

➤ Providing loans from outside the EU – subject to supervision?

Introduction

In the Netherlands, providing credit to other parties than consumers is permitted without a (banking) licence. At present, the Capital Requirements Implementation Act 2026 has been approved by the Dutch parliament, which will change the current banking climate in the Netherlands.¹ With this proposal, the sixth revised Capital Requirements Directive (“**CRD VI**”) is implemented into Dutch law.² CRD VI and this proposal aim to subject parties from outside the EU that wish to provide loans to parties within the EU to certain conditions. A number of exceptions relevant to the market will also apply, which are discussed below.

Regulation of core banking services

CRD VI distinguishes between two types of core banking services carried out in the EU by parties from outside the EU:

- ✘ taking of deposits and other repayable funds (the activity referred to in point 1 of Annex I to the CRD); and
- ✘ providing credit and providing guarantees (the activities referred to in point 2 and point 6 respectively of Annex I to the CRD), insofar as these are carried out by a party that would qualify as a credit institution (bank) if it were established in the EU).

In short, parties that provide these core banking services from outside the EU to parties within the EU will be subject to an obligation to establish an EU-branch, which will subsequently be subject to supervision (the third-country branch requirement, in short the “**TCB requirement**”). In the Netherlands, the supervisory regime will, in

brief, consist of a somewhat lighter regime compared to a full banking licence. The supervisory regime will, however, vary between EU member states. One point to note in this regard is that these supervised branches cannot make use of the so-called European passport and therefore cannot provide these core banking services throughout the EU, but in principle only in the EU Member State in which they are supervised.

It is important to note that, under CRD VI and its implementation in Dutch law, the provision of credit and guarantees by a non-EU party within the EU does not in itself trigger an obligation to establish a supervised branch in the EU. This is only the case where, in addition to providing credit and guarantees, such non-EU party would qualify as a credit institution (bank) if it were established in the EU. In brief, this means that this non-EU party both attracts repayable funds from the public and grants credit. Consequently, non-bank lenders, such as direct lenders and private equity firms, will probably fall outside the scope of the TCB requirement.

Exceptions

A number of exceptions to the TCB requirement apply which may be of significant practical importance to the market. These exceptions are as follows:

- ✘ where the core banking services are provided at the own initiative of the client or counterparty, the TCB requirement does not apply (so-called reverse solicitation). We note that reverse solicitation is generally interpreted quite strictly by the supervisory authorities;
- ✘ where the core banking services are provided to

1. Netherlands Parliamentary Papers 2025–2026, 36 885, no. 2.

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.

a bank established in the EU;

- ✘ where the core banking services are provided to an entity in the EU that belongs to the same group as the non-EU entity providing the core banking services; and
- ✘ where core banking services are provided as ancillary services to investment services under MiFID II, for example the taking of deposits in a securities account or providing credit in the context of a transaction in securities or other financial instruments.

Impact in practice

In the overview below, we have included a number of examples of services that may be affected by the TCB requirement. In this context, we set out the (highly simplified) expected position of these services before and after the entry into force of CRD VI, assuming the absence of a branch or (banking) licence in the Netherlands.

	Before implementation of CRD VI without a Dutch licence or branch	After implementation of CRD VI without a Dutch licence or branch
Does not qualify as a bank and provides credit (not to consumers) and guarantees.		
Provision of credit (and guarantees) to consumers.		
Taking repayable funds from the public.		
Combination of taking repayable funds from the public and providing credit (not to consumers).		
Providing credit (not to consumers) and/or guarantees and would qualify as a bank in the EU.		
Providing credit (not to consumers) and/or guarantees to a bank in the EU and would qualify as a bank in the EU.		
Qualifies as bank and provides credit of the initiative of the customer.		
Qualifies as bank and provides a business loan to a group entity in the EU.		

Entry into force & transitional regime

The TCB requirement will, on the basis of CRD VI, enter into force on 11 January 2027. The Netherlands is currently behind schedule in implementing CRD VI, although it is expected that implementation will be finalised in the next few weeks as the implementation act has been approved by Dutch parliament. Importantly, CRD VI provides that the TCB requirement includes a transitional period. According to the explanatory memorandum to the Dutch implementation, the TCB requirement must “not adversely affect” existing agreements entered into before 11 July 2026. In practice, this raises questions in relation to amendments to existing agreements after 11 July 2026. The explanatory memorandum to the Dutch implementation indicates that the concept of amending an agreement should be interpreted broadly and is not limited to the legal concept of “novation”.

Next steps

As noted above, CRD VI has not yet been implemented in Dutch legislation, although this is not expected to take much longer. It is important to note that the transitional period for the TCB requirement will already commence on 11 July of this year. It is therefore important to assess before that date whether the TCB requirement has an impact on existing documentation and whether such documentation may need to be amended in the near future.

In addition, a number of uncertainties remain, in respect of which it would be useful for the European legislator to provide further clarity. These include, for example, the precise interpretation of reverse solicitation and the manner in which the transitional period should be interpreted, as well as when an amendment to an agreement after 11 July 2026 will be caught by the TCB requirement.

We will keep you informed of further developments and would be pleased to provide you with more detailed information.

Questions about this topic?

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