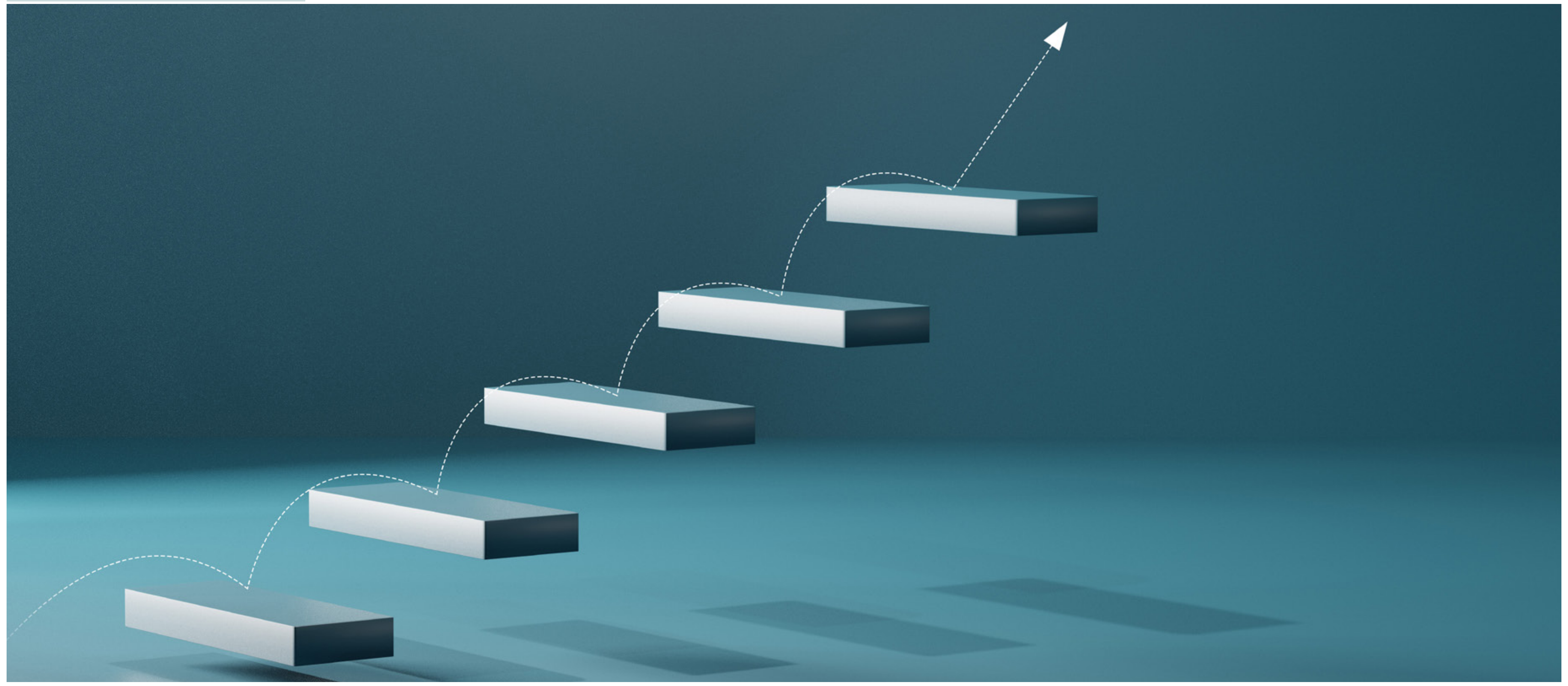
- instances of consent by the lender to proposals by the borrower that certain changes are effected should not automatically frustrate the acquired rights protection as such instances of consent can often be administrative, limited in terms of the lenders ability to withhold, disproportionate in terms of the consequences on the borrower if consent is withheld (e.g. consequence of same could be an event of default by the borrower).

- provisions within a facility, which set out a methodology or an 'agreement to agree' with respect to future changes, duration extensions, extensions of maturity, revision of interest applied and/or reborrowing of previously repaid loan amounts, should fall for consideration under acquired rights protection as they speak to the contingent rights of the borrower in a pre-11 July 2026 agreement, even though they are post 11 July 2026.

- Amongst other interesting points the 10 July 2026 LSTA paper states, "*While eligible contracts are protected, events outside a formal amendment or restructuring may still result in a "new" contract between the lender and EU borrower such that grandfathering is lost. When assessing potential break events, lenders should therefore consider whether the relevant change affects rights the borrower had at the outset of the contract or instead introduces new rights or obligations going beyond those acquired rights.*" Such circumstances many manifest in a change of control with respect to the ownership of the lender and how that may or may not affect a facility agreement with a borrower.

What constitutes the provision of core banking services in Ireland?

A key question that clients have been asking us is whether it is automatically the case that because a client/customer is in Ireland that the Article 21c regime applies or is a broader interpretation possible? There are two useful pieces of guidance available when considering this question, neither of which, we would concede, were issued to address the Article 21c regime, but both of which address very similar topics. One is a so called "*Dear CEO*" letter issued by the Central Bank of Ireland in 2019 in the context of British banks post-Brexit having Irish based customers and the other is a 1997 EU Commission document on when a credit institution in one Member State needs to "*passport*" into another Member State.



(1) Central Bank of Ireland "Dear CEO" letter 2019

In a Brexit context where newly "third country" UK credit institutions had existing business links to Ireland but no longer had the right to provide services in Ireland, the Central Bank of Ireland issued a "Dear CEO" letter on 27 August 2019. The CBI set out its view of factors to be taken into account when determining whether a person is carrying on banking business in Ireland, for the purposes of the Irish Central Bank Act 1971. The CBI pointed to a number of factors such as presence in Ireland, targeted marketing, jurisdiction-specific operations, and volume (in particular, of retail clients). To date no single factor on its own is generally considered determinative (which in typically the case in EU banking monopoly jurisdictions) and we have no reason to suspect that this 'total mix' approach to the assessment as to whether banking business is being carried on in Ireland will change in the immediate term. The CBI emphasised that credit institutions should be able to evidence the arrangements and mechanisms in place to ensure that Irish-based customers are not intentionally, or unintentionally, subject to marketing of financial products or services.

(2) 1997 European Commission's Interpretative Communication

With a more historic lens, the European Commission's Interpretative Communication on the freedom to provide services and the interest of the general good in the Second Banking Directive of 20 June 1997 (the "**Commission Communication**") is relevant despite its age. The Commission Communication centred around when a banking authorisation needs to be passported into other EEA Member States. Importantly, the Commission Communication accepts the principle that one may provide banking services to a person in a Member State without providing services in that Member State; it sets out as the essential test ".... the location of the service is the place of provision of what may be termed the 'characteristic performance' of the service, i.e. the essential supply for which payment is due must be determined."

This guidance may be useful in considering Article 21c scope questions though the absence of clear guidance at EU level will likely make a definitive view difficult to reach in some cases.

Conclusion

While Ireland has traditionally taken a very open position to the provision of financial services by TCUs (particularly to non-retail clients / counterparties), the transposition of the Article 21c regime will alter the provision of core banking services by TCUs in every Member State, including Ireland.

It is worth emphasising, that faithful transposition of the Article 21c regime, enables TCUs to avail of the Article 21c exemptions and acquired rights to their intended effect without national law limitations or peculiarities which enhances the ease with which such exemptions might be selected and applied in Ireland.

We would encourage the provision of guidance at EU level on the queries which arise when considering these measures.

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