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CRD VI'S NEW BRANCH REGIME: WHAT IT MEANS FOR NON-EU ASSET MANAGERS?

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Summary

Directive (EU) 2024/1619 ("**CRD VI**") introduces an EU-wide, mandatory branch regime for third-country banking business (deposit-taking, lending, guarantees/commitments). In contrast, Directive 2014/65/EU ("**MiFID II**") keeps branch requirements for third-country investment firms (e.g., Swiss asset managers) as an option each Member State may choose to impose and preserves the very narrow so-called "*reverse solicitation*" exception under Recital 111 and Article 42 MiFID II. In practice, a non-EU asset manager is outside CRD VI's banking branch rule and falls under MiFID II: whether a branch is required depends only and exclusively on the Member State's choice under Article 39 MiFID II; absent that, activity is limited to reverse solicitation.

What CRD VI actually changes and who it targets

In June 2024 the EU adopted CRD VI, which overhauls the treatment of third-country branches of credit institutions. The amending directive inserts, among other provisions, a new Article 21-*quater* (in the CRD) requiring entities that perform banking activities (e.g., deposit-taking; lending and guarantees) to establish a branch in the Member State before they can start or continue those activities.

Swiss banks seeking to provide such kind of banking activities to clients or counterparties within the European Union must, in principle, operate through an authorised third-country branch established in a Member State, unless a limited exemption (e.g. reverse solicitation or intragroup activity) applies. These branches are classified as Class 1 if they exceed EUR 5 billion in assets booked or originated in the host Member State, hold more than EUR 50 million in retail deposits. Branches below these thresholds are typically classified as Class 2. Class 1 branches are subject to more stringent regulatory obligations, including higher capital endowment, full liquidity coverage ratios, and enhanced governance standards, whereas Class 2 branches benefit from lighter supervisory requirements based on their lower systemic relevance.

Switzerland has been recognized by the European Commission as a jurisdiction with an equivalent supervisory framework, which means that Swiss branches may qualify as "qualifying

branches" and benefit from a more proportionate regulatory regime, including reduced capital and liquidity requirements.

Where Swiss portfolio managers sit: MiFID II, not CRD VI

Crucially, CRD VI's branch-obligation is aimed solely at **banking activities** through an evaluation of the activity based on a *substance over the form* approach. The CRD VI does not convert investment-services firms into "credit institutions", nor does it extend the bank-branch obligation to them. Therefore, it is reasonable to believe that non-EU asset managers remain outside the direct scope of the CRD VI branch mandate and continue to be handled under MiFID II.

When a Swiss entity provides portfolio management towards EU investors, it may be qualified as a third-country firm under MiFID II.

Cross border exemptions for Swiss portfolio managers

Swiss portfolio managers are subject to following exemptions when providing cross border services:

- *Member State branch option* (Article 39 MiFID II). MiFID II expressly allows (**but not mandates**) Member States to request a local branch where a third-country firm provides investment services to retail clients or professional clients on request in their territory. Many Member States have exercised this option (including Italy) so the practical effect is that a Swiss portfolio manager **could be subject to the obligation to establish a branch to serve such clients** (for example in Italy); and
- *reverse solicitation exemption* (Article 42 MiFID II). MiFID II preserves a narrow path where services requested at the client's exclusive initiative do not trigger host-state licensing/branch requirements beyond what the law allows. However, it cannot be used to *actively* market other products/services; it is transaction-specific and carefully policed. Furthermore, it is noteworthy that Delegated Regulation (EU) 2017/565 also reinforces third-country guardrails, for example, if an EU firm outsources portfolio management to a third-country provider, there must be an appropriate cooperation agreement between supervisors.
- *Private placement regimes for fund marketing to professional investors.* While MiFID II governs the provision of investment services, the marketing of collective investment undertakings (such as AIFs or structured products) to professional investors is also subject to fund-specific rules, including the AIFMD and national private placement regimes. According to the European Securities and Market Authority non-EU managers of AIFs should not be allowed to market or pre-market collective investment undertakings pursuant to the AIFMD without authorization. However, national laws, regulations and administrative provisions may allow non-EU managers of AIFs to carry out pre-marketing activities at national level. With respect to pre-marketing activities in Italy, no national provisions have been

enacted to authorize such activity. Consequently, non-EU manager of AIFs may currently operate only under a reverse solicitation scheme. On the other hand, Luxembourg' national competent authority, the Commission de Surveillance du Secteur Financier (CSSF), has highlighted that pre-marketing, should not in any way disadvantage EU managers of AIFs vis-à-vis non-EU managers of AIFs (as further explicitly confirmed by the Directive (EU) 2019/1160) and non-EU managers of AIFs engaging in pre-marketing to potential professional investors in Luxembourg shall send a duly completed and signed pre-marketing notification letter, within two weeks of it having begun pre-marketing, to the CSSF.

Italy's position: branch required

Italy has implemented MiFID II by requiring a branch for third-country firms that provide investment services locally to the relevant client segments. In practice, a Swiss portfolio manager planning to serve Italian retail or professional clients on a non-reverse-solicitation basis must set up an Italian branch and obtain the necessary authorisations. The Italian Legislative Decree 58/1998, referred to as the Consolidated Financial Act ("**CFA**") provisions reflect this approach. The only non-establishment path is the reverse solicitation exemption *i.e.*, when an Italian investor spontaneously and unsolicited initiates the engagement. Even then, the manager cannot broaden the relationship with other products/services not covered by the initial request; doing so would exit the safe harbour and re-trigger host-state requirements. Supervisors scrutinise patterns of "client initiative" to prevent *de facto* marketing under the guise of reverse solicitation. MiFID II makes these limits explicit, and CRD VI mirrors a similar logic for banks, adding monitoring powers.

Conclusion

For Swiss asset managers, the practical implication is clear: CRD VI's mandatory branch rule does not apply to their portfolio-management activity. Instead, the decisive question is whether the target Member State has exercised Article 39 option. Where it has (e.g., Italy), a branch will be required absent genuine reverse solicitation; where it has not, activity remains constrained by local rules and the narrow reverse solicitation exemption.

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