CRD VI and Cross-Border Lending to Danish Borrowers

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Introduction

The adoption of Directive (EU) 2024/1619 ("**CRD VI**") introduces a shift in how cross-border banking activities are regulated within the EU. While the new rules are primarily aimed at third-country credit institutions, they also raise broader questions about the traditional assessment of where financial services are considered to be carried out.

The Danish implementation of CRD VI shifts the focus from where banking services are performed to whether they are provided to customers in the EU.

The new regime applies specifically to third-country credit institutions and does not alter the existing passporting framework for EU institutions. However, the change in regulatory logic may have wider implications over time.

The Current Approach Under Danish Law

Under current Danish law, the assessment of whether a foreign credit institution is carrying out business in Denmark is generally based on a territorial analysis derived from EU law principles. On the basis of our understanding of the European Commission's 1997 interpretative communication on the freedom to provide financial services, legal scholars of the Danish community have developed the so-called "characteristic performance test", according to which a financial service is considered to be performed in the jurisdiction where its essential element takes place.

This approach is not codified in Danish law and has not been expressly formulated or confirmed by the Danish Financial Supervisory Authority, but rather reflects an interpretation developed by us and the market on the basis of an existing understanding.

In the context of lending, the characteristic performance is typically the extension of credit, including the credit decision and provision of funds. Where these elements are carried out outside Denmark, lending to a Danish borrower has generally not been treated as regulated activity in Denmark. This has enabled a flexible approach to cross-border lending, particularly for institutions operating without a physical presence in Denmark.

New Framework for Third-country Credit Instituions

CRD VI establishes a harmonized EU regime governing the provision of certain banking services by third-country credit institutions to EU customers. Under the new rules, such institutions may not provide “core banking services” to EU customers unless they establish an authorised branch in the EU or operate through an authorised EU entity.

Core banking services include:

- taking deposits and other repayable funds,
- lending (including commercial lending), and
- issuing guarantees and other credit commitments

From Territorial Assessment to Customer-Location-Based Regulation

A key implication of CRD VI is a shift away from the traditional territorial assessment of where a banking service is performed. For third-country credit institutions, the decisive factor is no longer where the characteristic performance takes place, but whether the institution is providing banking services to a customer located in the EU.

This marks a move from a place-of-performance test to a customer-location-based regulatory trigger. In practice, this means that even if all elements of the lending activity are carried out outside the EU, the activity may still fall within EU regulation if the borrower is located in the EU.

As a result, the concept of where a service is “performed” becomes significantly less relevant for regulatory purposes in this context.

In practical terms, third-country lenders that have historically relied on a cross-border model without EU presence may need to restructure their operations, for example by establishing an EU branch or lending through an EU-based entity.

Reverse Solicitation

CRD VI provides a limited exemption from the establishment requirement in cases of so-called reverse solicitation, i.e. where an EU customer approaches a third-country credit institution on its own exclusive initiative. In such cases, the institution may provide the requested services, including closely related ancillary services, without establishing a presence in the EU.

The reverse solicitation exemption is expected to be interpreted restrictively. In particular, if the customer's approach is influenced by any form of marketing or targeted activity by the bank, the exemption is unlikely to apply.

In a financing context, reverse solicitation may, in certain circumstances, also be relevant in sponsor-backed transactions, where EU borrowers join pre-arranged financing structures (for example as part of an acquisition financing). Similarly, it may apply where EU borrowers accede to existing facilities or participate in primary or secondary syndications, provided that no targeted solicitation has taken place.

Broader Implications for the Concept of ”Place of Performance”

Although CRD VI formally targets third-country institutions, the shift in regulatory logic may have wider implications. The preparatory works to the Danish implementing legislation suggest an intention to more clearly define when foreign institutions are considered to carry out activities in Denmark.

Over time, this may influence the broader understanding of cross-border banking activity, including for EU credit institutions. While CRD VI does not directly alter the regulatory framework for EU banks, it may contribute to a gradual shift away from the characteristic performance test towards a greater emphasis on the location of the customer and the market being served.

Rationale and Intended Effect

The preparatory works to the Danish implementation of CRD VI indicate that the new rules are intended to more clearly define when third-country credit institutions are considered to carry out activities in Denmark, thereby moving away from a case-by-case assessment based on the characteristic performance test. The broader objective is to create a more consistent and level regulatory framework across the EU, ensuring a level playing field between EU and third-country institutions while strengthening supervisory oversight.

At the same time, it is expected that the rules will be applied in a pragmatic manner. In particular, there should remain room for common market structures – such as group financings, accessions to existing facilities and participation in syndicated loans – without these automatically triggering establishment requirements. The practical impact will depend on how supervisory authorities balance regulatory objectives against the need to preserve well-functioning cross-border lending markets.

Outlook

CRD VI reflects a broader policy objective of ensuring consistent regulatory treatment and a level playing field between EU and third-country institutions.

While the practical application of the new rules will depend on supervisory practice, the direction of travel is clear: regulatory focus is shifting away from where banking activities are performed towards whether services are provided to customers located in the EU.

Timing and Transitional Regime

Member States must implement CRD VI by 10 January 2026, with general application from 11 January 2026. However, the key provisions concerning third-country institutions' provision of core banking services will apply from 11 January 2027.

The directive also includes a grandfathering regime:

- contracts entered into before 11 July 2026 may continue until expiry, and
- contracts entered into after this date will not benefit from grandfathering and will be subject to the new rules.

Contracts entered into after 11 July 2026 may therefore become non-compliant once the new regime applies in full from January 2027.

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